

## International Legal Regime regarding Islands and Rocks



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### Introduction

In Japan, detailed research regarding the treatment of islands and rocks in international law (maritime law) from an expert perspective has already been published by Professors Yamamoto Soji and Kuribayashi Tadao, among others,<sup>1</sup> and the Ocean Policy Research Foundation has advanced efforts, in particular regarding Okinotorishima Island.<sup>2</sup> What such research has made clear is that this issue has a complex history involving the actual interests of many nations, that there are many unclear points regarding the present legal regime, and that state practice and scholars’ views vary. The purpose of this paper is to summarize, as simply as possible, the international legal regime

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<sup>1</sup> For example, Yamamoto Soji, *Kaiyoho* [Maritime law] (Sanseido, 1992); Kuribayashi Tadao, “*Shima no seido*” [The regime of islands] in Ocean Association of Japan, *Shin kaiyoho joyaku no teiketsu ni tomonau kokunaihosei no kenkyu* [Research on domestic law with the conclusion of a new convention on the law of the sea] (1994), pp. 107–126.

<sup>2</sup> Portions of the FY2005 research results were compiled into Ocean Policy Research Foundation, *Okinotorishima no saisei ni kansuru chosa kenkyu heisei 17 nendo hokokusho* [Research survey on the regeneration of Okinotorishima Island: FY2005 report] (2006), and the status of islands is addressed in Kagami Yasuhiko, *Jizoku kanona kaihatsu no tame no shokubai to shite no Kokuren Kaiyoho Jyoyaku dai 121 jo 3 ko: Okinotorishima saisei he no ichi shiron* [UNCLOS Article 121, paragraph 3, as a catalyst for sustainable development: an essay on the regeneration of Okinotorishima Island].

currently applicable to islands and rocks and its main points of dispute, while limiting the review of past developments to the minimum. Finally, I apply those results to Okinotorishima Island and present a few proposals.

The principles of the international legal regime pertaining to this issue are prescribed in the United Nations Convention on the Law of the Sea (UNCLOS), especially Article 121. As of February 16, 2007, UNCLOS has been ratified by 152 nations and the European Community. The United States, which is one of the few coastal states that have not ratified this treaty, virtually accepts its provisions. Accordingly, UNCLOS has become an international law that is almost universally applied.

## 1 Provisions of the United Nations Convention on the Law of the Sea

UNCLOS Article 121, entitled “Regime of islands,” reads:

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.

I will examine several of the factors in this Article in detail later on. Looking at the Article overall to begin with, in its wording at the very least, paragraphs 1 through 3 are provisions regarding islands, as also indicated by the Article title “Regime of islands.” Accordingly, the “rocks” mentioned in paragraph 3 are also considered one type of the islands defined in paragraph 1. Hence, it is only natural to interpret the “rocks” in paragraph 3 as being regarded as a special form of island, and this viewpoint is generally adopted in academic theory.<sup>3</sup> That is to say, all the provisions of Article 121 concern islands, and the “rocks” in paragraph 3 (as also seen by the prescription in paragraph 2 that “except as provided for in paragraph 3, the territorial sea ... of an island”) indicate exceptional islands, which are called “rocks.” Therefore, the “rocks” in paragraph 3, too, must be naturally formed, surrounded by water, and above water at high tide as provided for in paragraph 1.

However, there are objections to such a literal interpretation of the provisions in line with the

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<sup>3</sup> M.S. Fusillo, “The Legal Regime of Uninhabited ‘Rocks’ Lacking an Economic Life of their Own,” *Italian Yearbook of International Law*, vol. 4 (1978–79), p. 51; R. 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 proper...,’” *Annuaire français de droit international*, tome 40 (1994), p. 904; D. Anderson, “British Accession to the UN Convention on the Law of the Sea,” *International and Comparative Law Quarterly*, vol. 46 (1997), p. 761; J. Charney, “Rocks That Cannot Sustain Human Habitation,” *American Journal of International Law*, vol. 93 (1999), p. 864.

natural writing. A representative example thereof is the government of Japan. In relation to Okinotorishima, a delegate of the government replied at the Construction Committee of the House of Representatives on April 16, 1999, that as Okinotorishima meets the conditions stipulated in Article 121, paragraph 1, it is not a rock but an island; that the provisions of paragraph 3 concern “rocks,” not islands, and do not provide a definition of rocks; and that from the perspective of state practice, those provisions do not provide any basis for a particular geographical formation to have no exclusive economic zone (EEZ) or continental shelf.<sup>4</sup> Although this interpretation seems to contradict most academic theories, it is true that the definition of rocks is not set to begin with, and that state practice has been inconsistent regarding this point. Also, as discussed below, because of the ambiguity and uncertainty of the provisions of paragraph 3, the dominant opinion is that a generally accepted interpretation of Article 121 should await evolution through future state practice.

Regardless, to avoid confusion of terminology, in principle the term “rocks” is hereinafter used to mean one form of the islands defined in Article 121, paragraph 1. Consequently, in principle, references to islands include “rocks.”

The next point requiring attention regarding the provisions of Article 121 is that, while the definition of islands in paragraph 1 is applied to islands in general, paragraph 3 does not apply to rocks in all sea areas regardless of the type of sea area in which the rocks are located. In fact, paragraph 3 does not apply in three cases. First, when an island in the immediate vicinity of the coastline of a state fulfills the conditions for employing straight baselines, regardless of the potential for sustaining human habitation or economic life of their own, the island may be employed by that coastal state for drawing a straight baseline (UNCLOS Article 7, paragraph 1), which can then serve as the base point for setting territorial seas, EEZs, and continental shelf. Second, a country recognized as an “archipelagic state” may draw straight archipelagic baselines joining their outermost islands and reefs that are above water at low tide (UNCLOS Article 47, paragraph 1), and similarly set territorial seas, EEZs, and so forth. Third, the treatment of islands in an EEZ that are relatively distant from the coastline is normally determined by agreement among relevant states when delimiting the EEZ with other coastal states. UNCLOS only prescribes that the delimitation of the EEZ and continental shelf between states “shall be effected by agreement on the basis of international law ... in order to achieve an equitable solution” in both Articles 74 and 83. In

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<sup>4</sup> Reply by Oshima Shotaro, director-general of the Economic Affairs Bureau of the Ministry of Foreign Affairs, to committee member Osanai Junichi. Also, in a response to further questions from Mr. Osanai, Aoyama Toshiki, director-general of the River Bureau of the Ministry of Construction, confirmed Mr. Oshima’s reply, saying that paragraph 3 is a provision concerning rocks, and that in the case of islands, just being above water at high tide would fulfill the requirement of paragraph 1. [http://www.shugiin.go.jp/index.nsf/html/index\\_kaigiroku.htm](http://www.shugiin.go.jp/index.nsf/html/index_kaigiroku.htm), accessed February 10, 2006.

delimitation agreements and judicial precedents, the existence of islands is usually regarded as related circumstances to be considered to bring about an equitable solution, and is dealt with in a variety of specific ways.

## 2 Ambiguity of Article 121, paragraph 3

The provisions of Article 121, paragraph 3, mostly result from a compromise between two viewpoints at the Third United Nations Conference on the Law of the Sea. One viewpoint is that solitary islands and so forth unsuitable for human habitation or economic life should not be given the same status as normal territory, because using them to obtain sovereign rights over 200-nautical-mile sea areas around them shrinks access to the deep seabed and its resources, which are the common assets of humanity, and unfairly restricts the freedom of fishing on the high seas. In contrast to this, the other viewpoint is that all territory, even islets and rocks, is accompanied by an EEZ and continental shelf. As a result of a compromise between these opposing viewpoints, various words that are difficult to interpret remain in the provisions. Consequently, many scholars agree that these provisions are characterized as extremely ambiguous and imprecise.<sup>5</sup>

Article 121, paragraph 3, introduces the term “rocks” without defining it, divides “rocks” into those that can sustain “human habitation or economic life of their own” and those that cannot, and denies the latter’s title to an EEZ or continental shelf. For the former, the setting of territorial seas, contiguous zones, EEZs, and continental shelf are allowed in accordance with Article 121, paragraph 2. These raise a number of issues: in particular, what “rocks” are, what “human habitation” and “economic life of their own” specifically mean, and what constitutes “naturally formed area of land” prescribed in Article 121, paragraph 1, as a general condition of islands including rocks. These questions are addressed in order in the sections below.

## 3 What are “rocks”?

At the UN Conference on the Law of the Sea, a proposal was made to consider size and geological characteristics as standards to distinguish “rocks” in Article 121, paragraph 3, from an island in general. However, on the primary grounds that it would be unfair, for example, to view a comparatively large island with geologically strong lithological characteristics as “rocks” with no title to an EEZ or continental shelf while treating an islet mostly comprised of gravel as a regular island, this was handled without any distinction made based on geological formation processes, and

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<sup>5</sup> For example, Yamamoto, *supra* note 1, p. 99; B. Kwiatkowska and A.H.A. Soons, “Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own,” *Netherlands Yearbook of International Law*, vol. 21 (1990), pp. 180–181; Kolb, *supra* note 3, p. 879; E.D. Brown, *The International Law of the Sea*, vol. I (1994), pp. 150–151; R. Churchill and V. Lowe, *The Law of the Sea*, 3rd ed. (1999), p. 50.

ultimately only the term “rocks” itself was retained.<sup>6</sup> In this way, the common understanding is that the legal meaning of rock is generally unrelated to size or geological characteristics and that rocks include sandbars and atolls. Moreover, as stated earlier, such rocks must be above water at high tide. Rocks that are above water only at low tide and submerged at high tide are called “low-tide elevations.” Coastal states may use low-tide elevations within their territorial seas or on the outer edge of their territorial seas as the base point for measuring the breadth of their territorial seas, but low-tide elevations outside of territorial seas have no territorial seas of their own (UNCLOS Article 13).

State practice regarding this point also shows that nations treat solitary islands far removed from coastal states as islands, regardless of their geological characteristics, and set EEZs. For example, Aves Island (length: a little less than 600 meters, minimum width: about 30 meters) in the Caribbean, which belongs to Venezuela, is composed of sand and coral; Jan Mayen Island (area: around 373 square kilometers), which belongs to Norway and is located near Greenland and Iceland, is volcanic; and Clipperton Island (area: around 1.6 square kilometers), which belongs to France and is located in the Pacific approximately 670 nautical miles from the coast of Mexico, is composed of coral and volcanic rock. Also, Mexico sets its EEZ using the Revillagigedo Islands, which are comprised of uninhabited rock islets located several hundred kilometers from its Pacific coast, and other islands.

However, it should also be noted that, in cases seen as clearly nothing but a clump of rocks, there are instances of practice running counter to this trend. For example, Mexico has not set an EEZ for the Alijos Rocks north of the aforementioned Revillagigedo Islands.<sup>7</sup> The United Kingdom, on the other hand, set part of its fishery zone from Rockall, a rock that has an area of about 624 square meters and is located some 200 nautical miles from the coast of Scotland, under the Fishery Limits Act 1976 and received objections from the neighboring countries of Denmark (Faroe Islands), Ireland, and Iceland asserting that Article 121, paragraph 3, applies to this rock; when the UK became a party to UNCLOS in 1997, however, it declared to the effect that Rockall is not an effective base point for determining the limits of its fishery zone under Article 121, paragraph 3, and hence there is a need to redefine those limits. Immediately thereafter, the UK revised the Fishery Limits Act 1976 so that it fully meets the requirements of Article 121.<sup>8</sup>

#### 4 The meaning of “sustain human habitation or economic life of their own”

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<sup>6</sup> For such details on the process of drafting Article 121, see Kuribayashi, *supra* note 1.

<sup>7</sup> Kagami, *supra* note 2, p. 115.

<sup>8</sup> Anderson, *supra* note 3, pp. 778–779.

The expression “Rocks which cannot sustain human habitation or economic life of their own” in Article 121, paragraph 3, creates several issues in interpretation. To begin with, this incorporates the two factors of sustaining “human habitation” and “economic life,” and these two are linked with the conjunction “or.” For that reason, the general interpretation is that if either of these requirements is met—that is, if either human habitation or an economic life cannot be sustained—then the rock has no EEZ or continental shelf; in other words, if either of these is possible, then the rock is to be treated in the same manner as a regular island. On the other hand, there is also the interpretation that “or” in this paragraph is used to express the meaning of “and.”<sup>9</sup> In this regard, some scholars argue that both factors are bundled requirements that cannot be separated, or a single concept, and for a rock to have an EEZ and continental shelf it must support a stable community of people that utilize the surrounding maritime space.<sup>10</sup>

However, this interpretation imposes the most severe conditions for a rock to avert the application of Article 121, paragraph 3, and it is only a minority opinion. Incidentally, when this provision was initially drafted, there was a proposal from Denmark to link the two factors of paragraph 3 with the word “and,” but from an early stage that was not accepted in general and the word “or” was consistently used thereafter. This background also indicates that it is natural to consider that the two factors are not treated as one.<sup>11</sup>

The 1981 dispute regarding the continental shelf of Jan Mayen Island can be cited as an example in relation to this point. This island has no permanent residents; and at the time, while some tens of meteorological observation and other personnel were stationed year-round, almost all at a base under the jurisdiction of the Norwegian Ministry of Defence, there were no economic activities taking place on the island. A report and recommendations issued in 1981 by an international conciliation commission between Norway and Iceland, which addressed the issue of delimiting the continental shelf between Jan Mayen Island and Iceland, rejected the claim by Iceland that Jan Mayen is a rock subject to Article 121, paragraph 3, of the draft UNCLOS (which has the same provisions as the Article 121 that was finally adopted), and found that Jan Mayen is subject to Article 121, paragraphs 1 and 2, and consequently has an EEZ and continental shelf.<sup>12</sup> Given that the conciliation commission characterized Article 121 of the draft UNCLOS as already reflecting

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<sup>9</sup> Kolb, *supra* note 3, p. 906. Also, statement by Dominica at the ninth session (1980) of the Third UN Conference on the Law of the Sea (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XIV, Plenary meetings, 140th meeting, para. 29).

<sup>10</sup> J. van Dyke, J. Morgan, and J. Gurish, “The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?” *San Diego Law Review*, vol. 25 (1988), pp. 437–438. Kolb, *supra* note 3, p. 906 also holds that it is difficult to conceive of economic life without social life and that the two factors of Article 121, paragraph 3, are like two sides of the same coin.

<sup>11</sup> Charney, *supra* note 3, p. 868.

<sup>12</sup> Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen: Report and Recommendations to the Governments of Iceland and Norway, 1981, *International Legal Materials*, vol. 20 (1981), pp. 803–804.

the international law of that time, and that the commission was comprised of three members (conciliators) who were also the national representatives playing a central role in the UN Conference on the Law of the Sea that was taking place at that time,<sup>13</sup> the report and recommendations can be said to have some weight in the interpretation of the provisions.

## 5 The meaning of “human habitation”

Then, what is the meaning of “cannot sustain human habitation”? In this regard, how to treat the following matters becomes a particular issue: cases where there were permanent residents in the past but not at present; cases where the residence is temporary but not permanent; cases where there could be residents in the future for some reason; the necessity of a certain number of residents and a society (community) existing; and the extent of self-sufficiency in drinking water and food to support residence. Specific examples include temporary residence for the collection of guano resources on a rock; a small-scale military post; temporary or long-term residence by scientists and other staff for meteorological observation, telecommunications, or research facilities; periodic fishing and other economic activities conducted in the internal waters and territorial sea of a certain rock by nearby residents who do not reside on the rock itself; and remote operation of unmanned structures and facilities for economic purposes. The UNCLOS text provides no clear answers regarding these questions, and there are not many instances of state practice.

Yet, at the very least, the expression “cannot sustain” (*ne se prétent pas à ...* in the French text) is not necessarily a description of current facts; therefore, it may be said that if the ability to “sustain” even in the future can be demonstrated, Article 121, paragraph 3, does not apply.<sup>14</sup> Thus, while historical facts can be a factor indicating the potential for the present or the future, it is still necessary to demonstrate that residence is once again possible now or in the future.<sup>15</sup>

Regarding this point, scholars who argue for the unity of the two factors in Article 121, paragraph 3, as mentioned earlier contend that meeting the condition of human habitation requires the existence of an organized community of a certain scale on the rock in question or within nearby territory.<sup>16</sup> Also, some hold the opinion that the existence of a community in the coastal area is necessary.<sup>17</sup> However, overall these perceptions are apparently based on the belief that such a community is essential to sustain ongoing economic life. Consequently, they do not necessarily apply to the common view that the two factors in paragraph 3 are separate and independent.

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<sup>13</sup> Representatives Elliot Richardson of the US, Hans Andersen of Iceland, and Jens Evensen of Norway.

<sup>14</sup> Kwiatkowska and Soons, *supra* note 5, pp. 160 and 166; Kolb, *supra* note 3, p. 905.

<sup>15</sup> Kwiatkowska and Soons, *ibid.*, p. 163.

<sup>16</sup> Van Dyke, et al., *supra* note 10, p. 437; Kolb, *supra* note 10, p. 906.

<sup>17</sup> Fusillo, *supra* note 3, p. 54.

The aforementioned Jan Mayen Island conciliation is one of the few examples related to the potential for human habitation. The conciliation commission report and recommendations note the fact that meteorological observation and other personnel are permanently stationed on the island (without touching on the point of economic life), and conclude that the island does not correspond to a rock under Article 121, paragraph 3. The commission, though, did not go further, nor did it specifically examine whether the requirements for “human habitation” are met. Another example concerns Clipperton Island, an isolated French island located 670 nautical miles from the coast of Mexico. A small group of guano miners are said to have lived on Clipperton from 1892 through 1917, depending on food and water from outside of the island.<sup>18</sup> France set an EEZ for the island in 1978, when the draft version of Article 121 was still being negotiated. Furthermore, Venezuela has claimed an EEZ and continental shelf regarding Aves Island, where coast guard facilities (a radar station and oceanography survey base) have been constructed and several military personnel and scientists are stationed, while not believed to be sustaining economic activities,<sup>19</sup> and this claim has been recognized by France, the Netherlands, and the US through their respective delimitation agreements with Venezuela. However, three nearby countries (Antigua, Saint Kitts, and Saint Vincent) object to these agreements, and this dispute remains unresolved.<sup>20</sup>

As demonstrated above, the requirements for “human habitation” arguably remain extremely unclear both in textual interpretation and in practice.

## 6 The meaning of “economic life”

Next, what does “cannot sustain economic life of their own” mean? Here, the first question is the meaning of “economic life.” This certainly includes the development of natural resources and other production activities. Many regard lighthouses and other navigation assistance facilities, too, as part of economic activities, because they are not only valuable for maritime transportation, fishery activities, and the leisure industry,<sup>21</sup> but may also be used as commercial satellite tracking bases depending on geographical location.<sup>22</sup>

On the other hand, there is also the academic theory that unmanned lighthouses and telecommunications facilities can be installed on any small rock, and are insufficient to demonstrate economic life by themselves, and that commercial or production activities are

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<sup>18</sup> Yamamoto, *supra* note 1, p. 97.

<sup>19</sup> Kagami, *supra* note 2, p. 114. However, Venezuela had previously claimed that the maintenance of economic life is possible based on the guano extraction around the middle of the 19th century and other resource development. Kwiatkowska and Soons, *supra* note 5, pp. 161–162.

<sup>20</sup> A. Oude Elferink, “Is it Either Necessary or Possible to Clarify the Provision on Rocks of Article 121 (3) of the Law of the Sea Convention?” in M.A. Pratt and J.A. Brown, eds., *Borderlands under Stress* (2000), pp. 393–394.

<sup>21</sup> Brown, *supra* note 5, p. 150; Kwiatkowska and Soons, *supra* note 5, p. 167.

<sup>22</sup> Charney, *supra* note 3, p. 871, note 34.



required.<sup>23</sup> However, in this age when meteorological observation and telecommunications facilities, even those not for commercial activities, are provided for increasingly wide-ranging uses, especially when their activities and data are published on the internet, it may be becoming difficult to completely separate them from “economic life.”

And what about cases where unmanned facilities and structures on rocks for economic purposes are operated from remote locations? There is every possibility that such uses may expand in the future, and it is considered appropriate to include these in “economic life.”<sup>24</sup>

Some also propose the setting of marine sanctuaries, nature reserves, and the like as another possibility for fulfilling the requirement of “economic life.” They argue that environmental conservation measures like these could generate various forms of economic benefits—such as expansion of fish species resources, tourism revenues, product development from coral reefs, and health benefits from reduced pollution—and ultimately meet the conditions for “economic life.”<sup>25</sup> Actual examples of islets and rocks designated as nature reserves or similar type of special conservation areas include Aves Island,<sup>26</sup> the Revillagigedo Islands of Mexico,<sup>27</sup> and the Northwestern Hawaiian Islands of the US.<sup>28</sup> Yet unless product development, ecotourism, or other specific economic activities are recognized, it seems somewhat excessive to automatically link the setting of marine sanctuaries itself to economic life. Accordingly, regarding this point, ultimately judgments should probably be reached in accordance with the substance of individual cases.

It is important to note that “economic life” is not limited to areas on the rock (on land) in question. Any rock with the status of an island comes at least with territorial sea (up to 12 nautical miles from the baseline) that is subject to the exercise of sovereignty and can be used for economic life on the sea or seabed. These include fisheries, fish culturing, fish holding, and the development of mineral resources in the territorial sea as a matter of course. On the other hand, areas of the EEZ and continental shelf outside of territorial seas are not part of national territory where sovereignty can be exercised, and activities in those locations are outside the range of “economic life” as used here.

With respect to the meaning of “cannot sustain” in Article 121, paragraph 3, as mentioned above, it should be sufficient to prove either the current condition or the potential to sustain, even in the

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<sup>23</sup> Kolb, *supra* note 3, p. 907.

<sup>24</sup> Kwiatkowska and Soons, *supra* note 5, pp. 164–165.

<sup>25</sup> J. Hafetz, “Fostering Protection of the Marine Environment and Economic Development: Article 121 (3) of the Third Law of the Sea Convention,” *American University International Law Review*, vol. 15 (1999–2000), p. 627.

<sup>26</sup> Kagami, *supra* note 2, p. 114.

<sup>27</sup> *Ibid.*, p. 115.

<sup>28</sup> *Establishment of the Northwestern Hawaiian Islands Marine National Monument*, US President proclamation of June 15, 2006. <http://www.whitehouse.gov/news/releases/2006/06/print/20060615-18.html>, accessed February 10, 2007.

future. As an actual example, whereas the hunting of polar bears is not permitted on Abel Island in Norway (an uninhabited island with an area of 13.2 square kilometers), the Supreme Court of Norway ruled in 1996 that if the hunting were not prohibited, substantial hunting activities could be sustained on the island, and thus that the island does not correspond to a rock under Article 121, paragraph 3.<sup>29</sup>

In reality, EEZ and continental shelf are set for remote uninhabited islands under the domestic laws of many nations; and in many cases, nations seem to have done so with a view toward the potential development of oil and other mineral and living resources in nearby sea areas. Regardless, problems remain as most of the resources they seem to target are in areas of the continental shelf and EEZ, and not in territorial seas. Examples of such remote islands are Clipperton Island, the Revillagigedo Islands of Mexico that include Clarion Island (Santa Rosa Island),<sup>30</sup> Salas y Gómez Island (length: 1.2 kilometers, width: 152 meters) of Chile,<sup>31</sup> the Kermadec Islands of New Zealand that include L'Esperance Rock,<sup>32</sup> and Ceva-i-Ra Island (Conway Reef) of Fiji.<sup>33</sup>

## 7 The meaning of “economic life of their own”

Yet another issue with Article 121, paragraph 3, is the meaning of “of their own.” Is that limited to a self-sufficient economic life that depends solely on the resources of the rock in question, or does it include one that is sustained via outside support? During the process of drafting the Article, some countries stressed the need for self-sufficient life. Nonetheless, even scholars who stress the need for a stable and organized community do not regard complete self-sufficiency as necessary.<sup>34</sup>

One standard that could be used for this point is the economic value of the rock itself including its territorial sea: for example, the presence of fisheries resources, oil and gas fields, tourism resources, and power generation resources such as wind power and seawater temperature differences. Locations that are suitable as satellite tracking bases also generate economic value. If a nation succeeds in developing and harnessing such resources, it can argue that economic life is sufficiently sustained by purchasing necessary items from outside to support activities.<sup>35</sup>

The issue is how much outside support is allowed in being viewed as having economic activities of its own. In today's society where it is nearly inconceivable to sustain economic activities with no support whatsoever from outside, even in regions in the interior of the continent, it is virtually

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<sup>29</sup> Oude Elferink, *supra* note 20, p. 392.

<sup>30</sup> Kagami, *supra* note 2, p. 115. Van Dyke et al., *supra* note 10, pp. 458–459.

<sup>31</sup> Van Dyke et al., *ibid.*, p. 461.

<sup>32</sup> *Ibid.*, p. 462. However, around 10 meteorological observation personnel are permanently stationed on the northernmost small island of these islands. *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> Kolb, *supra* note 3, p. 907.

<sup>35</sup> Charney, *supra* note 3, p. 870.

impossible to impose self-sufficient economic activities as a condition on an isolated island completely shut off from the outside. Therefore, ultimately the question becomes one of the types and extent of the external support, and there are no obvious criteria for those judgments. Generally speaking, if economic activities depend on external support, the greater the extent of such support, the more difficult local economic activities become, resulting eventually in difficulty in sustaining them. This means that such activities may have their own limits. Still, this point also differs greatly depending on the types of activities and with advances in science and technology. Ultimately, one will have to judge individual cases in light of future state practice.

## 8 The meaning of “naturally formed area of land”

Article 121, paragraph 1, stipulates that an island is a “naturally formed area of land.” As long as “rocks” in paragraph 3 are generally interpreted as one type of island, as mentioned above, this requirement of an island applies to rocks as well. In consequence, the meaning of “naturally formed” becomes an issue. Obviously, lighthouses and platforms constructed on low-tide elevations are artificial structures, and not naturally formed. These are treated as artificial islands and structures, and cannot be used for setting territorial seas around them (UNCLOS Articles 60 and 80).

Nevertheless, the meaning of “naturally formed” is ambiguous. It is unclear whether this is a requirement for the substances (materials) that form and expand land, or is designed to exclude intervention by human activity in the formation process. One interpretation is that this limitation requires that both the materials and the formation process be natural.<sup>36</sup>

Another interpretation is that this can be construed as a requirement for either the materials or the process.<sup>37</sup> The reclamation of a low-tide elevation using coral, gravel, and other natural materials to create land above water even at high tide is viewed as “naturally formed” under the former meaning, but is not treated as a new island under the latter meaning. As one example of such land formation, in 1971 a group of private persons based in the US reclaimed land at the Minerva Reefs, low-tide elevations that are the summits of seamounts located around 180 nautical miles southwest of the closest island of Tonga, by binding the gravel and coral with wire netting, solidifying it with concrete, and building up the land to make it above water even at high tide, and then issued a declaration of sovereignty the following year.<sup>38</sup> The delegate from Tonga touched on this incident at his opening speech at the Third UN Conference on the Law of the Sea in 1974, and explained that the government of Tonga had declared its own sovereignty over the Minerva Reefs to

<sup>36</sup> Yamamoto, *supra* note 1, p. 85; Kwiatkowska and Soons, *supra* note 5, p. 172.

<sup>37</sup> D.P. O’Connell, *The International Law of the Sea* (1982), vol. I, p. 196.

<sup>38</sup> The group planned to ultimately build a 2,500-acre residential and commercial zone. L. A. Horn, “To Be or Not To Be: The Republic of Minerva—Nation Founding by Individuals,” *Columbia Journal of Transnational Law*, vol. 12 (1973), pp. 520 et seq.

stop this occupation of the reefs (also known as the islands of Teleki Tonga and Teleki Tokelau) by these private persons.<sup>39</sup>

To ensure that these islands would unquestionably remain above water on a permanent basis, Tonga has reportedly completed the natural process by packing the coral at some areas, and set a 12-nautical-mile territorial sea.<sup>40</sup> Regarding the speech by the delegate from Tonga at the aforementioned conference, it was noted that no one questioned Tonga's legal basis for action.<sup>41</sup> Nevertheless, it does not seem appropriate to evaluate Tonga's acts as a precedent just because no objections were voiced. First of all, this speech was one of the general speeches given at the beginning of the UN Conference on the Law of the Sea, in which each country unilaterally presents its own basic positions, and counterarguments are normally not made. Secondly, although the 1958 Convention on the Territorial Sea and the Contiguous Zone, which was the law in effect at that time, did impose "naturally-formed" as a requirement for the definition of an island, the speech was given at a time when the UN Conference on the Law of the Sea had yet to enter full discussions regarding the treatment of islands and rocks, and the details and government intentions of that time lacked clarity (at least in the official records).

Next, in the latter case, namely, where the island formation process is interpreted as the issue, does that mean there must be no human intervention whatsoever, or can cases where humans intervene to accelerate natural processes still be considered "naturally formed"? For instance, in cases where the reclamation of land by natural processes is assisted by human intervention, or humans somehow assist in making a reef submerged at high tide always protrude, the dominant opinion is thought to be that these cannot be deemed an entirely unnatural formation.<sup>42</sup> However, such cases are normally only feasible in the territorial seas or internal waters of islands (land) that already exist: for example, the natural formation of new separate land at an isolated low-tide elevation in a process with such partial human intervention is probably unrealistic.<sup>43</sup>

### Conclusion: In relation to Okinotorishima Island in particular

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<sup>39</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. I, 28th Plenary Meeting, July 3, 1974, para.70.

<sup>40</sup> O'Connell, *supra* note 37, p. 197. The King of Tonga personally visited the Minerva Reefs together with ministers and other personnel, and officially declared Tonga's sovereignty over all islands, rocks, reefs, and water areas within a radius of 12 nautical miles from these two reefs, which are within the Kingdom of Tonga's fishery area. S. Menefee, "Republics of the Reefs: Nation-Building on the Continental Shelf and in the World's Oceans," *California Western International Law Journal*, vol. 25 (1994), p. 100. Tonga subsequently set an EEZ surrounding "the territorial sea of Tonga" of 200 nautical miles from the baseline. The Territorial Sea and Exclusive Economic Zone Act, Act No. 30 of 23 October 1978, as amended by Act No. 19 of 1989. [http://www.un.org/Septs/los/LEGISLATIONANDTREATIES/PDFFILES/TON\\_1989\\_Act.pdf](http://www.un.org/Septs/los/LEGISLATIONANDTREATIES/PDFFILES/TON_1989_Act.pdf), accessed February 16, 2007.

<sup>41</sup> O'Connell, *ibid*.

<sup>42</sup> *Ibid.*, p. 197; Kwiatkowska and Soons, *supra* note 5, p. 172.

<sup>43</sup> For example, surrounding a low-tide elevation with seawalls and pumping out the seawater inside is clearly an artificial process, and arguably cannot be called "naturally formed."

As presented above, the treatment of islands under international law, which is centered on UNCLOS Article 121, has remained extremely ambiguous, and this situation will likely continue for some time into the future. Furthermore, the legal status of islands should not be based on the conditions of the islands at a given point in time, but should be viewed dynamically, including the future potential for human habitation or economic life of their own. A renowned US international law expert stresses this point, arguing that the socioeconomic circumstances of an island—namely, the value of the island’s resources and its potential for human habitation and economic development—change over time, with the result that what used to be “rocks” may no longer correspond to “rocks” under Article 121, paragraph 3, due to changes in economic demand, technological innovations, or new human activities.<sup>44</sup>

Therefore, a more definitive interpretation of Article 121 will have to wait until many instances of state practice and international judicial precedents provide some standards, or the interpretation is clarified by a new convention.

Given this outlook, what Japan should do to maintain and regenerate Okinotorishima Island from the perspective of international law is to examine the various possible interpretations under the framework of Article 121 mentioned above in relation to the island, and then advance as many measures as possible in parallel. In this process, Japan must confirm that the table reef surrounding the two islets of Okinotorishima Island can be viewed as a “fringing reef” under UNCLOS. According to a glossary compiled by the Technical Aspects of the Law of the Sea Working Group of the International Hydrographic Organization, a fringing reef is defined as “a reef attached directly to the shore or continental land mass, or located in their immediate vicinity.”<sup>45</sup> Two rocks would not have any shores but, if they are viewed as islands, it is possible to deem the areas that are above water to be shores. UNCLOS prescribes that the baseline for measuring the territorial sea of islands having fringing reefs is “the seaward low-water line of the reef” in Article 6. Accordingly, all the portions of the table reef that are above water at low tide have the status of internal waters, and the territorial seas of these Higashikojima and Kitakojima islands are 12 nautical miles measured from the furthest seaward extent of the low-water line surrounding this table reef.<sup>46</sup> Thus, not only the Higashikojima and Kitakojima islands but also the entire table reef and its territorial sea are Japanese territory under Japanese sovereignty, and Japan can make free use of their space and resources.

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<sup>44</sup> Charney, *supra* note 3, p. 869.

<sup>45</sup> UN Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989), p. 60.

<sup>46</sup> That this interpretation regarding the territorial sea baseline of Okinotorishima Island is also the Japanese government’s position has been confirmed, albeit unofficially, by the Japan Coast Guard’s Hydrographic and Oceanographic Department.

Based on the above, Japan should pursue the following three points as the highest priority measures from now on:

- (i) Without any doubt, the most important item is to prevent the Higashikojima and Kitakojima islands, which are title to claims on the surrounding territorial sea, continental shelf, and EEZ, from being submerged at high tide. Even under Article 121, which has so many points that are ambiguous, it is clear that elevations that are not above water at high tide are not to be treated as islands. Provided that these two islands were to be submerged, legally they would cease to be islands, and cease to be Japanese territory, even if concrete seawalls and other structures constructed on the table reef remain, and even if economic activities are conducted in the vicinity. The present restoration and shore protection works being conducted on the two islands are believed to be effective for the time being. The problem, though, is that the possibility cannot be eliminated that the islands may become submerged in less than 50 years, as sea levels rise due to global warming.<sup>47</sup>
- (ii) Hence, presuming that the Higashikojima and Kitakojima islands will both be submerged, it becomes necessary, aside from these two islands, to make one or more areas of the land emerge on the table reef that can be interpreted as “naturally formed” and are above water at high tide. As one example, there is a proposal to create, inside the table reef, a cay formed of fragments of coral and the shells of foraminifera, and this is already being examined by the Ocean Policy Research Foundation’s Okinotorishima Research Committee.<sup>48</sup> Considering the influential academic theory that generally accepts *assistance* of the natural process by reclamation through drainage, various methods should be examined including artificial intervention within appropriate limits.
- (iii) The last item is to develop and carry out economic and commercial activities, as much as possible, within the table reef and its surrounding territorial sea. The important thing to note regarding this point is that what is needed to prove the sustenance of an “economic life of their own” is limited to activities within the table reef and its territorial sea only. That is because the development of resources in the EEZ and continental shelf is a right granted on the condition that Okinotorishima has the status of an island. To date, many different proposals have been made for use of the island, including temperature differential power generation, wind power and photovoltaic power generation, activities utilizing marine resources, development of seabed mineral resources, and the installation of bases, measurement devices, and facilities for various types of research and observations. However, considering the trend in the academic theory that affirms the potential for new activities

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<sup>47</sup> Ocean Policy Research Foundation, *White Paper on the Oceans and Ocean Policy in Japan 2006*, pp. 62–64.

<sup>48</sup> *Ibid.*, p. 64. For greater detail, see Ocean Policy Research Foundation, *supra* note 2.

emerging from constant changes in socioeconomic circumstances with the advance of science and technology and other developments, the use of facilities and devices that do not require the permanent stationing of personnel on the island should also be actively examined.

Furthermore, given the fundamental change in circumstances whereby predictions of substantial rises in sea levels are becoming a reality, I would like to propose, as an idea to be examined as a long-term measure, that Japan cooperate with the many countries and territories possessing islands and rocks in danger of submersion, in promoting an agreement for the implementation of Article 121.<sup>49</sup> In this regard, one good method of gaining the support of a greater number of countries would be to expand the issues to include the various legal problems facing coastal areas from rising sea levels in addition to the islands and rocks subject to Article 121.

Okinotoshishima Island



Kitakojima



Higashikojima



(source: <https://www.kaiho.mlit.go.jp/info/books/report2005/tokushu/p027.html>)

<sup>49</sup> So-called implementing agreements that are designed to effectively revise portions of, set details for implementation of, or add new provisions to, UNCLOS have been reached on the seabed mining provisions and on the conservation and management of straddling fish stocks and highly migratory fish stocks, and both are in force.

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