



South China Sea Award: Are the Tribunal's Considerations on Islands Part of an *Acquis Judiciaire*?

9TH ABLOS CONFERENCE

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Mont Saint Michel, Rock?



Robinson Crusoe Island, a Rock?

Mounts, Rocks, and Islands in Context

“Each [island] was unique and called for specific treatment “ in the process of maritime delimitation
(*Bangladesh/Myanmar*, § 317)





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Methodology of Interpretation

Article 121 UNCLOS Regime of islands

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

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the **ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.**
2. The **context** for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: ... [any agreement or instrument in connection with the conclusion of the treaty]
3. There shall be taken into account, together with the context:
 - a) any subsequent agreement ... regarding the interpretation of the treaty ...;
 - b) any subsequent practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, **including the preparatory work** of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

A piece-meal application of the general rule

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the **ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.**

General rule:

« **These elements** of interpretation - ordinary meaning, context and object and purpose - are **to be considered as a whole** » (ICJ, *Somalia v. Kenya*, § 64).

SCS: “In approaching the interpretation of Article 121, the Tribunal will **separately** review the text, its context, the object and purpose of the Convention, and the *travaux préparatoires*, before setting out the conclusions. » (SCS, § 477)

Excessive weight given to the textual interpretation

477. In approaching the interpretation of Article 121, the Tribunal will separately review the text, its context, the object and purpose of the Convention, and the *travaux préparatoires*, before setting out the conclusions that, in the Tribunal's view, follow with respect to the meaning of the provision.

i. The Text of Article 121(3)

478. Article 121(3) contains several textual elements that merit consideration, including the terms (a) "rocks", (b) "cannot", (c) "sustain", (d) "human habitation", (e) "or", and (f) "economic life of their own." Other aspects of the meaning of Article 121(3) arise from its context in the Convention and are discussed subsequently (see paragraphs 507 to 520 below).

(g) Conclusions Drawn from the Text of Article 121(3)

. Despite the complexity apparent in Article 121(3), the Tribunal considers that a number of propositions follow from the text itself:

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- (a) First, the use of the term "rock" does not require that a feature be composed of rock in the geologic sense in order to fall within the scope of the provision.
- (b) Second, the use of the term "cannot" makes clear that the provision concerns the objective capacity of the feature to sustain human habitation or economic life. Actual habitation or economic activity at any particular point in time is not relevant, except to the extent that it indicates the capacity of the feature.
- (c) Third, the use of the term "sustain" indicates both time and qualitative elements. Habitation and economic life must be able to extend over a certain duration and occur to an adequate standard.
- (d) Fourth, the logical interpretation of the use of the term "or" discussed above indicates that a feature that is able to sustain either human habitation or an economic life of its own will be entitled to an exclusive economic zone and continental shelf.

Additions to the text

Article 121 UNCLOS

Regime of islands

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

“ Features that are above water at high tide are referred to generically as ‘islands’. (...)

The Tribunal will use the term ‘rocks’ for high-tide features that “cannot sustain human habitation or economic life of their own” (...). For high-tide features which are not rocks, and which pursuant to Article 121(2) enjoy the same entitlements as other land territory under the Convention, the Tribunal will use the term ‘**fully entitled islands**’. ‘Rocks’ and ‘fully entitled islands’ are thus both sub-sets of the **broader category of ‘high-tide features’**”. (SCS, § 208).

Additions to the text

Article 121 UNCLOS

Regime of islands

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

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

510. The Tribunal understands the phrase ‘cannot sustain’ to mean ‘cannot, **without artificial addition**, sustain.’”

541. the status of a feature is to be determined on the basis of **its natural capacity**, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own.

Fetishism of the ordinary meaning

- **ROCK**: “§ 480: The **dictionary** meaning of “rock” does not confine the term so strictly, and rocks may “consist of aggregates of minerals . . . and occasionally also organic matter” (Footnote 523 “Rock,” *Oxford English Dictionary (Annex 818)* »
- **SUSTAIN** “485. The ordinary meaning of sustain generally means to “support, maintain, uphold.” The **Oxford English Dictionary** defines it as “to keep in existence, maintain; spec. to cause to continue in a certain state for an extended period or without interruption; »
- **HUMAN HABITATION**: “488. The ordinary meaning of “human habitation” is the “action of dwelling in or inhabiting as a place of residence; occupancy by inhabitants” or “a settlement”.⁵³¹ “Inhabit” is defined as meaning “to dwell in, occupy as an abode, to live permanently or habitually in (a region, element, etc.); to reside in (a country, town, dwelling, etc.).”⁵³² » Footnotes 531 and 532 refer to the **Oxford English Dictionary** and to the **Shorter Oxford English Dictionary**.

Departure from the ordinary meaning

485. The ordinary meaning of sustain generally means to “support, maintain, uphold.” The Oxford English Dictionary defines it as “**to keep in existence, maintain**; spec. to cause to continue in a certain state for an extended period or without interruption; to keep or maintain at the proper level, standard, or rate; to preserve the status of.”

487. The Tribunal considers that the ordinary meaning of “sustain” (...) is a **qualitative concept**, entailing at least a minimal “proper standard”. Thus, in connection with sustaining human habitation, to “sustain” means to provide that which is necessary to **keep humans alive and healthy** over a continuous period of time, according to a **proper standard**.

Selective context

ii. The Context of Article 121(3) and the Object and Purpose of the Convention

507. In the Tribunal's view, two aspects of the context of Article 121(3) require consideration.(...) Article 121(3) must accordingly be interpreted in conjunction with the other paragraphs of Article 121 and in conjunction with **Article 13** concerning low-tide elevations. Second, (...) Article 121(3) must be interpreted in the context of those maritime areas [EEZ] and **in light of the purpose behind the introduction of the exclusive economic zone.**

(a) The Context of Islands, Rocks, and Low-Tide Elevations

(b) The Link between Article 121(3) and the Purpose of the Exclusive Economic Zone

Rocks

Art. 76 and Annexe 2: « the thickness of **sedimentary rock**”

Islands

Art. 6: In the case of **islands** situated on atolls or of islands having fringing reefs...

Art. 7: 1. ...if there is a fringe of **islands** along the coast

Art. 10: Where, because of the presence of **islands**, an indentation has more than one mouth...

Art. 38

Art. 46

Art. 47

Art. 53....

Improper identification of the object and purpose

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the **treaty** in their context and **in the light of its object and purpose**.

509. In addition to maintaining the structure apparent across Articles 13 and 121, this reading is consistent with **the object and purpose of Article 121(3)**. If States were allowed to convert any rock incapable of sustaining human habitation or an economic life into a fully entitled island simply by the introduction of technology and extraneous materials, then the **purpose of Article 121(3) as a provision of limitation** would be frustrated.

Quick dismissal of the relevance of State practice

Art. 31 VCLT General Rule on Interpretation

3. There shall be taken into account, together with the context:

b) **any subsequent practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

552. This means that the Parties must have acquiesced in such practice so that one can speak of an **agreement reached concerning the interpretation** of the provision in question.

553. On the basis of the foregoing, the Tribunal comes to the conclusion that as far as the case before it is concerned, there is **no evidence for an agreement based upon State practice** on the interpretation of Article 121(3) **which differs from the interpretation of the Tribunal** as outlined in the previous Sections.

Examples of contrary State practice

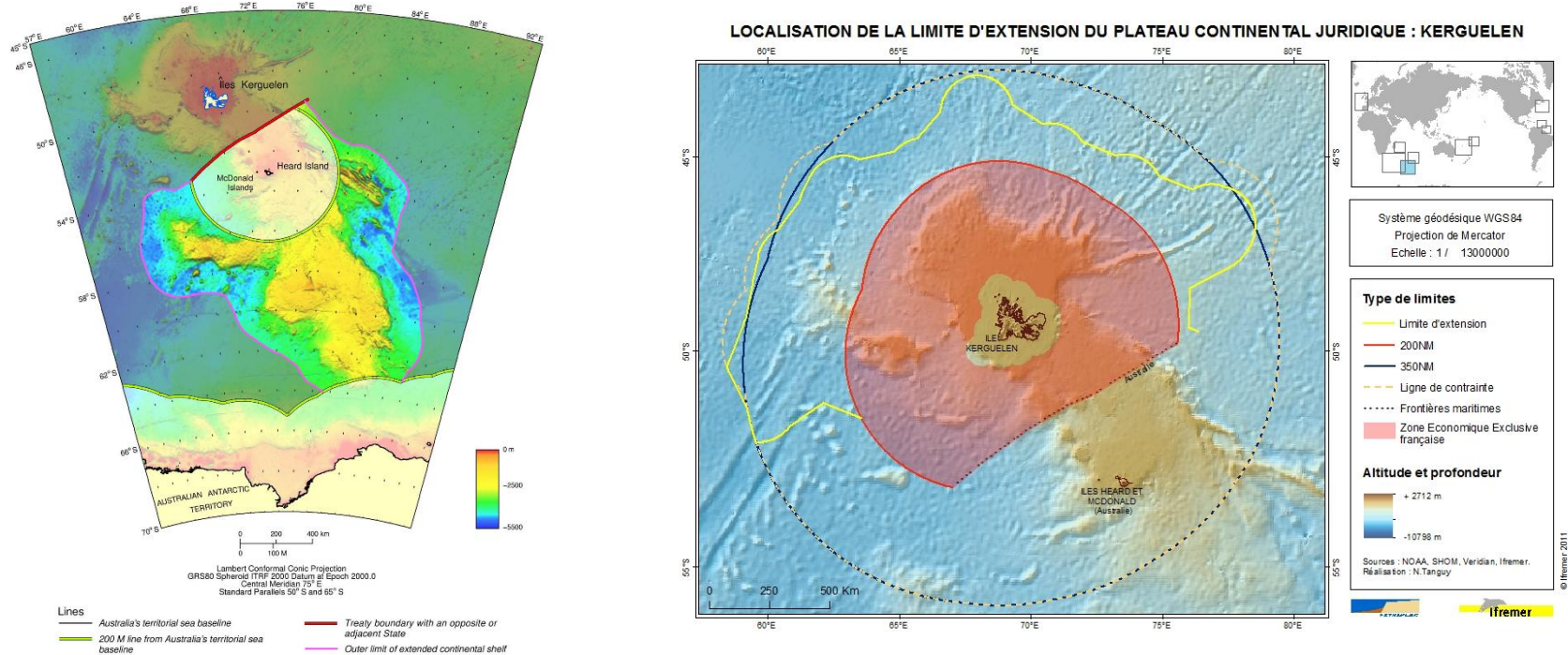


Figure 8. The outer limit of the continental shelf of Australia in the Kerguelen Plateau region showing the outer limit line and the area of extended continental shelf.
(see section H for notes relevant to this map)

AUS-DOC-ES-FIGURE-8

Islands and Rocks in Previous Case-Law

Case	Maritime Feature	Surface + Population	Terminology used	Effect (equidistance line or relevant circumstance)
<i>Gulf of Maine Area (Canada/United States)</i>	Seal Island	3,2 km ² Inhabited “all the year round”	“island”	Given half effect
<i>Jan Mayen (Denmark v. Norway)</i>	Jan Mayen	300 km ² Un-inhabited	“island”	Full effect
<i>Qatar v. Bahrein</i>	Qit’at Jaradah	Unknown/ No population	“very small island” and “tiny island”	Yes

Tentative criteria for identifying an *acquis judiciaire*

- Authority of the tribunal (permanent courts vs. arbitral tribunals?)
- Fill in *lacunae*
- Rigorous legal reasoning and methodology of interpretation
- Relation with previous jurisprudence
- Relation with State practice



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THANK YOU!

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