

# *The Enigma of Article 121, Paragraph 3: The Way Forward?*

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## Abstract:

The legal regime of islands has only stirred international attention since the creation of the exclusive economic zone and the delineation of the continental margin beyond 200 nautical miles offshore. As these are both rather novel concepts in the law of the sea, this in fact means that the Third United Nations Conference on the Law of the Sea (UNCLOS III; 1973-1982) proved to be a turning point in this respect. At UNCLOS III States agreed that a differentiation should be made amongst islands in order to prevent that excessive small features should generate the same kind of maritime rights as their more sizeable counterparts. At the end of almost a decade of negotiations, Article 121 of the United Nations Convention on the Law of the Sea (LOSC) is meant to provide an answer to this concern. Unfortunately, the genesis of this article indicates that it lacks internal coherence, especially as far as its novel part is concerned, namely paragraph 3, which at the time of creation was the only paragraph of Article 121 of the LOSC not reflecting existing customary international law.

Courts and tribunals have so far systematically side-stepped the issue of giving content to this enigmatic paragraph 3 by dealing with the delimitation issue first and by subsequently arguing that the issue became moot as they only attributed a territorial sea to a particular feature. So far only the International Court of Justice seems to have lifted a very small part of the veil, almost inadvertently, but only because the parties were in agreement on the nature of a particular maritime feature. Whether this is the way forward for Courts and Tribunals to develop the law in this respect can be doubted.

## **Introduction**

In conferences on the South China Sea these days the question whether a particular maritime feature is to be considered an island under contemporary international law able to generate, just as any other land area, an exclusive economic zone (EEZ) and continental shelf, is usually a hotly debated topic. Pictures of real maritime features, or sometimes even self-made creations of, for instance, maritime features with many, a few, two or finally one coconut tree on them,<sup>1</sup> are shown to the audience with the question whether they represent islands possessing an EEZ and continental shelf, after which the speaker usually answers that

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<sup>1</sup> See for instance the recent presentation by Prof. Kuan-Hsiung Wang at the ILA-ISIL Asia-Pacific Research Forum held in Taipei, Taiwan, Republic of China, on 26 May 2015, entitled 'Island or Rock? An Inquisition on the Status of Taiping Dao in the Spratlys'.

question himself. Unfortunately, international law is not developed by simply comparing quantitatively the number of scholar in favour or against a particular option with respect to a particular maritime feature.

The present contribution, which builds on recently conducted research by the present author,<sup>2</sup> will start out by looking into the genesis of the seemingly inextricable state of affairs (Part II). It will subsequently analyse the particular attention the Third United Nations Conference on the Law of the Sea (UNCLOS III) attached to this issue and the way these considerations finally found their way into the treaty language adopted at the end of almost a decade of negotiations (Part III). Finally the way forward will be addressed (Part IV).

### **Prolegomenae**

The importance of islands under international law has fluctuated over time, but it is only since the creation of the EEZ and the precise delineation of the continental margin, two new concepts introduced during the UNCLOS III (1973-82), that the issue became a focal point of international attention. Up until then, reliance on the well-established principle of '*la terre domine la mer*'<sup>3</sup> proved sufficient for islands, just as land, to generate maritime zones off their coast. At a time when the territorial sea was still of limited extent, this equation did not particularly disturb the international community. Instead, the advantages attached to a possible dissociation<sup>4</sup> could not compare to the disadvantages that would arise if islands were no longer put on an equal footing with land as far as the creation of maritime zones was

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<sup>2</sup> This article is based primarily on the following recent publication: Erik Franckx, 'The Regime of Islands and Rocks' in David Joseph Attard, Malgosia Fitzmaurice and Norman A Martinez Gutiérrez (eds), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea* (Oxford University Press 2014) 99-124.

<sup>3</sup> Already in 1909 this principle was thought to correspond 'aux principes fondamentaux du droit des gens, tant ancien que moderne, d'après lesquels le territoire maritime est une dépendance nécessaire d'un territoire terrestre'. Cour Permanente d'Arbitrage, *Affaire des Grisbådarna*, 23 October 1909, 5 <<https://pcacases.com/web/allcases/>> accessed 10 May 2016. In other words 'le territoire maritime formait une appartenance' . . . 'du territoire terrestre'. Ibid 6. This principle that the land dominates the sea still forms a cornerstone of contemporary international law of the sea. It has been relied upon by the International Court of Justice on many occasions (see *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (Merits) [2007] ICJ Rep 696, para 113, in which the Court gives an overview of all its previous cases where it relied upon this principle. It further relied on this principle in *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Merits) [2009] ICJ Rep 89, para 77, and *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Merits) [2012] ICJ Rep 674, para 140. The International Tribunal for the Law of the Sea has also referred to this principle in its first maritime delimitation case. *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (Merits) [2012] para 185 <<https://www.itlos.org>> accessed 10 May 2016.

<sup>4</sup> In an era when the cannon-shot rule was still relied upon as legal justification for why land was able to claim a maritime appurtenance, it seemed difficult to justify why a small feature, on which no coastal defence could possibly have been installed, should nevertheless be able to generate a maritime zone.

concerned. As *The Anna* decision of 1805 demonstrates, coastal State security was a guiding factor behind such assimilation. The ship was captured by an English privateer within the territorial sea of the United States, at least when measured from a little mud island near the mouth of the river Mississippi ‘composed of earth and trees drifted down by the river, which form a kind of portico to the mainland’.<sup>5</sup> After the ship had been brought across the Atlantic for adjudication before a British prize court, the judge nevertheless was of the opinion that the protection of the territory started from these islands for ‘the right of dominion does not depend upon the texture of the soil’,<sup>6</sup> his main concern being that otherwise other powers might occupy, embank and fortify such mud islands, possibly leading to control over the river itself.<sup>7</sup>

The idea that islands are to be treated as land also started to surface in treaty arrangements between States in the area of fisheries. As fish species do not discriminate between land and islands when choosing their preferred habitat in shallow waters, it became important for States to determine their exclusive fishery jurisdiction from their coasts with more precision in order to avoid conflict with fishermen from other countries. In the North Sea, for instance, when it became necessary to regulate the policing of fisheries on a regional basis during the late 1900s, it was stipulated that the coasts of the respective countries also included ‘the dependent islands and banks’.<sup>8</sup>

This purely coastal State-oriented approach, however, started to generate serious concerns once it became clear during the UNCLOS III negotiations that the spatial dimension of

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<sup>5</sup> *The Anna*, 165 English Reports 809, 815. This so-called ‘Portico Doctrine’ had a substantial influence on the later opinions of the Law Officers of the British Crown. See Daniel Patrick O’Connell and Ivan Anthony Shearer, *The International Law of the Sea* (vol 1, Clarendon Press 1982) 186-91.

<sup>6</sup> *The Anna* (n 5) 815.

<sup>7</sup> ‘What a thorn would this be in the side of America!’ the Judge exclaimed. *Ibid.* The Harvard Research on the Law of Territorial Waters of 1929 reflected this absence of distinction by providing in its art 7 that the ‘marginal sea around an island . . . is measured outward three miles therefrom in the same manner as from the mainland’. As reproduced in (1929) 23 *American Journal of International Law* 241, 243 (Supplement: Codification of International Law). In the commentary attached to this article this finding is said to be based on ‘nearly uniform’ practice. *Ibid.* 275-76. According to this proposition ‘any rock, coral, mud, sand or other natural solid formation’ was to be included. *Ibid.* 276.

<sup>8</sup> Convention for Regulating the Police of the North Sea Fisheries. Multilateral convention, 6 May 1882, Consolidated Treaty Series, vol 160, 219, art 2, para 1 <[iea.uoregon.edu/pages/view\\_treaty.php?t=1882-PoliceNorthSeasFishery.EN.txt&par=view\\_treaty\\_html](http://iea.uoregon.edu/pages/view_treaty.php?t=1882-PoliceNorthSeasFishery.EN.txt&par=view_treaty_html)> accessed 10 May 2016. This convention entered into force on 15 May 1884. The British were rather reluctant to endorse a German proposal that sought to include the flats and banks uncovered at low tide at the mouths of German rivers. See Thomas Wemyss 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, With Special Reference to the Rights of Fishing and the Naval Salute* (Blackwood 1911) 634-35, who explains that the inclusion of banks was novel but given the subject matter of the convention, namely fish species with their preference for shallow waters, this may have caused the addition of ‘banks’ to survive the negotiations at that time. *Ibid.* 640.

coastal State jurisdiction over maritime space was radically to expand.<sup>9</sup> From a territorial sea of three nautical miles, which for a long time was believed to represent a rule of customary international law by many States, maritime zones at present extend up to 200 nautical miles (EEZ) and even beyond that distance in the case of extended continental shelves on the basis of the United Nations Convention on the Law of the Sea.<sup>10</sup> A tiny rock in the middle of the ocean, with no other *terra firma* located within a range of 400 nautical miles, has the potential today to generate a maritime area in excess of 125.664 square nautical miles or 431.014 square kilometres.<sup>11</sup> With respect to the sea-bed and subsoil this area can even be substantially larger if the feature in question is located in a totally isolated area.<sup>12</sup>

### **UNCLOS III and the LOSC**

If the pre-UNCLOS III legal regime of islands was consequently easy to determine, namely that ‘an island is to be treated as possessing its own belt of territorial waters’,<sup>13</sup> this became a hot topic during these negotiations for the simple reason that islands come in all forms and sizes. The end result of this decade of diplomatic activity on how to differentiate between islands found its reflexion in the LOSC. A contemporary definition of islands in international law, as well as their legal regime, is to be found in its Part VIII, entitled ‘Regime of islands’. This Part contains one single provision bearing the same title, namely Article 121. It contains three short paragraphs and reads as follows:

#### *Regime of islands*

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<sup>9</sup> Andrew J Jacovides, ‘Some Aspects of the Law of the Sea: Islands, Delimitation, and Dispute Settlement Revisited’ in Andrew J Jacovides and Nani Jansen (eds), *International Law and Diplomacy: Selected Writings* (Martinus Nijhoff Publishers 2011) 91, 93.

<sup>10</sup> United Nations Convention on the Law of the Sea. Multilateral convention, 10 December 1982, United Nations Treaty Series, vol 1833, 397-581, arts 57 and 76 <[www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf)> accessed 10 May 2016. This convention entered into force on 16 November 1994. Hereinafter LOSC.

<sup>11</sup> Clive H Schofield, ‘Islands or Rocks - Is that the Real Question?: The Treatment of Islands in the Delimitation of Maritime Boundaries’ in Myron H. Nordquist (ed), *The Law of the Sea Convention: US Accession and Globalization* (Nijhoff 2012) 322-325, explaining that the calculations are based on a feature having no area.

<sup>12</sup> According to art 76, para 5 of the LOSC these coastal State rights can reach up to 350 nautical miles or 100 nautical miles measured from the 2.500 metre isobath, meaning almost double the extent of the EEZ, even though probably not in all directions.

<sup>13</sup> Constantine John Colombos, *The International Law of the Sea* (6th edn, Longmans 1967) 120, that is on the condition that the island is located more than twice the distance of the territorial sea from its mainland, i.e. 6 nautical miles according to this author.

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.

Paragraphs 1 and 2, as will be demonstrated, reflect pre-existing law. Paragraph 3 on the other hand, which introduces the term ‘rock’ in the legal debate, is new and is a reflection of the (meagre) outcome of 10 years of negotiations. As Article 121 is about definitions and entitlement, these elements will also be the main focus of the present contribution. The article does not contain a provision on delimitation, even though many delegations made proposals to that end at UNCLOS III. Delimitation issues will only be taken on board insofar as they formed part of such proposals or prompted courts and tribunals to touch upon issues relating to the application of Article 121.

This Part II will start from the analysis, paragraph by paragraph, of Article 121, to first retrace its origins, second explain its meaning, and third discuss its status under present-day international law. But before starting such a paragraph-by-paragraph analysis, a short clarification about the interrelationship between the two basic terms encountered in Article 121, namely ‘islands’ and ‘rocks’, seems justified. From the structure of the article it is first of all obvious that all rocks are islands. Paragraph 3 forms indeed an integral part of Article 121 on the regime of islands. If rocks were not islands, in other words, the exception of paragraph 3 would have been unnecessary.<sup>14</sup>

Much less support is to be found for the proposition that not all rocks fall under the paragraph 3 exception. In the specialized literature the argument is often centred on the different legal

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<sup>14</sup> Jonathan I Charney, ‘Rocks That Cannot Sustain Human Habitation’ (1999) 93 *American Journal of International Law* 863, 864. Or as stated by Oxman, paragraph 3 ‘is not an exception to the definition of an island; indeed, the exception assumes that rocks are included within the definition’. Bernard H Oxman, ‘On Rocks and Maritime Delimitation’ in Mahnoush H Arsanjani (ed), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Nijhoff 2010) 893, 894-95. This also implies that rocks must fulfil all the requirements of islands: They must be naturally formed and above surface at high tide. As stressed by Clive Symmons, ‘Some Problems Relating to the Definition of “Insular Formations” in International Law: Islands and Low-tide Elevations’ (1995) 1 *Maritime Briefing* 8. See also Haritini Dipla, *Le régime juridique des îles dans le droit international de la mer* (Presses Universitaires de France 1984) 41, who comes to a similar conclusion based on the fact that low-tide elevations are treated in the part of the territorial sea, as well as on the particular genesis of art 121, para 3.

consequences generated by islands and rocks. This island-rock dichotomy, however, does not seem to be warranted, no matter how convenient it may look for the purpose of easy classification. It is indeed submitted that not all rocks fall within the paragraph 3 exception, but only those rocks that cannot sustain human habitation or economic life of their own.<sup>15</sup> This implies that there are also rocks that can sustain human habitation and economic life of their own and are rather governed by the rule of paragraph 2 instead of the exception of paragraph 3.<sup>16</sup> One can of course raise the question in what ways rocks that can sustain human habitation and economic life of their own differ from islands,<sup>17</sup> but this categorisation makes it possible for islands that cannot sustain human habitation or economic life of their own still to fall under the rule of paragraph 2, rather than the exception of paragraph 3, because they do not fit the category of rocks.<sup>18</sup>

## Paragraph 1

The first paragraph provides a definition of the term ‘island’, namely ‘a naturally formed area of land, surrounded by water, which is above water at high tide’.

### 1. Origin

This is a verbatim reproduction of the definition, which was already included in the 1958 Convention on the Territorial Sea and the Contiguous Zone.<sup>19</sup> Attempts were made over the years to distinguish within this category with the purpose of excluding certain types of

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<sup>15</sup> If one reads this clause as a non-restrictive one because of the use of the word ‘which’ instead of ‘that’ in the English authentic version, this would imply that all rocks are incapable of sustaining human habitation and economic life of their own. The word ‘which’, it should be noted, is however not preceded by a comma, like when used in the first paragraph of this article, diluting the non-restrictive argument.

<sup>16</sup> David H Anderson, ‘Islands and Rocks in the Modern Law of the Sea’ in Myron H. Nordquist (ed), *The Law of the Sea Convention: US Accession and Globalization* (Nijhoff 2012) 307, 310, arguing that Part VIII ‘contains provisions about islands, including those rocks which are accorded treatment similar to that of islands, and those other rocks which are accorded only part of that treatment’. See also Charney (n 14) 866, writing: ‘Rocks that do not fail this test are entitled to all four maritime zones’, and José Luis Jesus, ‘Rocks, New-born Islands, Sea Level Rise and Maritime Space’ in Jochen Abraham Frowein (ed), *Verhandeln für den Frieden, Negotiating for Peace: Liber Amicorum Tono Eitel* (2003) 579, 584, making this further distinction between rocks. Already during UNCLOS III this position was defended by some scholars. See for instance K Jayaraman, *Legal Regime of Islands* (Marwah Publications 1982) 168-69.

<sup>17</sup> Syméon Karagiannis, ‘Les rochers qui ne se prêtent pas à l’habitation humaine ou à une vie économique propre et le droit de la mer’ (1996) 29 *Revue Belge de Droit International* 559, 571, for whom this is a rhetorical question for he answers it in the following manner: ‘Probablement en rien du tout’. *Ibid* note 50. Nevertheless, this will depend on the exact meaning one gives to the term ‘rock’ as discussed below.

<sup>18</sup> *Ibid*. See also Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edn, Hart 2016) 89-90. *Contra* Vekateshwara Subramanian Mani, ‘Towards Codification of the Legal Regime of Islands’ (1986) 19 *Indian Year Book of International Affairs* 53, 93.

<sup>19</sup> Multilateral convention, 29 April 1958, UNTS, vol 516, 205, 206-224, art 10 <[http://legal.un.org/ilc/texts/instruments/english/conventions/8\\_1\\_1958\\_territorial\\_sea.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf)> accessed 10 May 2016. This convention entered into force on 10 September 1964. Hereinafter 1958 Territorial Sea and Contiguous Zone Convention.

islands. Indeed, when the British Empire tried to streamline its policy at the Imperial Conference of 1923 it defined islands as ‘all portions of territory permanently above high water in normal circumstances’ but added the words ‘and capable of use or habitation’,<sup>20</sup> implying that certain islands should be excluded from the definition. This British position was maintained during the discussions at the League of Nations 1930 Codification Conference,<sup>21</sup> but the Second Sub-Commission only retained what Gidel calls a ‘minimum’ definition,<sup>22</sup> namely: ‘An island is an area of land, surrounded by water, which is permanently above high-water mark’.<sup>23</sup> During the preparatory work undertaken by the International Law Commission, Mr Lauterpacht tried to insert a similar requirement, namely that islands should be ‘capable of effective occupation and control’.<sup>24</sup> This proposed insertion, however, proved unacceptable to the Rapporteur.<sup>25</sup> As no further attempts were made during the conference to re-insert a similar clause, it can be argued that actual or potential habitability does not form part of the definition of an island.<sup>26</sup>

## 2. Meaning

The requirement that an island is a ‘naturally formed area of land’<sup>27</sup> implies that today artificial islands receive different treatment as they generate, in principle, no maritime zones.<sup>28</sup> This was already reflected in the 1958 Convention on the Continental Shelf where it

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<sup>20</sup> Edward Duncan Brown, *The International Law of the Sea: Introductory Manual* (vol 1, Dartmouth 1994) 151, who adds that the attached commentary explained that nothing more definite could be agreed upon, but that ‘capable of use’ meant ‘capable, without artificial addition, of being used throughout all seasons for some definite commercial or defence purpose’ and ‘capable of habitation’ meant ‘capable, without artificial addition, of permanent human habitation’. Ibid.

<sup>21</sup> See Gilbert Charles Gidel, *Le droit international public de la mer : le temps de paix* (vol 3, Mellottée 1932) 670.

<sup>22</sup> Ibid 672.

<sup>23</sup> League of Nations, 1930 Hague Codification Conference, Report of the Second Commission (Territorial Waters), C.230.M.117.1930.V, 13.

<sup>24</sup> ILC, A/CN.4/SR.260, 1 Yearbook of the International Law Commission (1954), 92.

<sup>25</sup> Ibid 94. The Rapporteur was of the view that ‘[a]ny rock could be used as a radio station or a weather observation post. In that sense, all rocks were capable of occupation and control. The provision seemed either unnecessary or confusing’. Mr Lauterpacht withdrew his proposition immediately afterwards. Ibid.

<sup>26</sup> Derek William Bowett, *The Legal Regime of Islands in International Law* (Oceana Publications 1979) 9. As will be seen, it has been reintroduced in paragraph 3 on the legal consequences to be attached to certain rocks.

<sup>27</sup> The addition of the word ‘natural’ in front of ‘area of land’ was also a proposal of Mr Lauterpacht introduced at the same time as his ‘capable of effective occupation and control’ proposal (n 24).

<sup>28</sup> According to art 60, para 8 of the LOSC artificial islands in the EEZ ‘do not possess the status of islands. They have no territorial sea of their own . . .’. Only a safety zone can be established around them (art 60, para 5). This provision applies *mutatis mutandis* to the continental shelf (art 80). Only a limited exception exists when maritime zones can be claimed by artificial islands, and that is in the case of lighthouses. Alex G Oude Elferink, ‘Artificial Islands, Installations and Structures’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law Online* (Oxford University Press, 2007) para 10 <[www.mpepil.com](http://www.mpepil.com)> accessed 10 May 2016.

is provided that installations and devices used to explore and exploit the natural resources of the continental shelf ‘do not possess the status of islands’.<sup>29</sup>

As the substance of the term ‘land’ is not specified it can take different forms,<sup>30</sup> but ice seems to be excluded.<sup>31</sup>

The requirement of being surrounded by water at high tide clearly excludes today all low-tide elevations.<sup>32</sup> At the beginning of the 1930 Hague Codification Conference States were still divided on this issue,<sup>33</sup> but by excluding low-tide elevations from the definition of the term ‘island’, the Sub-Commission II of the Second Commission on Territorial Waters found a way forward, leading to the present-day solution.<sup>34</sup>

The manner in which the high tide needs to be determined is not defined by the LOSC and consequently depends on the tidal datum adopted by the coastal State. The indication of the high tide on the official charts of the coastal States therefore appears to be good policy in order for mariners to be able to distinguish between islands and low-tide elevations in case of doubt.<sup>35</sup>

As the LOSC contains special provisions on reefs and archipelagos, constituted by a group of islands, these will not be covered.<sup>36</sup> It has however no provisions on the possible change of the legal status of islands due to natural factors, as for instance sea-level rise.<sup>37</sup>

### 3. Status

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<sup>29</sup> Multilateral convention, 29 April 1958, United Nations Treaty Series, vol 499, 311, 312-320, art 5, para 4 <[http://legal.un.org/ilc/texts/instruments/english/conventions/8\\_1\\_1958\\_continental\\_shelf.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf)> accessed 10 May 2016. This convention entered into force on 10 June 1964. Hereinafter 1958 Continental Shelf Convention.

<sup>30</sup> See for instance above (n 7) *in fine*.

<sup>31</sup> Haritini Dipla, ‘Islands’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law Online* (Oxford University Press, 2008) para 3 <[www.mpepil.com](http://www.mpepil.com)> accessed 10 May 2016.

<sup>32</sup> The definition of a low-tide elevation is similar to that of an island, but instead of being above water at high tide, it remains submerged. Art 13 of the LOSC. Low-tide elevations generate a territorial sea if they are ‘situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island’. *Ibid*.

<sup>33</sup> See Gidel (n 21) 670-71, giving the example of the United States, sustaining that low-tide elevations should be able to generate maritime zones.

<sup>34</sup> Even though this codification attempt proved unsuccessful, the proposal was later taken over by Mr François in his first report as Rapporteur of the International Law Commission on this issue. For a succinct overview, see Hiran Wasantha Jayewardene, *The Regime of Islands in International Law* (Nijhoff 1990) 3-5.

<sup>35</sup> PB Beazley, *Maritime Limits and Baselines: A Guide to Their Delineation* (Hydrographic Society 1987) 7 and 10.

<sup>36</sup> Arts 6 and 46-54 of the LOSC respectively.

<sup>37</sup> Choon-ho Park, ‘The Changeable Legal Status of Islands and “Non-islands” in the Law of the Sea: Some Instances in the Asia-Pacific Region’ in David D Caron and Harry N Scheiber (eds), *Bringing New Law to Ocean Waters* (Nijhoff 2004) 483-491. See also Jesus (n 16) 580 and 600-2.



Since it was agreed upon in 1958, the definition of the term ‘island’ has undoubtedly become part of customary international law.<sup>38</sup> In view of the fundamental norm-creating character of this provision, this development should not really come as a surprise.

## **Paragraph 2**

Paragraph 2 attaches legal consequences to maritime features that fit the definition of the term ‘island’ as stipulated in paragraph 1. Reflecting the basic idea that no difference should be made between islands and land as far as the generation of maritime areas is concerned, this paragraph attributes a territorial sea, contiguous zone, EEZ and continental shelf to all islands, except those mentioned in paragraph 3.

### **1. Origin**

The content of this paragraph once again finds its basis in the legal consequences attached by the 1958 Territorial Sea and Contiguous Zone Convention to islands, namely by granting them a territorial sea just like land territory.<sup>39</sup> This assimilation of islands and land had of course to be adapted to a developing law of the sea, with new zones being created and others redefined during the UNCLOS III process. The LOSC still starts from the same assimilation by also granting islands newly created EEZs or conceptually redefined continental shelves. It is of course true that this latter notion already existed before and that the 1958 Continental Shelf Convention explicitly provided that islands generated a continental shelf in exactly the same manner as land territory,<sup>40</sup> but the implications of such assimilation at a time when 200 metres corresponded to the maximum exploitable depth that technology made possible<sup>41</sup> are of course totally different when continental shelf rights extend at least to 200 nautical miles, and in certain circumstances well beyond that limit as already alluded to.<sup>42</sup>

At the same time, however, as indicated by the introductory words of paragraph 2,<sup>43</sup> certain islands no longer fall under this basic assimilation between islands and land. This new category will be discussed under paragraph 3.

### **2. Meaning**

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<sup>38</sup> *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)* (Merits) [2001] ICJ Rep 91, para 167 and 99, para 195. These excerpts were later cited with approval by the same Court in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (n 3) 674, para 139.

<sup>39</sup> Art 10, para 2 of the 1958 Territorial Sea and Contiguous Zone Convention.

<sup>40</sup> Art 1 of the 1958 Continental Shelf Convention.

<sup>41</sup> These were the two legs defining the spatial extent of the continental shelf. *Ibid.*

<sup>42</sup> See above (n 10) and accompanying text.

<sup>43</sup> ‘Except as provided for in paragraph 3, . . .’.

Islands continue to be treated in a manner equal to land territory. According to paragraph 2, therefore, islands do generate a territorial sea, a contiguous zone, an EEZ and a continental shelf as does other land territory. Based on this assimilation, it is submitted that islands also generate internal waters just like other land territory,<sup>44</sup> as in the case of straight baselines,<sup>45</sup> mouths of rivers,<sup>46</sup> bays<sup>47</sup> and ports.<sup>48</sup>

### 3. Status

Like paragraph 1 relating to the definition of the term ‘island’, paragraph 2 concerning the legal consequences to be attached to such status also forms part and parcel of customary international law. As clearly stated by the International Court of Justice in 2001:

In accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.<sup>49</sup>

The emphasis placed by the Court on the fact that the size of the islands does not matter is noteworthy, for *in casu* it accepted that Qit’at Jaradah was an island even though at high tide its area was only 12 by 4 metres, whereas at low tide this was 600 and 75 metres respectively, with only an elevation of 0.4 metres at high tide.

### Paragraph 3

Paragraph 3 represents the result of about 10 years of negotiations in order to make the basic assimilation between islands and land palatable to the international community in a context of extended coastal State jurisdiction. It is consequently a totally novel provision conceived and shaped during the UNCLOS III process. For these reasons alone, it is worth repeating: ‘Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf’.

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<sup>44</sup> All ‘waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State’. Art 8, para 1 of the LOSC. See also indirectly art 50 relating to the effect of islands on the archipelagic sea.

<sup>45</sup> Art 7 of the LOSC.

<sup>46</sup> Ibid art 9.

<sup>47</sup> Ibid art 10.

<sup>48</sup> Ibid art 11.

<sup>49</sup> *Case Concerning Maritime Delimitation* (n 38) 97, para 185. This excerpt was later cited with approval by the same Court in *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (n 3) 696, para 113, and more than once in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (n 3) 645, para 37, 674, para 139 and 689-90, para 176.

## 1. Origin

In discussing the origin of this provision, a distinction will be made between its material and formal sources.<sup>50</sup> The material sources of this paragraph have to be found in a desire of States, already noticeable in the past, but intensified by the drastic extension of coastal States' powers over adjacent maritime space during UNCLOS III, to ensure that certain small features are eliminated from the basic assimilation between islands and land. This was most vividly phrased by the representative of Denmark, who stated during the Caracas session in 1974:

If the Conference decided to grant coastal States extensive rights in the form of broad exclusive economic zones, then consideration should be given to what extent, if at all, those zones could be claimed on the basis of the possession of islets and rocks which offered no real possibility for economic life and were situated far from the continental land mass. If such islets and rocks were to be given full ocean space, it might mean that the access of other countries to the exploitation of the living resources in what was at present the open sea would be curtailed, and that the area of the sea-bed falling under the proposed International Sea-Bed Authority would also be reduced.<sup>51</sup>

Three groups of states had a marked interest in the issue: First, those States in possession of many islands,<sup>52</sup> who had of course no interest in changing the existing situation; secondly, those States that had heavily invested in high seas fisheries,<sup>53</sup> and finally States that openly

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<sup>50</sup> Under material sources are meant the substantial reasons that triggered the creation of the rule in question. Formal sources, on the other hand, are those documents generated during UNCLOS III which shaped the discussion and finally resulted in the drafting of paragraph 3 as it now exists. The formal sources, for instance, have been enumerated in Anon, 'Article 121' in Satya N Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (vol 3, Martinus Nijhoff 1995) 324, 324-26. See also United Nations, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea* (United Nations 1988) 30-51, para 33, 88-89, para 58, 93, para 68, and 104-5, para 86.

<sup>51</sup> Statement by Mr Kiaer, A/CONF.62/C.2/SR.39, Third United Nations Conference on the Law of the Sea, Official Documents, vol 2, 279.

<sup>52</sup> Like France. See A/CONF.62/C.2/SR.40, Third United Nations Conference on the Law of the Sea, Official Documents, vol 2, 286-87.

<sup>53</sup> Like the Soviet Union and certain other socialist countries. Even though they saw themselves as honest brokers in the discussion, trying to reach a compromise between opposing sides on the issue (RF Sorokin, 'Pravovoi rezhim ostrovov' in AP Movchan and A Yankov (eds), *Mirovoi Okean i Mezhdunarodnoe Pravo: Otkrytoe More, Mezhdunarodnye Prolivy, Arkhipelazhnye Vody* (Nauka 1988) 167), a certain self-interest in the fisheries issue on the high seas can hardly be denied. See Karagiannis (n 17) 593.

took position to defend the common heritage of mankind principle,<sup>54</sup> the latter two both wanting to limit the entitlement of smaller islands.<sup>55</sup>

The formal sources, however, present a totally different picture. In view of the special procedure followed by Committee II,<sup>56</sup> it was only able to produce a ‘main trends’ document at the end of the Caracas session, which was intended to form the basis for its future work.<sup>57</sup> This document set out a limited number of alternatives on most issues, including islands.<sup>58</sup> The main article under the heading ‘Régime of Islands’ had three alternatives: A first one representing the *status quo* as reflected at that time in Article 10 of the 1958 Territorial Sea and Contiguous Zone Convention;<sup>59</sup> a second one<sup>60</sup> distinguishing between islands,<sup>61</sup> islets,<sup>62</sup>

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<sup>54</sup> Like China, as expressed in their diplomatic note of 3 August 2011 addressed to the Secretary-General of the United Nations <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/chn\\_3aug11\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_3aug11_e.pdf)> accessed 10 May 2016: ‘The application of Article 121(3) of the Convention relates to the extent of the International Seabed Area as the common heritage of mankind, relates to the overall interests of the international community, and is an important legal issue of general nature’. Even though, here as well, other motivations might have been at play. See Erik Franckx, ‘The International Seabed Authority and the Common Heritage of Mankind: The Need for States to Establish the Outer Limits of Their Continental Shelf’ (2010) 25 *International Journal of Marine and Coastal Law* 543, 563-64. On China’s shift to protecting international community concerns, see Guifang Xue, ‘How Much Can a Rock Get?: A Reflection from the Okinotorishima Rocks’ in Myron H Nordquist (ed), *The Law of the Sea Convention : US Accession and Globalization* (Nijhoff 2012) 341, 357-60. To use the words of a number of American authors commenting on the Japanese claim with respect to Okinotorishima: ‘This unilateral assertion is so out of conformity with the intention and purpose of the 1982 LOS Convention (“the common heritage of mankind”) that it would just be an example of greed’. Leticia Diaz, Barry Hart Dubner and Jason Parent, ‘When is a “Rock” an “Island”?: Another Unilateral Declaration Defies “Norms” of International Law’ (2007) 15 *Michigan State Journal of International Law* 519, 554.

<sup>55</sup> John R Stevenson and Bernard H Oxman, ‘The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session’ (1975) 69 *American Journal of International Law* 1, 25, who observe in this respect: ‘The promise of jurisdiction over seabed minerals and fisheries could well serve to stimulate or exacerbate disputes over islands. Indeed, it is arguable this has already begun to happen’.

<sup>56</sup> This committee, which had to deal with the largest and most diverse number of issues when compared to the other two committees, had first of all some catching up to do from the 1971-72 preparatory period. See Edward L Miles, ‘The Structure and Effects of the Decision Process in the Seabed Committee and the Third United Nations Conference on the Law of the Sea’ (1977) 31 *International Organization* 159, 185. For a good concise description of the work of the Sea-bed Committee 1968-73, see for the primary documents United Nations (n 50) 10-21, paras 16-19; for an analysis Jon M Van Dyke and Robert A Brooks, ‘Uninhabited Islands: Their Impact on the Ownership of the Oceans’ Resources’ (1983) 12 *Ocean Development and International Law* 265, 278-80.

<sup>57</sup> Statement of activities of the Second Committee (Prepared by the Rapporteur of the Committee, Mr Satya Nandan), A/CONF.62/L.8/Rev.1, Third United Nations Conference on the Law of the Sea, Official Documents, vol 3, 104, 106.

<sup>58</sup> A/CONF.62/C.2/WP.1, Third United Nations Conference on the Law of the Sea, Official Documents, vol 3, 107. Hereinafter ‘main trends’. The provisions relating to islands concern the numbers 239-43. See *ibid* 140-42.

<sup>59</sup> This alternative was based on proposals submitted by Greece (A/CONF.62/C.2/L.22, Third United Nations Conference on the Law of the Sea, Official Documents, vol 3, 200, 201, and A/CONF.62/C.2/L.50, Third United Nations Conference on the Law of the Sea, Official Documents, vol 3, 227) and Fiji, New Zealand, Tonga and Western Samoa (A/CONF.62/C.2/L.30, Third United Nations Conference on the Law of the Sea, Official Documents, vol 3, 210).

<sup>60</sup> This alternative was taken from a proposal submitted by Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta and Zambia (A/CONF.62/C.2/L.62/Rev.1, Third United Nations Conference on the Law of the Sea, Official Documents, vol 3, 232).

<sup>61</sup> Defined as under the first alternative.

rocks<sup>63</sup> and low-tide elevations;<sup>64</sup> and a third one<sup>65</sup> distinguishing between islets<sup>66</sup> and islands similar to islets.<sup>67</sup> If one further concentrates on the entitlement issue,<sup>68</sup> the proposal of the same countries found its reflection in the text of the ‘main trends’ with the addition of a proposal submitted by Turkey.<sup>69</sup> Most of these proposals in other words came from countries that did not so much mind fisheries on the high seas or the common heritage of mankind principle, i.e. the material sources of this paragraph mentioned above, but rather had their own delimitation problems involving small features.<sup>70</sup>

This ‘main trends’ document was certainly an improvement, for it made orderly negotiations possible during the next session held in Geneva in 1975.<sup>71</sup> But it is far from clear whether this text also formed the basis for the participants during their private negotiations.<sup>72</sup> What is clear, however, is that this document at least served as a point of reference during the informal negotiations, which tried to reduce the number of alternatives in the ‘main trends’ document as far as possible.<sup>73</sup> Two such informal proposals, both introduced on 28 April 1975, i.e. just days before the Chairman of Committee II produced a single text,<sup>74</sup> took position on two sides of the issue. The first granted islands maritime zones as generated by

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<sup>62</sup> Defined as ‘a smaller naturally formed area of land, surrounded by water, which is above water at high tide’.

<sup>63</sup> Defined as ‘a naturally formed rocky elevation of ground, surrounded by water, which is above water at high tide’.

<sup>64</sup> Defined as ‘a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide’.

<sup>65</sup> This alternative was taken from a proposal submitted by Romania (A/CONF.62/C.2/L.53, Third United Nations Conference on the Law of the Sea, Official Documents, vol 3, 228).

<sup>66</sup> Defined as ‘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’.

<sup>67</sup> Defined as ‘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’.

<sup>68</sup> It concerns the provisions 240-42 of the ‘main trends’ document.

<sup>69</sup> A/CONF.62/C.2/L.55, Third United Nations Conference on the Law of the Sea, Official Documents, vol 3, 230.

<sup>70</sup> Romania was for instance very much concerned with the possible influence of Serpents’ Island on the delimitation of maritime areas with Ukraine. The proposals it introduced were clearly written for that purpose (see A/CONF.62/C.2/L.18, Third United Nations Conference on the Law of the Sea, Official Documents, vol 3, 195, art 2, paras 2-4, and A/CONF.62/C.2/L.53 (n 65) art 2). The proposals of Greece and Turkey were also clearly axed on the Aegean Sea. Whereas Greece only had to restate the law in force, i.e. that all islands should receive the same treatment as land (A/CONF.62/C.2/L.22 (n 59) art 9; A/CONF.62/C.2/L.50 (n 59) art 2), Turkey went to great lengths to categorize islands into either islands, islets or rocks (A/CONF.62/C.2/L.23, Third United Nations Conference on the Law of the Sea, Official Documents, vol 3, 201, art 2; A/CONF.62/C.2/L.34, Third United Nations Conference on the Law of the Sea, Official Documents, vol 3, 213, art 1), with different entitlements (A/CONF.62/C.2/L.55 (n 69) art 3, paras 2-4).

<sup>71</sup> John R Stevenson and Bernard H Oxman, ‘The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session’ (1975) 69 *American Journal of International Law* 763, 769.

<sup>72</sup> Miles (n 56) 199. As far as islands are concerned, an informal consultative group, namely Group 11, was created during the Geneva session of 1975. See Dipla (n 14) 40-41.

<sup>73</sup> Clive Ralph Symmons, *The Maritime Zones of Islands in International Law* (Martinus Nijhoff 1979) 18.

<sup>74</sup> See below (n 85) and accompanying text.

other land territory.<sup>75</sup> The second<sup>76</sup> was a rough combination of the definition proposed by certain African States,<sup>77</sup> distinguishing between islands, islets, rocks and low-tide elevations,<sup>78</sup> and the legal consequences attached to different features proposed by Turkey.<sup>79</sup> Important to note is that of all the proposals discussed above, only those of Turkey<sup>80</sup> and the one submitted by a number of African countries,<sup>81</sup> i.e. the two initiators whose proposals were merged in this second informal proposal of 28 April 1975, relied on the notion of ‘rock’, be it with a markedly different content. For Turkey, rocks seemed to be the smallest kind of island before it turned into a low-tide elevation.<sup>82</sup> The main distinguishing feature of a rock in the proposal of the African States was however related to the composition of the feature.<sup>83</sup> The combination of the definition of a rock from the African proposal (‘naturally formed rocky elevation’) with the consequences attached to it borrowed from the Turkish proposal (‘Rocks and low-tide elevations shall have no marine space of their own’) in fact combines the term ‘rock’ in its primary geological meaning as ‘a hard mass of the solid part of the earth’s crust’<sup>84</sup> with its more general use as a small island that can be composed of any kind of material, be it hard or soft like mud, clay or sand.

On 18 April 1975, a proposal by the President was adopted that instructed the chairmen of the three committees to prepare a single negotiating text. When the Chairman of the Second Committee presented his informal single negotiating text on 7 May 1975,<sup>85</sup> i.e. a text based on all formal and informal discussions and proposals doing away with all the variations contained in the ‘main trends’ document and retaining but one consolidated version, the text that he proposed at that time with respect to islands, divided into three paragraphs, turned out to be extremely influential, because it remained unaltered afterwards and finally became Article 121 of the LOSC, of which it was an exact copy except for one drafting change, namely that ‘this Convention’ has replaced the original ‘the present Convention’.

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<sup>75</sup> Provision 241, Proposal, 28 April 1975, as reproduced in Renate Platzöder (ed), *Third United Nations Conference on the Law of the Sea: Documents* (vol 3, Oceana 1983) 221. All islands were treated equally.

<sup>76</sup> Provisions 239 to 243, Proposal, 28 April 1975, as reproduced in Renate Platzöder (ed), *Third United Nations Conference on the Law of the Sea: Documents* (vol 3, Oceana 1983) 221-22.

<sup>77</sup> A/CONF.62/C.2/L.62/Rev.1 (n 60).

<sup>78</sup> As described above (n 61-64) and accompanying text.

<sup>79</sup> A/CONF.62/C.2/L.55 (n 69).

<sup>80</sup> Namely A/CONF.62/C.2/L.23 (n 70), A/CONF.62/C.2/L.34 (n 70), and A/CONF.62/C.2/L.55 (n 63).

<sup>81</sup> A/CONF.62/C.2/L.62/Rev.1 (n 60).

<sup>82</sup> As described above (n 70).

<sup>83</sup> A/CONF.62/C.2/L.62/Rev.1 (n 60), art 1, para 3, defines a rock as ‘a naturally formed rocky elevation of ground, surrounded by water, which is above water at high tide’.

<sup>84</sup> John Robert Victor Prescott and Clive H Schofield, *The Maritime Political Boundaries of the World* (Nijhoff 2005) 62.

<sup>85</sup> A/CONF.62/WP.8/Part II, Third United Nations Conference on the Law of the Sea, Official Documents, vol 4, 152.

This is quite remarkable, given all the assurances provided by the President,<sup>86</sup> and reemphasized by the Chairman of the Second Committee,<sup>87</sup> that the informal single negotiating text would be a mere basis for further negotiations not binding the negotiators. Maybe the text was so well-drafted, representing the perfect synthesis of all the preceding discussions and proposals, that it met with immediate general approval? Highly unlikely, as the text rather instantly raised many questions.<sup>88</sup> Furthermore, a number of formal<sup>89</sup> and informal<sup>90</sup> proposals for amendment were introduced. Moreover, on 28 April 1979, at the

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<sup>86</sup> Namely that the text so prepared 'would be informal in character and would not prejudice the position of any delegation nor would it represent any negotiated text or accepted compromise. It should, therefore, be quite clear that the single negotiating text will serve as a procedural device and only provide a basis for negotiation. It must not in any way be regarded as affecting either the status of proposals already made by delegations or the right of delegations to submit amendments or new proposals'. Note by the President of the Conference, Third United Nations Conference on the Law of the Sea, Official Documents, vol 4, 137.

<sup>87</sup> Stating that 'the text would be a basis for negotiation, rather than a negotiated text or accepted compromise, and would not prejudice the position of any delegation'. See Introduction by the Chairman of the Second Committee, Third United Nations Conference on the Law of the Sea, Official Documents, vol 4, 153.

<sup>88</sup> Or as worded by members of the US delegation at the end of that session: 'The effect of this text, and the reactions of states to it, are unclear'. Stevenson and Oxman (n 71) 786. Writing around the same time period and commenting on the informal single negotiating text, see Robert D Hodgson and Robert W Smith, 'The Informal Single Negotiating Text (Committee II): A Geographical Perspective' (1976) 3 *Ocean Development and International Law* 225, 233, arguing that art 121, para 3 'should be eliminated for geographical reasons as being impossible to administer'. See also the many oral positions taken since that date by the different delegations, often sustaining widely divergent positions. See United Nations (n 50) 88-91, para 60, 95-96, para 71, 97-99, para 76, 103-8, paras 84 and 87, and 110-12, para 95.

<sup>89</sup> A/CONF.62/C.2/L.96, Third United Nations Conference on the Law of the Sea, Official Documents, vol 7, 84. This proposal by Algeria, Iraq, Ireland, Libyan Arab Jamahiriya, Madagascar, Nicaragua, Romania, Turkey and United Republic of Cameroon stated: 'Islands which are situated on the continental shelf or exclusive economic zone of another State, or which on the basis of their geographical location affect the normal continental shelf or exclusive economic zone of other States shall have no economic zone or continental shelf of their own'. This document was dated 11 July 1977.

<sup>90</sup> Proposal by Columbia concerning Article 132 of the Informal Single Negotiating Text II, as reproduced in Renate Platzöder (ed), Third United Nations Conference on the Law of the Sea: Documents (vol 4, Oceana 1983) 346. This proposal, intending to amend paragraph 3, stated: 'Islands without a life of their own, without a permanent and settled population, that are closer to the coastline of [an]other State than to the coastline of the State to which they belong, and located at a distance less than double the breadth of the territorial sea of that State will not have an exclusive economic zone or continental shelf'; Proposal by Libyan Arab Republic concerning Article 132 of the Informal Single Negotiating Text II, as reproduced in Renate Platzöder (ed), Third United Nations Conference on the Law of the Sea: Documents (vol 4, Oceana 1983) 347. This proposal deleted in paragraph 2 the words 'applicable to other land territory', amended paragraph 3 and added a new paragraph 4. Paragraphs 3 and 4 stated: '3) Small islands and rocks, wherever they may be, which cannot sustain human habitation or economic life of their own shall have no territorial sea, nor contiguous zone, nor economic zone, nor continental shelf. 4) Such islands and rocks provided for in the preceding third paragraph shall have [a] maritime safety zone which will not affect the maritime space of the adjacent or opposite states'; Proposal by Tunisia concerning Article 132 of the Informal Single Negotiating Text II, as reproduced in Renate Platzöder (ed), Third United Nations Conference on the Law of the Sea: Documents (vol 4, Oceana 1983) 347-48. This proposal was identical as far as the substance is concerned to A/CONF.62/C.2/L.62/Rev.1 (n 60), of which this country was a co-sponsor. Only the numbering was adapted; Proposal by Turkey concerning Article 132 of the Informal Single Negotiating Text II, as reproduced in Renate Platzöder (ed), Third United Nations Conference on the Law of the Sea: Documents (vol 4, Oceana 1983) 348. This proposal suggested deleting the words 'as provided for in paragraph 3' in paragraph 2 and replacing them by 'where they constitute special circumstances within the terms of articles 13, 61 and 70'. Paragraph 3 should read: 'Rocks shall have no marine space of their own'; Proposal by Algeria, Iraq, Libyan Arab Jamahiriya, Madagascar, Nicaragua, Romania, Turkey, United Republic of Cameroon and Yemen concerning Article 128 of the Revised Single Negotiating Text II, as

time of the release of the first revision of the informal composite negotiating text, the President of the conference explicitly mentioned the item of islands among issues that ‘had not yet received adequate consideration and should form the subject of further negotiation during the resumed session’,<sup>91</sup> triggering once again further formal<sup>92</sup> and informal<sup>93</sup> proposals. This paragraph in other words remained controversial until the end of the negotiations.<sup>94</sup>

What is clear from all these proposals is that, first, most of them concerned paragraph 3, and second that they did not show any sign of merging of the positions of States on the issue. On the contrary, while some countries asked for the simple suppression of paragraph 3,<sup>95</sup> others

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reproduced in Renate Platzöder (ed), *Third United Nations Conference on the Law of the Sea: Documents* (vol 4, Oceana 1983) 483. This proposal, intending to add a fourth paragraph, stated: ‘Islands which are situated on the continental shelf or exclusive economic zone of another State, or which on the basis of their geographical location affect the normal continental shelf or exclusive economic zone of other States shall have no economic zone or continental shelf of their own’; Proposal by Algeria, Bangladesh, Cameroon, Iraq, Libya, Madagascar, Morocco, Nicaragua, Somalia and Turkey concerning Article 121, as reproduced in Renate Platzöder (ed), *Third United Nations Conference on the Law of the Sea: Documents* (vol 5, Oceana 1984) 30. This proposal, dated 28 April 1978, added a new third paragraph that stated: ‘Islands which because of their geographical location constitute a source of distortion or inequity in the drawing of[f] 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’. Old paragraph 3, which in this proposal became new paragraph 4, extended its application from mere rocks to rocks and islets; Proposal by Japan concerning Article 121, as reproduced in Renate Platzöder (ed), *Third United Nations Conference on the Law of the Sea: Documents* (vol 5, Oceana 1983) 37. This proposal, dated 3 May 1978, suggested the deletion of paragraph 3.

<sup>91</sup> Explanatory Memorandum by the President of the Conference, *Third United Nations Conference on the Law of the Sea, Official Documents*, vol 8, 19.

<sup>92</sup> A/CONF.62/86, *Third United Nations Conference on the Law of the Sea, Official Documents*, vol 12, 68, 69. This proposal by the Group of Islamic States stated: ‘Islands which, by their geographical situation, constitute a source of disagreement in the delimitation of maritime boundaries between adjacent and opposite countries will only share sea space according to equitable principles and taking into account all relevant circumstances’. This document was dated 22 August 1979; A/CONF.62/L.118, *Third United Nations Conference on the Law of the Sea, Official Documents*, vol 16, 225. This proposal by Romania, intending to add a fourth paragraph to art 121, stated: ‘Uninhabited islets should not have any effects on the maritime spaces belonging to the main coasts of the States concerned’. This document was dated 13 April 1982; A/CONF.62/L.126, *Third United Nations Conference on the Law of the Sea, Official Documents*, vol 16, 233. This proposal by the United Kingdom stated in part: ‘Article 121: delete paragraph 3’. This document was dated 13 April 1982. This country explained its proposition two days later. Statement by Mr Powell-Jones, A/CONF.62/SR.168, *Third United Nations Conference on the Law of the Sea, Official Documents*, vol 16, 91. During the same session Japan supported this UK proposal to delete paragraph 3, a proposition it had already made itself on 3 May 1978 as mentioned above (n 90). Statement by Mr Nakagawa, A/CONF.62/SR.169, *Third United Nations Conference on the Law of the Sea, Official Documents*, vol 16, 96.

<sup>93</sup> Proposal by Ireland concerning Article 121, as reproduced in Renate Platzöder (ed), *Third United Nations Conference on the Law of the Sea: Documents* (vol 5, Oceana 1984) 55. This proposal, dated 17 August 1979, intended to insert at the very beginning of paragraph 2, the words ‘without prejudice to the provisions of articles 15, 74, and 83 and’.

<sup>94</sup> Bernard H Oxman, ‘The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)’ (1981) 75 *American Journal of International Law* 211, 232.

<sup>95</sup> Like Japan (n 90 and 92) and the United Kingdom (n 92). See also the position taken by France. Even though not submitting a specific proposal, this country nevertheless spoke out against paragraph 3 and proposed its deletion on 3 April 1980. Statement by Mr de Lacharrière, A/CONF.62/SR.127, *Third United Nations Conference on the Law of the Sea, Official Documents*, vol 13, 30.



wanted to extend its application to islets<sup>96</sup> or, depending on their location, even islands<sup>97</sup> or also deprive such features of a territorial sea and a contiguous zone.<sup>98</sup>

In view of this particular history, the only sensible conclusion to be reached in this respect is therefore that the formulation of Article 121 of the LOSC, and especially its new paragraph 3, as proposed by the Chairman of Committee II in 1975 on the basis of what he thought to be a good synthesis of the discussions and proposals derived from the ‘main trends’ document and intended solely to serve as a starting point for further negotiations, proved afterwards impossible to amend in view of the global package deal, which delegations did not want to endanger.

## 2. Meaning

The interpretation of paragraph 3 as it now reads is fraught with difficulty.<sup>99</sup> One can be certain however that this paragraph does not apply to rocks which are included in a system of straight baselines established in accordance with Article 7 of the LOSC.<sup>100</sup>

### *a. Rocks*

First of all, the basic term it introduces, namely rock, has not been adequately defined as already observed by Venezuela at the time of UNCLOS III.<sup>101</sup> This turned out to be correct. It will suffice to refer to the meticulous analysis by Kwiatkowska and Soons, reading in the legislative history that there is nothing to support the distinction between rocks in a strict

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<sup>96</sup> Like the proposal made by Algeria, Bangladesh, Cameroon, Iraq, Libya, Madagascar, Morocco, Nicaragua, Somalia and Turkey (n 90).

<sup>97</sup> Like Colombia (n 90).

<sup>98</sup> Like Libya (n 90) and Turkey (n 90), the latter even dispensing with the requirement that such rocks cannot sustain human habitation or economic life of their own.

<sup>99</sup> As labelled by Brown (n 20) ‘a perfect recipe for confusion and conflict’ or a Pandora’s box, by Robert Kolb, ‘L’interprétation de l’article 121, paragraphe 3, de la Convention de Montego Bay sur le Droit de la Mer : les “rochers qui ne se prêtent pas à l’habitation humaine ou à une vie économique propre . . .” (1994) 40 *Annuaire Français de Droit International* 876, 899. Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 50, 151, 163, repeating that this paragraph is poorly drafted. Using more diplomatic language, see Mani (n 18) 102, stating that ‘the phraseology of paragraph 3 of Article 121 is not altogether a happy one’.

<sup>100</sup> Roberto Lavalle, ‘Not Quite a Sure Thing: The Maritime Areas of Rocks and Low-tide Elevations under the UN Law of the Sea Convention’ (2004) 19 *International Journal of Marine and Coastal Law* 43, 54.

<sup>101</sup> Statement by Mr Falcon Briceno, A/CONF.62/SR.135, Third United Nations Conference on the Law of the Sea, Official Documents, vol 14, 20, 21. He stated: ‘The term “rocks” was in neither the legal nor the scientific vocabulary and might refer to any island formation’. In the Manual on Technical Aspects of the United Nations Convention on the Law of the Sea 1982 (Prepared by IHO, IAG, IOC Advisory Board on Law for the Sea (ABLOS)) (4th edn, International Hydrographic Bureau 2006), Appendix 1-23, <[http://www.iho.int/iho\\_pubs/CB/C-51\\_Ed4-EN.pdf](http://www.iho.int/iho_pubs/CB/C-51_Ed4-EN.pdf)> accessed 10 May 2016, a rock is defined as ‘consolidated lithology of limited extent’, but at the same time it is stressed that the LOSC itself does not define this term, neither does it distinguish between rocks and islands. *Ibid* Chapter 4-9.

geological sense and other islands,<sup>102</sup> and compare it to the work of Prescott and Schofield who deconstruct the legal argumentation of the former in a similar thorough manner,<sup>103</sup> in order to grasp the difficulty of the exercise.

Our own analysis of the matter tends to side with the position taken by Kwiatkowska and Soons for the simple reason that the combination of documents the Chairman relied upon to make his influential proposal in 1975 combined proposals of States having different conceptions of this notion: If the State providing for the definition of the term was of the opinion that it had to be a 'rocky' elevation, the consequence-part of the proposal relied on countries who rather looked at a rock as a small island, to be classified between an islet and a low-tide elevation.<sup>104</sup> The better conclusion to be drawn, therefore, appears to be that the term 'rock' should be interpreted in its generic, non-restrictive meaning and includes fairly small islands composed of rock or sand indiscriminately.<sup>105</sup>

***b. Cannot sustain human habitation or economic life of their own***

This second distinguishing feature, unfortunately, is not much clearer than the first.<sup>106</sup> Several problems of interpretation arise.

First of all, the factor 'human habitation of their own' is in need of clarification. Here again, two diametrically opposed positions are to be found in the literature. On the one hand, there is the opinion of Van Dyke and others suggesting that the standard involved concerns 'a stable community of permanent residents' living on the feature and using the surrounding maritime

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<sup>102</sup> Barbara Kwiatkowska and Alfred HA Soons, 'Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own' (1990) 21 *Netherlands Yearbook of International Law* 139, 151. According to them, the term 'rock' also covers 'sandbanks and other insular features different from rocks in the ordinary meaning of that term'. *Ibid* 151-52.

<sup>103</sup> Prescott and Schofield (n 84) 61-75. They conclude their analysis with the words: 'This examination, of the view that the *travaux préparatoires* establish that the term "rocks" should be interpreted to include cays and barren islands, shows it to be wishful'.

<sup>104</sup> As discussed in detail above (n 77-84) and accompanying text. On exactly how small the island has to be to turn into a rock, different mathematical methods have been suggested. See for instance Robert D Hodgson, 'Islands: Normal and Special Circumstances' in John King Gamble, Jr. and Giulio Pontecorvo (eds), *Law of the Sea: The Emerging Regime of the Oceans (Proceedings Law of the Sea Institute Eighth Annual Conference, June 18-21, 1973, University of Rhode Island, Kingston, Rhode Island)* (Ballinger 1974) 137, 150-51, suggesting that a rock is less than 0,001 square mile in area (0,0025 square kilometres). But as defined by the International Hydrographic Organization, a rock would be nearly 400 times larger than according to the definition of Hodgson. As remarked by Brown (n 20) 150 and Hodgson and Smith (n 88) 230. Despite the obvious clarity of such definitions, they never found a reflection in State practice.

<sup>105</sup> As already suggested by authors at the time that the informal single negotiating text saw the light of day. See Hodgson and Smith (n 88) 230. In the same sense, see Beazley (n 35) 9. This author clearly focuses on size, not substance. See also Marius Gjetnes, 'The Spratlys: Are They Rocks or Islands?' (2001) 32 *Ocean Development and International Law* 191, 193, and Symmons (n 14) 8.

<sup>106</sup> According to Brown (n 20) 150, this text 'is also intolerably imprecise'.

area.<sup>107</sup> On the other hand, there is the perception that an abstract capacity, present or even future, is sufficient to comply with this criterion.<sup>108</sup> After a careful analysis of the *travaux préparatoires*, Kolb reaches the conclusion that ideas apparently shifted from the former to the latter position as the UNCLOS III negotiations progressed.<sup>109</sup>

A similar difficulty of interpretation is to be found with respect to the ‘economic life of their own’ requirement. Is it the economic life on the island that determines the access to the maritime zones, or can it be the potential of for instance the living resources of the surrounding waters that makes the feature fulfil this requirement?<sup>110</sup>

Finally, the relationship between ‘human habitation of their own’ and ‘economic life of their own’ needs to be clarified. The problem here is that the text of paragraph 3 connects them with the word ‘or’.<sup>111</sup> However, if it could be possible to escape from the application of paragraph 3 by fulfilling just one of these requirements, the exception would become totally inoperative. In that case, the mere potential of offshore fisheries or mineral resources exploitation would be sufficient to fall within the remit of paragraph 2. The same result

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<sup>107</sup> Jon M Van Dyke, Joseph R Morgan and Jonathan Gurish, ‘The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?’ (1988) 25 San Diego Law Review 425, 487. These authors argue *a contrario*: ‘If no one lives on a small island, this logic does not apply, and it seems inappropriate to allocate exclusive resource rights to a people living far way whose only link to the island may be a claim made more than a century ago by guano prospectors’. Ibid. See also Van Dyke and Brooks (n 56) 286 and 288. Van Dyke’s writings on the issue of islands and rocks have been recognized as an influential part of his legacy to legal scholarship. Harry N Scheiber, ‘A Jurisprudence of Pragmatic Altruism: Jon Van Dyke’s Legacy to Legal Scholarship’ in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff 2014) 21, 38-39. Also arguing that more than a mere human presence is necessary, see Jesus (n 16) 587-90.

<sup>108</sup> See for instance the declaration made upon signature of the LOSC on 10 December 1982 by Iran <[http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#Iran](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Iran) Upon signature> accessed 10 May 2016: ‘Islets 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, fall within the provisions of paragraph 2 of article 121 concerning “Regime of Islands”, and have, therefore, full effect in boundary delimitation of various maritime zones of the interested Coastal States’.

<sup>109</sup> Kolb (n 99) 902-3.

<sup>110</sup> As suggested by Charney (n 11) 871-72. Another interesting question is whether the protection of a reef to promote the proper economic life of a rock could be sufficient. As argued by Jonathan L Hafetz, ‘Fostering Protection of the Marine Environment and Economic Development : Article 121(3) of the Third Law of the Sea Convention’ (1999) 15 American University International Law Review 583, 611 and 627. *Contra* Jesus (n 14) 590-92, arguing that this would lead to a manifestly absurd or unreasonable result.

<sup>111</sup> Yann-Huei Song, ‘Okinotorishima: A “Rock” or an “Island”? : Recent Maritime Boundary Controversy between Japan and Taiwan/China’ in Seoung-Yong Hong and Jon M Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Nijhoff 2009) 145, 166, stressing the alternative application. In the same sense, see Jesus (n 14) 587, pointing nevertheless at the fact that in practice the two criteria might go hand in hand. See also Dipla (n 14) 42, emphasizing that this alternative application further illustrates the insufficiency of this rule. It is nevertheless interesting to note that probably one of the last introduced informal proposals, making a synthesis of previous alternatives to be found in the ‘main trends’ document, stated in this respect: ‘Islets or islands without economic life and unable to sustain a permanent population shall have no marine space of their own’. Provisions 239 to 243, Proposal, 28 April 1975 (n 76) art 4, para 1. This proposal in other words used ‘and’ instead of ‘or’.

would apply to the mere posting on the island of military personnel or scientists to man a weather station, activities unrelated to the economic life of the island itself. A teleological interpretation would therefore seem to require the cumulative application of both criteria if the provision of paragraph 3 is to have any meaning at all.

The difficulty with such an interpretation is that it runs apparently counter to the plain wording of the text, which reads ‘or’, not ‘and’. Logic and argumentation might offer some relief, for the phrase is formulated in a negative manner: Instead of stating ‘rocks which sustain human population of their own AND economic life of their own shall have an exclusive economic zone AND continental shelf’ it is phrased negatively ‘rocks which cannot sustain human habitation of their own OR economic life of their own shall have no exclusive economic zone OR continental shelf’. If we analyse this phrase more formalistically and agree that p represents ‘to sustain human habitation of their own’, q ‘to sustain economic life of their own’, r ‘to have an exclusive economic zone’, and s ‘to have a continental shelf’, one ends up with ‘-(p v q) -> -(r v s)’. This in turn is equal to ‘-p & -q -> -r & -s’. Just as it seems obvious that if the conditions in the first part of the equation are fulfilled, the feature will have no exclusive economic zone AND no continental shelf, the first part should also read: if no human habitation of their own can be sustained AND if no economic life of their own can be sustained, then the second part of the equation, just described, will apply to such rocks.<sup>112</sup> It is therefore submitted that both the capacity to sustain human habitation and economic life of its own must be present for a feature to be able to generate an EEZ and a continental shelf, or put negatively, the absence of either of these two requirements is sufficient to deprive it of such maritime zones.<sup>113</sup>

### 3. Status

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<sup>112</sup> The author would like to thank Professor Jean Paul Van Bendegem, Centre for Logic and Philosophy at the *Vrije Universiteit Brussel* for having shared his insights on this matter.

<sup>113</sup> This seems to be confirmed by the opinion of Judge Vukas expressed in his declaration made in the *Monte Confurco* case, where he only relied on the fact that the Kerguelen Islands had been declared ‘uninhabitable and uninhabited’ to conclude that it was questionable whether these islands generated an EEZ. *The ‘Monte Confurco’ Case (Seychelles v. France)* (Prompt Release) [2000] <<https://www.itlos.org>> accessed 10 May 2016. When he felt obliged to explain his position with respect to Heard and McDonald Islands in greater detail in the *Volga* case, where he served as Vice-President, he once again placed the emphasis on the human factor to which the economic factor was an appurtenance, for the crux of the matter concerned the economic needs of coastal fishing communities. *The ‘Volga’ Case (Russian Federation v. Australia)* (Prompt Release) [2002] paras 2-6 <<https://www.itlos.org>> accessed 10 May 2016. See also Jon M Van Dyke, ‘Disputes Over Islands and Maritime Boundaries in East Asia’ in Seoung-Yong Hong and Jon M Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Nijhoff 2009) 39, 49, who reads moreover in this opinion of Judge Vukas that rocks must not necessarily be geological features.

If there was one issue relating to paragraph 3 on which a clear majority of legal writers were in agreement, it concerned the status of this provision under customary international law. The chequered history of this paragraph, together with the absence of any clear state practice on the issue normally led authors to conclude that, contrary to paragraphs 1 and 2, paragraph 3 did not form part of customary international law.<sup>114</sup> The only disturbing factor in this reasoning was that the Conciliation Commission, established by Iceland and Norway in order to recommend to the parties a manner in which to divide the continental shelf area between Iceland and Jan Mayen, made the following assessment of Article 121 during the month of June 1981, i.e. at that time the LOSC had not yet been adopted. After having cited Article 121 in full, the Commission argued:

In the opinion of the Conciliation Commission this article reflects the present status of international law on this subject. It follows from the brief description of Jan Mayen in Section III<sup>115</sup> of this report that Jan Mayen must be considered as an island. Paragraphs 1 and 2 of Article 121 are thus applicable to it.<sup>116</sup>

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<sup>114</sup> David Joseph Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press 1987) 260; Churchill and Lowe (n 99) 151 and 164; James Richard Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 803; Dipla (n 14) 42, 48-49, 100-2 and 232; Alex G Oude Elferink, 'Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Processes' (1998) 6 *Boundary and Security Bulletin* 58, 59, and by the same author in an updated article 'Is it Either Necessary or Possible to Clarify the Provision of Rocks of Article 121(3) of the Law of the Sea Convention?' (1999) 92 *Hydrographic Journal* 9; Carl August Fleischer, 'Fisheries and Biological Resources' in René-Jean Dupuy and Daniel Vignes (eds), *A Handbook on the New Law of the Sea* (vol 2, Martinus Nijhoff 1991) 989, 1061; Maria Silvana Fusillo, 'The Legal Regime of Uninhabited "Rocks" Lacking an Economic Life of Their Own' (1978) 4 *Italian Yearbook of International Law* 47, 56-57; Karagiannis (n 17) 595-623; Kolb (n 99) 894-99; Kwiatkowska and Soons (n 102) 174-80; Laurent Lucchini and Michel Voelckel, *Droit de la mer: La mer et son droit; les espaces maritimes* (vol 1, Tome 1, Pedone 1990) 339; Yann-Huei Song, 'The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean' (2010) 9 *Chinese Journal of International Law* 663, 678; Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2012) 67-68; Walter van Overbeek, 'Article 121(3) LOSC in Mexican State Practice in the Pacific' (1989) 4 *International Journal of Estuarine and Coastal Law* 252, 263-67. *Contra* Aristotelis B Alexopoulos, 'The Legal Regime of Uninhabited Islets and Rocks in International Law: The Case of the Greek Seas' (2003) 56 *Revue Hellénique de Droit International* 131, 149; Derek Bowett, 'Islands, Rocks, Reefs, and Low-tide Elevations in Maritime Boundary Delimitations' in Jonathan I Charney and Lewis M Alexander (eds), *International Maritime Boundaries* (vol 1, Martinus Nijhoff 1993) 131, 121; Charney (n 14) 871-73.

<sup>115</sup> This section of the report described Jan Mayen as an island 53 kilometres long, and with a maximum width of 20 kilometres and an area of 373 square kilometres, about the same size as the largest of the Faroe Islands. It is the home of the volcano Beerensburg, measuring 2.227 metres in height. 30-40 people live all year round on the island, which possesses an airport and stations interconnected by roads.

<sup>116</sup> Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen, as reproduced in (1981) 20 *International Legal Materials* 797, 803-4.

Whether Jan Mayen was an island or a rock resurfaced during the dispute before the International Court of Justice between Denmark and Norway more than ten years later.<sup>117</sup> Denmark did raise the issue of Article 121, paragraph 3. It did so, however, not to contest that Jan Mayen had an EEZ and continental shelf entitlement, but rather to have this provision play a mitigating influence with respect to maritime delimitation.<sup>118</sup> The Court simply took note of the agreement between the parties that Jan Mayen was an island and decided that it would not give full effect to Jan Mayen as requested by Denmark, thereby disposing of the issue whether paragraph 3 formed part of customary international law.<sup>119</sup> The Court in other words did not look into the customary law nature of paragraph 3.<sup>120</sup>

If some doubts remained after the 1981 report of the Conciliation Commission on the customary nature of paragraph 3 of Article 121,<sup>121</sup> these have been definitively put to rest by the recent decision of the International Court of Justice in the case between Nicaragua and Colombia of 2012. After having noticed that the parties were in agreement that Article 121 is to be considered declaratory of customary international law,<sup>122</sup> and recalling that in an earlier judgement it had already reached the conclusion that paragraphs 1 and 2 form part of customary international law, the Court continued:

The Judgment in the *Qatar v. Bahrain* case did not specifically address paragraph 3 of Article 121. The Court observes, however, that the entitlement to maritime rights accorded to an island by the provisions of paragraph 2 is expressly limited by reference to the provision of paragraph 3. By denying an exclusive economic zone and a continental shelf to rocks which cannot sustain human habitation or economic life of their own, paragraph 3 proves an essential link between the long-established principle that ‘islands, regardless of their size . . . enjoy the same status, and therefore generate

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<sup>117</sup> *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)* (Merits) [1993] ICJ Rep 38.

<sup>118</sup> Ibid 65, para 60.

<sup>119</sup> Ibid 73-74, para 80. It should be noted that when the case was decided by the Court neither of the disputing parties was a party to the LOSC, even though they had both signed it. The LOSC had moreover not yet entered into force. Under these circumstances the Court concluded that ‘[t]here can be no question therefore of the application, as relevant treaty provisions, of that Convention’. Ibid 59, para 48.

<sup>120</sup> Other judges doubted whether Jan Mayen should not rather have been covered by paragraph 3, but since Denmark did not pursue that argument, these other judges apparently did not find it was the task of the Court to decide otherwise. See Separate Opinion of Vice-President Oda, ibid 100-1, paras 42-43; Separate Opinion Judge Schwebel, ibid 126; and Separate Opinion Judge Ajibola, ibid 291 and 299.

<sup>121</sup> A common criticism in the literature was that the Commission only applied paragraphs 1 and 2, and consequently its findings did not concern paragraph 3. See for instance Karagiannis (n 17) 622-23; Kwiatkowska and Soons (n 102) 174; and Kolb (n 99) 898. See also Dipla (n 14) 102, stating that the Conciliation Commission went ‘trop loin et trop vite’.

<sup>122</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (n 3) 673, para 137.

the same maritime rights, as other land territory' ([Qatar v. Bahrain p. 97]) and the more extensive maritime entitlements recognized in UNCLOS and which the Court has found to have become part of customary international law. The Court therefore considers 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.<sup>123</sup>

### **The Way Forward**

After having analysed the regime of islands and rocks under UNCLOS III and Article 121 of the LOSC in some detail, it is an euphemism to state that this Article 121, and especially its new paragraph 3, is difficult to apply in practice.<sup>124</sup> As worded by the late Prof. Brownlie, this paragraph 'raises considerable problems of definition and application'.<sup>125</sup> This has to do with the complicated genesis of this paragraph in 1975 and the subsequent impossibility to further improve the text proposed by the Chairman of Committee II during the remaining seven years of negotiations.<sup>126</sup> The text in itself is unclear and the *travaux préparatoires* are only of limited help.<sup>127</sup> Establishing a definitive interpretation merely based on the text has been labelled 'almost inconceivable'.<sup>128</sup> As with other provisions of the LOSC restricting coastal State rights, it should not come as a surprise that there aren't many instances of State practice where the paragraph 3 exception is adopted in national legislation in a

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<sup>123</sup> Ibid 674, para 139.

<sup>124</sup> See for instance a recent attempt to apply art 121, para 3 to the Liancourt rocks, disputed between Japan (calling them Takeshima) and Korea (naming them Tokdo) by Phil Haas, 'Status and Sovereignty of the Liancourt Rocks: The Dispute between Japan and Korea' (2012) 15 Gonzaga Journal of International Law 2, 4-10.

<sup>125</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 221.

<sup>126</sup> Saying that a consensus was reached around art 121 (see John Briscoe, 'Islands in Maritime Boundary Delimitation' (1989) 7 Ocean Yearbook 14, 19) seems therefore somewhat awkward if understood in the primary meaning given to this notion by Bryan A Garner, *Black's Law Dictionary* (9th edn, West 2009) 345, namely 'a general agreement', as well as by Jean Salmon (ed), *Dictionnaire de droit international public* (Bruylant 2001), 239, namely 'consentement général donné en dehors de toute forme particulière'. It is therefore submitted that the word has to be rather understood here in the second meaning provided by both sources with their emphasis on the absence of any formal objection. Ibid.

<sup>127</sup> Anderson (n 16) 313, calling them an unreliable guide. In the same sense, Clive H Schofield, 'Islands or Rocks - Is that the Real Question?: The Treatment of Islands in the Delimitation of Maritime Boundaries' in Myron H Nordquist (ed), *The Law of the Sea Convention: US Accession and Globalization* (Nijhoff 2012) 322, 328.

<sup>128</sup> Clive H Schofield, 'The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation' in Seung-Yong Hong and Jon M Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Nijhoff 2009) 19, 27. See also Elferink, 'Clarifying Article 121(3)' (n 114) 58, and by the same author 'Is it Either Necessary or Possible' (n 114) 9, reaching a similar conclusion based on the relevant literature.

straightforward manner.<sup>129</sup> Bilateral delimitation agreements are moreover of limited utility, because they do not have to be based on law, but can take other considerations into account.<sup>130</sup>

Under such circumstances, one is inclined to seek guidance in decisions of courts and tribunals. Just as maritime delimitation law concerning the EEZ and continental shelf has become a kind of judge-made common law<sup>131</sup> after the ‘de-codification’ of that law during UNCLOS III,<sup>132</sup> Article 121 paragraph 3 seems impossible to implement by the parties to a dispute themselves.<sup>133</sup>

Even though sporadically an example can be found on the national level,<sup>134</sup> on the international plane however courts and tribunals have so far always found a way around addressing Article 121 paragraph 3 head on, even though sometimes the facts of the case fully provided them with the opportunity to do so.

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<sup>129</sup> The only exception seems to be Mexico. See Tanaka (n 114) 67, and even that country only applies the principle to some of its small offshore features. See van Overbeek (n 124) 262-63 and 267. The only country having so far rolled back a claim apparently to comply with art 121, para 3, has been the United Kingdom, when they became a party to the LOSC. David H Anderson, ‘British Accession to the UN Convention on the Law of the Sea’ (1997) 46 *International and Comparative Law Quarterly* 761, 778. The inapplicability of law of the sea concepts because they are not able to resolve disputes between States, has been labelled a ‘rockapelago’ by one author. See Barry Hart Dubner, ‘The Spratly “Rocks” Dispute: A “Rockapelago” Defies Norms of International Law’ (1995) 9 *Temple International and Comparative Law Journal* 291, note 1.

<sup>130</sup> Prosper Weil, *The Law of Maritime Delimitation: Reflections* (Grotius Publications Limited 1989) 105-14; and by the same author, ‘Geographic Considerations in Maritime Delimitation’ in Jonathan I Charney and Lewis Alexander (eds), *International Maritime Boundaries* (vol 1, 1991) 115, 121. It is nevertheless interesting to note that when such bilateral agreements, giving effect to rock-like features, impinge upon the rights of third States, the latter have at times protested on the basis that art 121, para 3 does not allow rocks to generate an EEZ and continental shelf. See J Ashley Roach and Robert W Smith, *Excessive Maritime Claims* (Nijhoff 2012) 178, giving the example of Aves Island. See also the protest to the Japanese submission to the Commission on the Limits of the Continental Shelf on the basis of art 121, para 3 with respect to Okinotorishima (as discussed above n 54) by the People’s Republic of China on 6 February 2009 <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/chn\\_6feb09\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf)> accessed 10 May 2016 and on 3 August 2011 (n 54), and by the Republic of Korea on 27 February 2009 <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/kor\\_27feb09.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf)> accessed 10 May 2016 and on 11 August 2011 <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/kor11aug11.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor11aug11.pdf)> accessed 10 May 2016.

<sup>131</sup> Jonathan I Charney, ‘Progress in International Maritime Boundary Delimitation Law’ (1994) 88 *American Journal of International Law* 227, 228.

<sup>132</sup> Expression used by Tullio Treves, ‘Codification du droit international et pratique des États dans le droit de la mer’ (1990) 223 *Recueil des cours de l’Académie de droit international de la Haye* 9, 104.

<sup>133</sup> It is interesting to note that a proposal was also submitted towards the end of the UNCLOS III negotiations that envisaged introducing the standard of ‘equitable principles and taking into account all relevant circumstances’ with respect to islands, i.e. a standard which refers the parties to third party dispute settlement. See A/CONF.62/86 (n 92).

<sup>134</sup> Robin Churchill, ‘Norway, Supreme Court Judgement on Law of the Sea Issues’ (1996) 11 *International Journal of Marine and Coastal Law* 576-580, stating that the Court reasoned that Abel Island, measuring 13,2 square kilometres, was too large to be considered a rock. *Ibid* 579. See also Gjetnes (n 105) 193.



With respect to Jan Mayen, the International Court of Justice side-stepped the issue because Denmark had not pushed the entitlement aspect of Article 121, paragraph 3.<sup>135</sup>

In the 1999 Eritrea-Yemen maritime boundary delimitation award,<sup>136</sup> the Tribunal did not really explain why Jabal al-Tayr and the Zubayr group, both belonging to Yemen, were not given any effect. By referring to the ‘barren and inhospitable nature’ of these features the Tribunal may have meant to hint at Article 121, paragraph 3, but never said so.<sup>137</sup>

In the case between Qatar and Bahrain the International Court of Justice emphasized that no matter how small the feature, islands generate the same maritime rights as other land territory.<sup>138</sup> It made the remark with respect to Qit’at Jaraday, a feature of which the exact status was disputed between the parties.<sup>139</sup> After having found that the feature surfaced at high tide, the Court referred to paragraph 2, but, notwithstanding the extremely small size of the feature involved as described above,<sup>140</sup> did not find it necessary to raise the issue *proprio motu* whether paragraph 3 applied.<sup>141</sup> A similar remark has been made with respect to the Court’s treatment of Fasht al Jarim.<sup>142</sup>

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<sup>135</sup> As discussed above (n 118-120) and accompanying text. Including a feature, potentially fitting art 121, para 3, into the system of straight baselines, is also a manner in which states avoid having to apply that provision (see above n 100 and accompanying text). When Iceland established its systems of straight baselines in 1952, as revised in 1961, Kolbeinsey measuring a few square metres and 6 metres above water at high tide was each time listed as separate basepoint but not included in the system of straight baselines (see The Geographer, Office of the Geographer, Bureau of Intelligence and Research, Department of State, United States, *Straight Baselines: Iceland* (vol 14 (revised), 1974) 4. How this plays out in a delimitation context is however far from certain. See for instance Alex G Oude Elferink, ‘Denmark/Iceland/Norway: Bilateral Agreements on the Delimitation of the Continental Shelf and Fishery Zones’ (1998) 13 *International Journal of Marine and Coastal Law* 607-16, giving ample attention to this particular feature.

<sup>136</sup> *Award of the Arbitral Tribunal in the Second Stage – Maritime Delimitation (Eritrea/Yemen)* <<https://pcacases.com/web/allcases/>> accessed 10 May 2016.

<sup>137</sup> Nuno Sérgio Marques Antunes, ‘The 1999 Eritrea-Yemen Maritime Delimitation Award and the Development of International Law’ (2001) 50 *International and Comparative Law Quarterly* 299, 328-30, stressing that the Tribunal did not clarify the exact reason why these features were not given any effect: Either because they could not generate any EEZ and continental shelf on the basis of art 121, para 3, or rather because the EEZ and continental shelf generated by these features had a distortive effect on the delimitation. *Ibid* 330. Even though Eritrea was not a party to the LOSC, the Arbitration agreement provided that the ‘Tribunal shall decide taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor’. *Award of the Arbitral Tribunal in the Second Stage* (n 136) 2, para 5 and 40, para 130.

<sup>138</sup> *Case Concerning Maritime Delimitation* (n 38) 97, para 185.

<sup>139</sup> They disputed whether it was an island or a low-tide elevation. *Ibid* 98, para 191. Neither party raised the issue whether it was a rock.

<sup>140</sup> As discussed above (n 49) and the text following that note.

<sup>141</sup> Some authors infer from this refusal that the Court considers a sand bank not to be a rock. See Emmanuella Doussis, ‘Îles, îlots, rochers et hauts-fonds découvrants’ in Laurent Lucchini (ed), *Le processus de délimitation maritime : étude d’un cas fictif : Colloque international* (Pedone 2004) 134, 147.

<sup>142</sup> Iriani Papanicolopulu, ‘The 2001 ICJ Decision in the Qatar v. Bahrain Case (merits) and its Bearing Upon the 1982 United Nations Convention on the Law of the Sea’ (2002) 55 *Revue Hellénique de Droit International* 385,

In the case between Nicaragua and Honduras the parties had mentioned two cays during the proceedings, namely Media Luna Cay and Logwood Cay. In response to a question by one of the judges as to whether these features were to be considered as islands, the parties agreed that one of them no longer surfaced at high tide. But with respect to Logwood Cay the parties disagreed. The Court disposed of the issue by simply stating that it was not in a position to make a determinative finding on the issue.<sup>143</sup>

Concerning Serpents' Island, Romania and Ukraine had diametrically opposed positions: According to the former it was a paragraph 3 feature,<sup>144</sup> according to the latter it rather fell under the application of paragraph 2.<sup>145</sup> By giving the island no effect on delimitation, save a 12 nautical mile arc of territorial sea which both parties had already agreed upon,<sup>146</sup> 'the Court does not need to consider whether Serpents' Island falls under paragraphs 2 or 3 of Article 121'.<sup>147</sup>

Finally, even in the case between Nicaragua and Colombia, in which the Court had declared paragraph 3 to form part and parcel of customary international law<sup>148</sup> serving an 'essential link'<sup>149</sup> between the past (equating islands and land) and the present (extended maritime zones), it refused to apply it *in casu*. Nicaragua had argued that Albuquerque Cays, East Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo were all rocks falling under paragraph 3,<sup>150</sup> whereas Colombia argued that these features fell outside of the exception of paragraph 3.<sup>151</sup> Referring back to its statement in the case between Qatar and Bahrain,<sup>152</sup> the Court emphasized once more that 'a comparatively small island may give an entitlement to a considerable maritime area'.<sup>153</sup> The Court referred back to the Black Sea case and applied a

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408, assuming that this implies that the Court did not consider art 121, para 3 to form part of customary international law.

<sup>143</sup> *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (n 3) 703-4, paras 143-44.

<sup>144</sup> *Maritime Delimitation in the Black Sea* (n 3) 120, para 180.

<sup>145</sup> *Ibid* 121, para 183.

<sup>146</sup> *Ibid* 123, para 188.

<sup>147</sup> *Ibid* 123, para 187. In such cases, according to Crawford (n 114) 295, 'the potential impact of Article 121(3) may be occluded'. About this missed opportunity to clarify art 121, para 3, see Jon M Van Dyke, 'The Romania v. Ukraine Decision and its Effect on East Asian Maritime Delimitations' (2010) 15 *Ocean and Coastal Law Journal* 261-83.

<sup>148</sup> As discussed above (n 123) and accompanying text.

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

<sup>150</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (n 3) 688, paras 170-71.

<sup>151</sup> *Ibid* 689, para 173.

<sup>152</sup> As discussed above (n 49) and the text following that note.

<sup>153</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (n 3) 690, para 176.

similar technique, i.e. by granting these features only a 12 nautical mile territorial sea, the issue of whether they fall within the paragraph 3 exception became moot.<sup>154</sup>

Of particular importance for the present study is that in this recent case between Nicaragua and Colombia the Court did make a finding that one of the features in dispute, namely QS 32 at Quitasueño, remained above water at high tide and was consequently an island,<sup>155</sup> but was nevertheless deprived of an EEZ and continental shelf on the basis of the application of paragraph 3 of Article 121.<sup>156</sup> Unfortunately, this finding at first sight does not bring much clarification with respect to the correct interpretation of this problematic paragraph 3 for the simple reason that it was merely based on the fact that none of the parties to the dispute had suggested that QS 32 was ‘anything other than a rock which is incapable of sustaining human habitation or economic life of its own’.<sup>157</sup> Nevertheless, it is submitted that indirectly this decision at least clarifies one point, and that is whether the term ‘rock’ in paragraph 3 is to be limited to features consisting of hard material of the earth’s crust or can also be composed of soft material, like mud, clay or sand.<sup>158</sup> In its primary determination whether QS 32 is an island, i.e. surfaces at high tide, the Court reasoned as follows:

Nicaragua’s contention that QS 32 cannot be regarded as an island within the definition established in customary international law, because it is composed of coral debris, is without merit. International law defines an island by reference to whether it is ‘naturally formed’ and whether it is above water at high tide, not by reference to its geological composition. The photographic evidence shows that QS 32 is composed of solid material, attached to the substrate, and not of loose debris. The fact that the feature is composed of coral is irrelevant.<sup>159</sup>

It is of course true that the Court in this part is only talking about islands in general, not about rocks in particular. But this passage receives a totally different content when later on the Court determines that this feature is covered by the exception of paragraph 3 of Article

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<sup>154</sup> Ibid 691-92, para 180, where the Court clarifies: ‘Whether or not any of these islands falls within the scope of that exception is therefore relevant only to the extent that it is necessary to determine if they are entitled to a continental shelf and exclusive economic zone’.

<sup>155</sup> Ibid 692, para 181. It is above water at high tide by some 0,7 metres. Ibid 645, para 37.

<sup>156</sup> Ibid 693, para 183. As Colombia was not a party to LOSC only customary law applied. Ibid 666, para 114. The Court had nevertheless clarified that art 121, para 3 formed part of customary international law. See above (n 148) and further reference to be found there.

<sup>157</sup> Ibid 693, para 183.

<sup>158</sup> As discussed above (n 84) and the text surrounding that note.

<sup>159</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (n 3) 645, para 37.

121.<sup>160</sup> The fact that the Court apparently only bases that decision on the fact that the parties are in agreement on this point<sup>161</sup> seems today irrelevant given the customary law nature of this paragraph as determined by the Court in another part of the same reasoning.<sup>162</sup> If paragraph 3 applies, it means the feature in question, namely QS 32 composed of coral as it is, must be a rock in the eyes of the Court.

The difficulty of interpretation of Article 121 paragraph 3, the absence of clear State practice and the refusal of courts and tribunals so far to provide any direct guidance in this respect, was thought at a particular moment in time to possibly result in the slow atrophy of this paragraph from the rest of Article 121.<sup>163</sup> The recent decision of the International Court of Justice, however, has placed paragraph 3 back at the centre of the proper application of this provision. If in the past courts and tribunals have taken refuge in the law of maritime delimitation, preferred because of its great flexibility, in order not to have to tackle Article 121 paragraph 3, it should be kept in mind that conceptually entitlement always precedes delimitation.<sup>164</sup>

## **Part V. Conclusions**

So far courts and tribunals have relied on the agreement of the parties on particular issues relating to Article 121 to move forward. Relying on the consent of the parties appearing before it is a convenient manner for a court or tribunal to help shape its decision in a particular case. As explained by the present author with respect to the decision of the International Court of Justice in the recent Whaling in the Antarctic Case,<sup>165</sup> where the court also relied on the consent of the parties with respect to the obligation to co-operate with the Commission and the Scientific Committee established within the framework of the International Whaling Convention, in order to reach its conclusion that Japan had overstepped the limits of its discretion when determining its whaling program “for purposes

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<sup>160</sup> As discussed above (n 156) and accompanying text.

<sup>161</sup> As discussed above (n 157) and accompanying text.

<sup>162</sup> As discussed above (n 123) and accompanying text.

<sup>163</sup> Oxman (n 14) 896-902 and 906, not leaving much room for paragraph 3 to be applied in practice.

<sup>164</sup> Nuno Sérgio Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (Martinus Nijhoff Publishers 2003) 297.

<sup>165</sup> Erik Franckx, ‘The Legal Nature of Resolutions of Intergovernmental Organizations: The Contribution of the Whaling in the Antarctic Case’ (2015) 58 Japanese Yearbook of International Law 275-97.

of scientific research”, there are a number of drawbacks attached to such an approach. It tends for instance to develop the law in a rather haphazard manner outside of any well-conceived general framework and might well induce States to think twice before making concessions in the course of their legal proceedings.

The recent recognition of the customary nature of the whole provision of Article 121, including paragraph 3 this time, might encourage judges and arbitrators to tackle this issue with more confidence in the future. It will be interesting to see whether the recently established arbitral tribunal in the dispute between China and the Philippines will be the first to provide further guidance in this respect.<sup>166</sup>

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<sup>166</sup> *Arbitration with Respect to the Dispute with China over the Maritime Jurisdiction of the Philippines in the West Philippine Sea (Philippines v. China)* <<https://pca-cpa.org/en/cases/>> accessed 10 May 2016.