

ISLANDS AND THEIR CAPACITY TO GENERATE MARITIME ZONES

Case law Romania v. Ukraine



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1 INTRODUCTION

The aim with this thesis has been to get a better understanding on how islands can affect the delimitation process. The delimitation of maritime boundaries continues to exercise a hold over the imagination of international lawyers not only because of its intrinsic significance, amply demonstrated by the volume of State practice,¹ but also because of – perhaps mainly because of – the unusually large number of disputes which have been submitted to the International Court of Justice² and arbitral tribunals³.

I have divided this presentation into two main parts. First I have concentrated on the definition of the islands and their right to possess maritime zones under the Law of the Sea Conventions and I have presented the evolution of this subject starting with the 1958 Convention. I have also choose to make a brief presentation of the artificial islands and take a look at their legal status.

In the second main part I have examined the current dispute between Romania and Ukraine over the delimitation of their respective maritime boundaries and drawing a single maritime frontier. I have presented the historical background and the specific features of the case but I have focused on analyzing some aspects of a particular type of islands,

¹ The texts of over 160 maritime boundary agreements concluded to the end of 2000 are collected in J. I. Charney and L. M. Alexander, *International Maritime Boundaries*, vols. I-III and J. I. Charney and R. W. Smith, *International Maritime Boundaries*, vol. IV, American Society of International Law/ Martinus Nijhoff Publishers, 1993-2002

² Hereinafter referred to as the ICJ.

³ See Malcolm D. Evans, *Maritime Boundary Delimitation: Where Do We Go From Here?*, Oxford University Press, 2006, p.137

identified as rocks that cannot sustain human habitation or economic life of their own from the point of view of their capacity to generate maritime spaces under the 1982 United Nations Convention on the Law of the Sea. There have been some other instances where the issue similar to that between Romania and Ukraine was directly or implicitly involved but there has not so far been any direct third-party international review of whether a particular feature is a UNCLOS III Article 121(3) "rock" or is an Article 121(2) "island". Therefore, the Romanian – Ukrainian dispute may be the first case where the question of whether or not the island constitutes a "rock" with all the following implications under UNCLOS will be examined by the main international adjudicative forum.

However, with regard to the first main part concerning the regime of the islands, I have not attempted to give a complete presentation of the subject. The thesis has got a maximum restriction on 18000 words and a full presentation would require much more space. My sources are mainly based upon a literature study of articles and books. In addition, the knowledge gained through the course "Public International Law" taught at the Faculty of Law at the University of Oslo has been used.

2 THE STATUS OF ISLANDS UNDER THE LAW OF THE SEA CONVENTION

The purpose with this chapter is to give an overview over the rules on islands in relation to maritime delimitation. In order to give the reader a greater understanding of the topic, first I will discuss the definition of the island and, after this, will describe the role of islands for maritime delimitation. I will also say a few words about the artificial islands and their legal status.

2.1 GENERAL APPROACH

At present the developing character of the law of the sea cannot be questioned. The most recent document is the United Nations Convention on the Law of the Sea 1982⁴. The UNCLOS III has extended the jurisdiction of coastal States as to baselines, territorial sea, contiguous zone and the continental shelf. It has also extended the jurisdiction by defining new maritime zones such as the 200 nautical mile exclusive economic zone (EEZ). For islands, the UNCLOS III adopted Article 121.

The law of the sea has been governed internationally by the four Geneva Conventions⁵ of 1958, the Conventions resulted from the First United Nations Conference on the Law of the Sea 1958 (UNCLOS I). Article 10 of the Convention of the Territorial Sea and

⁴ Hereafter referred to as the UNCLOS III.

⁵ Convention on the Territorial Sea and the Contiguous Zone, UN Doc.A/CONF/13/L.52; Convention on the High Seas, UN Doc.A/CONF/13/L.53 and Corr. 1; Convention on Fishing and Conservation of the Living Resources of the High Seas, UN Doc.A/CONF/13/L.54; Convention on the Continental Shelf, UN Doc.A/CONF/13/L.55.

Contiguous Zone and Article 1(b) of the Continental Shelf Convention deal with the regime for islands. These articles provide for the definition of “island” and the prescribing of its territorial sea and the continental shelf, and Article 121 of the UNCLOS III follows them. Accordingly, an island is regarded as “a naturally formed area of land, surrounded by water, which is above water at high tide”. Furthermore, the UNCLOS III has provided for an EEZ regime for islands so that there is no restriction on islands in relation to having an EEZ or to the continental shelf⁶.

However, a restriction has been imposed on “rocks”. In order to benefit from an EEZ and the continental shelf, “rocks” must “sustain human habitation or economic life of their own”⁷, but I will discuss this aspect later in Chapter 3⁸.

2.2 THE DEFINITION OF THE ISLAND

Although the definition of the island and the accompanying right to possess marine spaces was discussed on several earlier occasions, it was only during the UNCLOS III that it came fully to the fore as an important factor in deliberations on the prospective recognition of the institution of the exclusive economic zone. The question whether every high tide elevation should be considered as an island and, should it, by the same token, enjoy the right to a maritime zone, went beyond theoretical and scholarly discussion acquiring along the way an immense practical dimension. How serious consequences it could have for the entire international community is perhaps best illustrated by the case of the Rockall rock. Its circumference is about 100 meters but, should the British claim be

⁶ See Article 121(2) of the UNCLOS III.

⁷ See Article 121(3) of the UNCLOS III.

⁸ See M. Habibur Rahman, *The Impact of the Law of the Sea Convention on the Regime for Islands: Problems for the Coastal State in Asserting Claims to the “New-Born” Islands in Maritime Zones in International and Comparative Law Quarterly*, The British Institute of International and Comparative Law, 1985, p. 369.

endorsed, it would win an exclusive economic zone no smaller than 125 thousand square miles⁹.

Islands differ from one another in their origin, size, geographical location, ecological conditions and, last but not least, their political status. As for their geomorphological origin there are two kinds of islands: continental and oceanic. Continental islands are built from gneiss, granite or slate that had been exposed to very high temperatures and extreme pressure similar to that occurring in continents or along its fringe. Mid-ocean islands are mainly volcanic or volcanic-coral type. Some islands may also emerge as a specific configuration of the sea bed and underwater ranges, currents, tides or other factors that had led to sedimentation of some organic or mineral matter.

It is estimated that there are over half a million islands totaling 3.823 thousand square miles ranging from hardly measurable peaks to such giants as Greenland with an area of over 840 thousand square miles. Among them nearly 123 islands are greater than one thousand square miles¹⁰. They can be either close to continents or out in the ocean. There can be single islands or clusters arranged in various geometrical patterns. Some islands are rich in mineral resources and have an abundant fauna and flora, some are poor beyond the point of any economic life or habitation.

Neither is the political status of the islands uniform. Some of them, be it single islands or archipelagos, constitute a part of archipelagic states. With nearly fifty archipelagic states in 2008, the archipelagic states are inhabited by one fourth of the world population. Islands may belong to continental states, they may be associated, they may constitute a trusteeship

⁹ The 1972 Act recognized the Rockall rock to be an island. Consequently, it acquired the continental shelf (1974), and a 200 nautical mile zone of exclusive fishing (1977).

¹⁰ See R. D. Hodgson, *Normal and Special Circumstances in Law of the Sea: The Emerging Regime of the Oceans*, Proceedings, Law of the Sea Institute, Eight Annual Conference, June 18-21, 1973, ed. by J. K. Gamble, G. Pontecorovo, Cambridge Mass. 1974, p. 139.

territory or, lastly, they may still remain under foreign domination or control despite tremendous advances of decolonization.

A possibility of establishing a full 200 nautical miles economic zone puts a number of mid-ocean islands in a very advantageous position. The ratio of the land area to the area to the area of economic zone is nothing short of impressive. For example, the Cook Islands occupy a territory of 94 square miles but have a 1.360 thousand square miles of the economic zone; Nauru has 8.2 square miles territory and over 125 thousand square miles of the economic zone; the Bermudas have 21 square miles territory and 123 thousand square miles of the economic zone. The UNCLOS III did not call into question the very situation, given a universal recognition of a special dependence of islands states on the surrounding marine environment. All the same the attention was focused from the outset on the necessity to settle the question whether rocks or “small uninhabited elevations” should have the right to possess an economic zone and continental shelf. It seems to contravene the rules of justice and threaten with a substantial limitation of the area of the common heritage of mankind. In this connection a need arose to render the whole situation in more specific terms and, consequently, elaborate an appropriate definition of “island”.

The first attempt to such a definition was made by the Hague Codification Conference in 1930¹¹. An overall impression as it emerged from the answers offered in the questionnaire prepared by the Preparatory Committee was that states did not examine “islands” as a problem in itself but rather advanced a view that while the right to own territorial sea should be given to an island permanently remaining above the high-water mark, those islands which remain above sea level only at low tide should be considered exclusively for the purpose of drawing the baseline of the territorial sea¹².

¹¹ In science the problem of artificial islands and rocks was first taken up by ILA in its Report of the International Law Association of 1924

¹² See M. S. MacDaughal, W. T. Burke, *The Public Order of the Oceans, A Contemporary International Law of the Sea*, New Haven, 1962, p. 391-392.

The Sub-Committee II of the 1930 Conference drafted the following definition of the island: “an area of land, surrounded by water, which is permanently above high-water mark” and distinguished as a separate issue “elevations of the seabed situated within the territorial sea, through only above water at low tide”¹³.

The literature on the subject notes that at the Hague Conference of 1930 there were two basic approaches to the definition of the island. The first one said that an island is an area of land remaining permanently above high-tide level and having a right to a territorial sea quite irrespective of its area or capability to provide settlement and even irrespective of whether the seabed elevations had been naturally formed by the forces of nature or by artificial means. The second approach, notably advanced by the United Kingdom, made recognition of an island conditional upon a requirement that the territory in question should be suitable for “effective occupation and use”. According to the British government, there were no grounds for giving that right to a belt of territorial waters around rocks that did not conform to this condition¹⁴.

Work on the definition continued in the UN International Law Commission and its final outcome was Article 10(1) of the Convention on the Territorial Sea and Contiguous Zone adopted by the I Conference on the Law of the Sea in 1958. ILC draft articles included the following definition:

“An island is an area of land, surrounded by water, which in normal circumstances is permanently above high water mark”¹⁵.

¹³ See Acts of the Hague Conference, 1930, vol. III, p. 217. As regards elevations of the seabed remaining above sea level only at low tide, the Sub-Committee II put forth the view that these should be taken into account in delimiting the baseline for the territorial sea.

¹⁴ See C. R. Symmons, *The Maritime Zones of Islands in International Law, Development in International Law*, The Hague, 1979, p. 10. There is some irony in the situation that half a century later Great Britain took a diametrically opposite stand.

¹⁵ International Law Commission Yearbook 1956, vol. II, p. 270.

In a commentary , the Commission explained that an island is an area of land surrounded by water, which except for special situations remains permanently above water at high-tide, while the following are not recognized as islands and, in consequence, do not have territorial sea:

- a) low-tide elevations even in a situation when there are installations permanently remaining above water (e.g. lighthouses);
- b) installations built on the seabed as e.g., those used for the exploitation of the shelf. The Commission proposed to establish safety zones around them but did not deem it necessary to establish such zones around light houses.

During the I Conference, the United States put forth an amendment to the ICL draft definition suggesting, on the one hand, to include a phrase “naturally-formed” and, on the other, to delete the phrases “in normal circumstances” and “permanently”. The text thus read as follows: “an island is a naturally-formed area of land, surrounded by water, which is above water at high tide”¹⁶. The U. S. proposal was adopted in view of the fact that its underlying objective, the elimination of a possibility to recognize as an island some man-made, artificial land area, has met with the approval of a majority of delegations. Parenthetically it could be mentioned that the term “island” is also used in Article 1 of the Convention on the Continental Shelf with regard to the seabed and the subsoil of the submarine areas adjacent to the coast of an island¹⁷.

¹⁶ The omission of the phrases “in normal circumstances” and “permanently” was being justified, and rightly so, by an internal contradiction because in island could remain above water at high-tide either “permanently” or “in normal circumstances”.

¹⁷ Since the Convention on the Continental Shelf lacks a definition of the island a question arose whether in such a case the definition given in the Convention on the Territorial Sea should be automatically applied. This is not without significance for the disputes around islands where the opposing parties being bound by the Shelf Convention are not bound by the provisions of the Convention on the Territorial Sea and Contiguous Zone. The opinion that the Convention on the Continental Shelf does not define islands and that such a

The status of islands was on the agenda of the Seabed Committee. The Committee proposed to include the problem as the agenda no. 19 relating to the law of the sea in the form of two sub-points: a) islands under colonial dependence or foreign domination or control and, b) other related matters.

As regards the definition of the island, two opposing stands dominated the work of the Seabed Committee. They have been further developed in documents, statements and during negotiations at the UNCLOS III mainly in the Conference's Second Committee.

According to the opinion presented at the Caracas session of the Conference (1974) by Canada, Cyprus, Fiji, Greece, New Zealand, Tonga, Trinidad and Tobago, Venezuela, and Western Samoa, the definition of the island as rendered in Article 10 of the Convention on the Territorial Sea and Contiguous Zone did not require any change or supplementing, while additional criteria could only hamper the reaching of a consensus. This stand was advanced by Fiji, New Zealand, Tonga and Western Samoa and Greece and it clearly stated that the provisions concerning islands relate to all islands including those comprised in an island State.

A contrary opinion claimed that the definition of the island as contained in the Geneva Convention was too vague and covered various land formations from great islands to tiny rocks or reefs and therefore, being neither judicious nor adequate, it should be worked out in greater detail. As early as during the works of the Seabed Committee, Malta proposed to recognize as the island only that land area whose area is greater than 1 square kilometer. Proposals aimed at introducing some distinctions between individual islands were tabled by Romania, Turkey and Algeria, Dahomey¹⁸, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Morocco, Mauretania, Sierra Leone, Sudan, Upper Volta and Zambia. The Romanian

definition is necessary was put forth by Ireland as early as the plenary meeting of the Caracas session of the 3rd Conference.

¹⁸ Now called the Republic of Benin

draft distinguished an islet as a naturally formed elevation of land less than one square kilometer in area, and, an island similar to an islet as a naturally formed elevation of land which is more than one square kilometer, which is not or cannot be inhabited permanently or which does not or cannot have its own economic life. The document submitted by Turkey distinguished: a) island having at least one tenth of the land area and population of the state to which they belong; b) islands without economic life; and c) rocks. The African states suggested a distinction between a) islands; b) islets (the smallest naturally formed land area); and c) rocks (naturally formed rocky elevations of the seabed).

The informal Single Negotiating Text drafted at the third session in Geneva (1977) contained Article 132 which distinguished between an island and a rock. Its paragraph 1 repeated the Geneva Convention: “an island is a naturally-formed area of land, surrounded by water, which is above water at high tide” and in paragraph 3 it read: “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”. Despite repeated efforts to change that article, it has been included without amendments in the successive texts and, ultimately adopted as Article 121 of the UNCLOS III.

While the very idea to distinguish between islands and rocks is justified, some doubts arise as to the very interpretation of the employed texts. Thus it could be discussed whether the term “rocks” covers also reefs, sandbanks or other small land formations which are not rocks in a strict sense. Not indisputable either are the phrases concerning the impossibility to sustain human habitation or the unfeasibility of economic life of their own. Does the exploitation of biological resources in the surrounding waters amount the economic life, or does it not? The problem would have been much simplified if the criteria mentioned in Article 121(3) had been supplemented with a qualification from the point of view of the area. Nevertheless even with the present wording, the differences of opinion should not prove insoluble, given the system of peaceful settlement of disputes provided for in the convention.

2.3 THE RIGHT OF THE ISLANDS TO POSSESS MARITIME ZONES

The questions related to the right of islands to possess marine space and, in particular, the continental shelf and the exclusive economic zone were the subject of a heating negotiating battle. During the III Conference these issues were discussed on three planes:

- a) in conjunction with the definition of the island;
- b) in conjunction with the island's location with respect to the coast of other states;
and
- c) in conjunction with the island political status, whether the island was under foreign or colonial rule

Efforts to work out a more specific definition of the island aimed at, on the one hand, a restriction (in specific circumstances) of the right of the island to possess the exclusive economic zone and the continental shelf and, on the other, sought to totally exclude such a possibility with respect to rocks and islets. For example, according to a proposal submitted by the African States the delimitation of marine spaces of islands would have to take into consideration such factors as: the size of the island, its geographical configuration, the geological and geomorphological structure, the needs of the island's population as well as the conditions preventing its permanent habitation. At the same time the proposal excluded any claims to marine spaces which have been advanced on the grounds of exercising

sovereignty over islets and reefs¹⁹. These could only have a safety zone. The Turkish proposal stipulated that no right to marine space should be enjoyed by “islands without economic life” and rocks. According to the Romanian draft, states could establish a safety zone or even a territorial sea around the islets and “islands similar to islets” provided that it would be without prejudice to the marine spaces of the neighboring states. In the course of the debate of the Second Committee, Colombia proposed establishing a special body to deal with the situation of islands and make decisions on marine spaces²⁰.

The question of restricting the right to marine spaces around islets and rocks continued unresolved throughout the III Conference, and even as late as its 11th session (New York 1982) the United Kingdom proposed to delete paragraph 3 on rocks from Article 121, while Romania submitted a proposal to include in that article another paragraph saying that uninhabited islets shall be without prejudice to the marine spaces belonging to the coast of the interested states.

Ultimately, Article 121 of the Convention provides that only rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf. It follows that, all the same, rocks have retained the right to the territorial sea and the contiguous zone. Still some doubts arise when it comes to the fact that states have the right to establish a contiguous zone around uninhabited rocks for the purpose of protecting their customs, immigration or sanitary interests. It may happen as well that the territorial sea of a rock shall border the economic zone of another state; in such a situation would it be possible for the state to which the rock belongs to establish a contiguous zone in a foreign economic zone? It could be likewise disputed whether a rock that has no right to an economic zone of its own may restrict the right to an economic zone

¹⁹ The project also distinguished “elevations which remain above water at low tide”. These questions would not be discussed here because there was a consensus that such elevations have no right to either to a territorial sea or to a continental shelf or an economic zone. They could be considered for the delimitation of the baseline of the territorial sea.

²⁰ Official Records, vol. II, p. 280.

of another state by establishing a contiguous zone around itself? This case lacks clarity and gives rise to contradictory interpretations²¹.

2.4 ISLANDS AND DELIMITATION PROCESS

Islands can have an effect on the process of delimitation in a wide range of ways²². The island can be an independent island State²³ or it can be a political dependency of a metropolitan State²⁴ and at the same time one of the two entities between which the delimitation is to be carried out; it can also be an entity belonging to one of the States parties to the dispute and have its effect, as a special circumstance, on the line of delimitation drawn according to the configuration of the coasts lines²⁵, or can be used as a basepoint in such way that waters between the coast and the island are analyzed as internal waters²⁶;

The question of whether an island situated near the coast of another State should be treated as a “special circumstances” and, consequently, should its right to marine spaces be qualified by the rule of justice, became the focus of an animated discussion. The dividing line between the parties has been drawn according to whether a State pronounced itself for the median line or for the rule of justice in delimiting marine spaces.

²¹ See Hugo Caminos, *Law of the Sea*, University of Miami School of Law, USA, 2001, p. 115-120

²² See Robert Kolb, *Case Law on Equitable Maritime Delimitation*, Martinus Nijhoff Publishers, 2003, p.147-148

²³ See *Libya v. Malta* case, 1985.

²⁴ For example *St. Pierre-et-Miquelon* (Canada v. France, 1992) and *Jan Mayen* (Denmark v. Norway, 1993).

²⁵ See *Tunisia v. Libya* case (1982), *Eritrea v. Yemen* case (1999) and *Dubai v. Sharjah* case (1981)

²⁶ See *United Kingdom v. France* (1977: Eddystone) and *Eritrea v. Yemen* (1999: Dahlaks).

The Turkish draft submitted to the Second Committee stated plainly that an island situated in the economic zone or the continental shelf of another State shall have neither the economic zone nor the continental shelf or its own unless it constitutes one tenth of the territory and the population of the State to which it belongs. The African States' document provided that in the case of islands the delimitation of marine spaces between opposite or adjacent States should be executed through mutual agreement according to the rule of justice, while the medium end equidistance line is not the only method of delimitation.

The parties particularly engaged in the discussion of whether islands should be regarded as "special circumstances" in the case of delimitation²⁷ included, on the one hand, Colombia, Greece, Spain and the U.K. which were against such status, and, on the other, States supporting the "special circumstances" case including Ireland, Romania, Turkey and Venezuela. The latter stand was supported also by Poland²⁸.

Article 121 contains no provisions concerning the situation of islands in the case of delimiting the economic zone or the continental shelf, so is it useful to draw a distinction between the territorial sea, the continental shelf and perhaps the contiguous zone of an island (as in *St. Pierre-et-Miquelon*, 1992)? Might it not be better to take for granted all these zones to which an island is entitled, making a clear separation between the issues of entitlement and delimitation? One might proceed to the delimitation with the freedom to make adjustments independently of any predetermined category (12 miles, 24 miles etc.). However it is not certain that in practice the exercise is so very different, particularly since it can seem reasonable, when carrying out a delimitation exercise, to attempt to ensure that an island has the benefit of zones corresponding to the categories laid down by the law of the sea. In practice, therefore, the effects produced by an island will often be decided by the maritime zones which the geography allows it. It may claim the lot if the distance from the coasts is great enough (for example *Jan Mayen*). But in other cases (for example *St. Pierre-et-Miquelon*), where the geographical context is narrow one, only a territorial sea or a

²⁷ Official Records, vol. II, p.279-289

²⁸ Hugo Caminos, *Law of the Sea*, University of Miami School of Law, USA, 2001, p. 120-121

contiguous zone and their respective seabeds and subsoils may be available. The process is controlled by the non-encroachment rule. It will be noted that this rule applies as a function of the concrete geographical circumstances, not as function of island status²⁹.

2.5 ARTIFICIAL ISLANDS

As the very term suggests what distinguished an “artificial island” from an “island” in the terms of the law of the sea, is a sole result or effect of human activity³⁰. It could be a part of land, piled or hardened, or it could be a construction (made of concrete, metal, plastic or glass). Neither case has a bearing on its legal situation.

Although neither the 1982 Convention on the Law of the Sea nor the 1958 Geneva Convention on the Continental Shelf include a definition of an artificial island, installation or structure, an attempt at such a definition could all the same be made, given the existing components of the definition of the island. It could thus be generally said that “an artificial island is a man-made construction or part of land situated out at sea and surrounded by water, which is permanently above water at high tide and both fixed to or erected on the seabed or floating on the water surface”.

Given the technical advances and new requirements, the earlier definitions had to be expanded to cover, along with a stationary construction permanently fixed to, or erected on the seabed, also a construction floating or suspended on the water surface. An “artificial

²⁹ See Robert Kolb, *Case Law on Equitable Maritime Delimitation*, Martinus Nijhoff Publishers, 2003, p.148-149

³⁰ As rightly pointed out by R. D. Hodgson, in some cases the question whether an island had been naturally formed or man-made may give rise to different opinions. For example, during works on the maintenance of navigational channels, dredging of ports or rivers, part of the material may form an island due to the operation of winds, currents or natural forces. Has then such an island been created naturally or not?

island” must also be situated on and surrounded by the sea, and remain permanently above sea level at high tide. A construction not surrounded by water forms a part of a port or harbor facilities and, if it fails to remain permanently above sea level, then it is regarded as an “underwater construction or installation” thereby losing its “island” status³¹.

As concerns the classification of artificial islands from the point of view of their construction it should be accepted that what is important here is not the island’s size or the material used for its construction but the question whether the island is a permanently fixed one, or a floating unit. Here artificial islands seem to fall into four categories:

- a) islands erected and permanently fixed to the bottom of the sea;
- b) islands fixed to the bottom when under operation but otherwise movable;
- c) islands floating or rather sustained on the surface of the sea (anchored, towed or moved by ocean currents or winds);
- d) islands carrying navigation equipment (self-propulsion or other equipment).

In the latter case the island should be distinguished from a vessel.

From the point of view of their location, one should distinguish between:

- a) islands in internal waters and the territorial sea (within the territorial sovereignty of a State);
- b) islands in the economic zone and the continental shelf;
- c) islands in the high seas.

³¹ Article 11 of the Convention on the Law of the Sea saying that outermost permanent harbor works which form an integral part of the harbor system are regarded as forming part of the coast, contains an additional sentence saying that offshore installations and artificial islands shall not be considered as permanent harbor works.

This classification is essential in deciding who has the right to erect artificial islands and exercise jurisdiction over them.

In the Law of the Sea, the problem of artificial islands raises several issues but I will shortly discuss only their legal status.

Likewise the Convention on the Continental Shelf, the UNCLOS III in its Article 60(8) says:

“Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”

Any assumption such as e.g., treating artificial islands as a territory with all the consequences thereof and among them the recognition of a thesis that a State not only exercises jurisdiction but also has sovereignty, would lead to an illegal, from the point of view of international law, appropriation of the high seas. States may not establish territorial waters but they may, if necessary, create safety zones around artificial islands, installations or structures and they can also undertake appropriate measures in the zones to ensure the safety of the navigation as well as safeguard the islands themselves. This is particularly important in the case of exploitation of oil and natural gas. The zones should be established upon international standards, and except for certain situations provided for in the international standards or recommended by international organizations, they should not exceed 500 meters. All vessels must respect safety zones and the accepted international standards concerning the navigation in the vicinity of artificial islands. In the case of violation of a safety zone within the economic zone or continental shelf, the coastal State has the right of hot pursuit as provided for in Article 111 of the Convention.

At the UNCLOS III both the safety zone and the right of hot pursuit were the subjects of a vigorous discussion as two approaches found themselves at loggerheads: the first sought to expand the safety zones, while the other one argued that, with thousands of

installations now at sea, an expansion of safety zones might seriously hamper the international navigation. As concerns the right of hot pursuit it was put forth that it should only be exercised if an infringement of a safety zone led to a damage done to the island or the installation. This proposal however was discarded. The fact that artificial islands and installations are not territories is reflected in the passage saying³² that all installations and structures that have been abandoned or used up should be removed in order to ensure the safety of navigation³³.

³² See Article 60(3) of the UNCLOS III

³³ See Hugo Caminos, *Law of the Sea*, University of Miami School of Law, USA, 2001, p. 129-130

3 THE ROMANIAN-UKRAINIAN MARITIME DELIMITATION DISPUTE

3.1 INTRODUCTION

In the second part of the thesis I will examine the current dispute between Romania and Ukraine over the delimitation of their maritime boundaries as a case – study of the role of islands for maritime delimitation. The role of islands for maritime delimitation has not yet been addressed in-depth by the ICJ.

The dispute between the two neighboring riparian countries concerns the maritime delimitation of the overlapping continental shelf and the exclusive economic zones in the Black Sea. The situation is complicated by the existence of the Ukrainian Serpents’ Island³⁴ located exactly on the common maritime boundary to be drawn between these countries and whose status is contested by Romania³⁵.

³⁴ The name “Serpents’ Island may be traced back to the 14th century period of Genovese dominance over the Black Sea, and is apparently due to the many reptiles found by the Genovese sailors in the ancient Greek temple’s water reservoirs. The island itself lacks fresh water, however, and this is one of the reasons that until recently it was never inhabited.

³⁵ See Igor Karaman, *Dividing the Black Sea in Revue Hellenique de Droit International*, Editions Ant. N. Sakkoulas, 2005, p. 214.

Assuming that the ICJ finds its jurisdiction in this case, it will be the first precedent in the international adjudication in elucidation of the standard for what constitutes a “rock” and what constitutes an “island” in the terms of UNCLOS III Article 121(3).

3.2 ROMANIA BRINGS A CASE AGAINSTE UKRAINE TO THE INTERNATIONAL COURT OF JUSTICE

On 16 September 2004 Romania brought a case against Ukraine to the International Court of Justice, principal judicial organ of the United Nations, in a dispute the subject of which is described in the Application as “concerning the establishment of a single maritime boundary between the two States in the Black Sea, thereby delimiting the continental shelf and the exclusive economic zones appertaining to them”.

In its Application Romania explains that, “following a complex process of negotiations”, Ukraine and itself signed on 2 June 1997 a Treaty on Relations of Cooperation and Good Neighborliness, and concluded an Additional Agreement by exchange of letters between their respective Ministers for Foreign Affairs. Both instruments entered into force on 22 October 1997. By these agreements, “the two States assumed the obligation to conclude a Treaty on the State Border Regime between them, as well as an Agreement for the delimitation of the continental shelf and the exclusive economic zones...in the Black Sea”. At the same time, “the Additional Agreement provided for the principles to be applied in the delimitation of the abovementioned areas, and set out the commitment of the two countries that the disputes could be submitted to the ICJ, subject to the fulfillment of certain conditions”. Between 1998 and 2004, 24 rounds of negotiations were held. However, according to Romania, “no result was obtained and an agreed delimitation of the maritime areas in the Black Sea was not accomplished”. Romania now brings the matter before the Court “in order to avoid the indefinite prolongation of discussions that, in [its] opinion, obviously cannot lead to any outcome”.

Romania requests the Court “to draw in accordance with international law, and specifically the criteria laid down in Article 4 of the Additional Agreement, a single maritime boundary between the continental shelf and the exclusive economic zone of the two States in the Black Sea”.

As a basis for the Court’s jurisdiction Romania invokes Article 4(h) of the Additional Agreement, which provides:

“If these negotiations [referred to above] shall not determine the conclusion of the abovementioned agreement [on the delimitation of the continental shelf and the exclusive economic zones in the Black Sea] in a reasonable period of time, but not later than 2 years since their initiation, the Government of Romania and the Government of Ukraine have agreed that the problem of delimitation of the continental shelf and the exclusive economic zones shall be solved by the UN International Court of Justice, at the request of any of the parties, provided that the Treaty on the regime of the State border between Romania and Ukraine has entered into force. However, should the International Court of Justice consider that the delay of the entering into force of the Treaty on the regime of the State border is the result of the other Party’s fault, it may examine the request concerning the delimitation of the continental shelf and the exclusive economic zones before the entering into force of this Treaty”.

Romania contends that the two conditions set out in Article 4(h) of the Additional Agreement have been fulfilled, since the negotiations have by far exceeded two years and the Treaty on the Romanian-Ukrainian State Border Regime entered into force on 27 May 2004.

In its Application Romania further provides an overview of the applicable law for solving the dispute, citing a number of provisions of the Additional Agreement of 1997, as well as the 1982 Montego Bay United Nations Convention on the Law of the Sea, to which

both Ukraine and itself are parties, together with other relevant instruments binding the two countries³⁶.

3.3 HISTORICAL BACKGROUND OF THE DISPUTE

The diplomatic impasse is old and has its roots in the times of the Union of Soviet Socialist Republics³⁷. The Paris Peace Treaty of 1947 imposed by the victorious nations at the end of World War II provided that the frontiers of Romania with the USSR were the same as those drawn in 1940; therefore, the Serpents' Island belonged to Romania. Subsequently, on February 4, 1948, the Treaty of Friendship, Co-operation and Mutual Assistance between Romania and the USSR was concluded and the two parties agreed to establish, fix and mark the border³⁸. Within this framework, the first operation of drawing the borderline did not lead to any dispute. Later, the border had to be marked on the site and the minute describing the course included Serpents' Island into the former USSR. The same happened in the case of several small islets on the Chilia Channel. Subsequent high level talks emphasized the intention of the USSR to seize the Serpents' Island from Romania and use it for strategic and military purposes to monitor and watch the area. Since then, the Soviet cartographers included the island under the jurisdiction of the USSR, whereas the Romanian map makers avoided, by using technical means, to mention it on any public use maps.

In keeping with the Genève Conference on the High Seas of 1958, any country may assert jurisdiction over waters and shelf as much as 12 nautical miles beyond its coast and

³⁶ See the ICJ website: <http://www.icj-cij.org/docket/index.php?pr=3&p1=3&p2=1&case=132&p3=6>

³⁷ Hereafter referred to as the USSR.

³⁸ To this purpose, the *Protocol for the drawing of the borderline between the Popular Republic of Romania and the Union of Soviet Socialist Republics* was signed by Dr. Petru Groza and Veacheslav Molotov.

to a depth of maximum 200 meters. Based on this, in 1967 started the negotiations between Romania and USSR and the talks conducted during 10 meetings referred to the continental shelf and the exclusive economic rights. The proposals made by the Soviet counterpart³⁹ were rejected by Romania⁴⁰.

After the adoption of the UNCLOS III on 10 December 1982, the issue of delimitation of the maritime zones and establishment of the maritime frontier became more topical. On 25 April 1986, Romania adopted a Decree on the establishment of the EEZ⁴¹; subsequently, both States have ratified the Convention, under which they implicitly undertook the international obligations to delimit their maritime spaces⁴². The negotiations were unsuccessful and were broken off in 1987.

In 1991, the USSR collapsed and the borders between Romania and USSR became accordingly the borders between Romania and successive Ukraine. Correspondingly, the dispute between Bucharest and Moscow now became the dispute between Bucharest and Kiev.

Since UNCLOS III provides for the islands the ability to generate the same maritime zones, which the mainland is able to do or to have⁴³, in particular, the ability to have the juridical shelf and the EEZ, the presence of Serpents' Island can drastically affect the maritime delimitation. Romania claims that this island is a "rock" under UNCLOS III Article 121(3) and it is not therefore able to generate an EEZ and have a continental shelf⁴⁴; Ukraine, on the contrary, maintains the position that the island is a fully-fledged

³⁹ In three versions: 2 000 square km; 6 000 square km and, finally, 4 000 square km.

⁴⁰ See Aurelian Teodorescu, *Serpents' Island: Between Rule of Law and Rule of Force*, 1999.

⁴¹ Decree No. 142 of 25 April 1986 of the Council of State Concerning the Establishment of the Exclusive Economic Zone of the Socialist Republic of Romania in the Black Sea, available at:

http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ROM_1986_Decree.pdf

⁴² UNCLOS III Articles 74, 83.

⁴³ *Ibid.* Article 121(2).

⁴⁴ UNCLOS III Article 121(3): "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

“island” under UNCLOS III Article 121(2) having therefore the ability to generate all maritime zones⁴⁵, which further overlap with Romanian zones and then taken into considerations during the maritime demarcation and delimitation to the full effect⁴⁶.

3.4 NEGOTIATIONS BETWEEN ROMANIA AND UKRAINE

The delimitation of the continental shelf and of the exclusive economic zones in the North-Western basin of the Black Sea was the object of an extended process of negotiations, which took place between 1967 and 1987, between Romania and the USSR – no agreement having been reached between the Parties. After the dissolution of the USSR, this issue began to be discussed with the Ukraine.

On 2 June 1997, the Treaty on the Relations of Good Neighborliness and Cooperation between Romania and Ukraine was signed at Constanta (the Basic Political Treaty)⁴⁷. On the same occasion, the Agreement Additional to the Basic Political Treaty⁴⁸, concluded by exchange of letters between the ministers of foreign affairs of the two countries, was also signed.

The latter document contains provisions regarding the obligations of the Parties to initiate negotiations for the conclusion of a Treaty on the State Border Regime and of an

⁴⁵ UNCLOS III Article 121(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.*”

⁴⁶ See Igor Karaman, *Dividing the Black Sea* in *Revue Hellenique de Droit International*, Editions Ant. N. Sakkoulas, 2005, p. 216.

⁴⁷ The *Treaty on the Relations of Good Neighborliness and Cooperation between Romania and Ukraine* is available at: http://untreaty.un.org/unts/144078_158780/5/6/13042.pdf

⁴⁸ Both instruments entered into force on 22 October 1997.

Agreement for the Delimitation of the Continental Shelf and the Exclusive Economic Zones of Romania and Ukraine in the Black Sea. At the same time the Additional Agreement contains a series of principles according to which the two parties agreed to proceed to delimitation. The above mentioned document also included a special clause, establishing the possibility for either of the Parties to unilaterally seize the ICJ in order to find a solution to the problem of the delimitation of the mentioned maritime zones, on condition that two simultaneous conditions were met:

- a) *The negotiations regarding the delimitation of the maritime zones to have lasted for more than two years;*
- b) *The Treaty on the Border Regime to have entered into force or, if that was not the case, that this delay was due to the fault of the other Party⁴⁹.*

Thus, on 19 January 1998, started the negotiations of the Treaty on the Common State Border Regime and Agreement on the Delimitation of the Maritime Zones and lasted six years till 16 December 2004. During this period twenty four rounds of negotiations had taken place. During the first nineteen rounds the main attention of the Parties was focused on agreeing on the provisions of the Treaty on the Romanian – Ukrainian State Border Regime, Collaboration and Mutual Assistance on Border Matters⁵⁰ which was signed on 17 June 2003 in the Ukrainian town of Chernovtsy. Both countries have subsequently ratified this instrument.

The Treaty confirmed the Ukrainian – Romanian border established by the 1961 Treaty, clarified the issues of marking and maintenance of the borderline⁵¹, established a Mixed

⁴⁹ See press releases ROMANIA-Ministry of Foreign Affairs website:

<http://www.mae.ro/index.php?unde=doc&id=10766>

⁵⁰ The *Treaty on the Romanian – Ukrainian State Border Regime, Collaboration and Mutual Assistance in Border Matters* is available at: http://untreaty.un.org/unts/144078_158780/7/7/14484.pdf

⁵¹ Articles 2-7.

Ukrainian – Romanian Border Commission⁵², outlined the procedure for the use of nearby waters, railways, roads and other communication infrastructures⁵³, fishing, hunting, forestry, subsoil exploitation and the protection of the environment at the state border⁵⁴ etc. During the following five rounds of negotiations the Parties wholly concentrated on the issue of delimitation of their maritime spaces and on the status of the Serpents' Island⁵⁵.

Nevertheless, the bilateral negotiations with respect to the Agreement on the Delimitation of the Continental Shelf and the Exclusive Economic Zones of Romania and Ukraine in the Black Sea, which took place between 1998 and 2004, did not lead to any concrete results; the text of this document could not have been agreed upon. The Romanian side has constantly proposed during this negotiation process the necessity of applying the method well established by the ICJ, which is “the equidistance/median line – relevant circumstances”. This proposition was not accepted by the Ukrainian side, which proposed another method according to which Serpents' Island was given, from Romania's point of view, an exaggerated role and which would have led to an area belonging to Ukraine two times bigger than the maximum of the surface effectively claimed by the former USSR in the period 1967 – 1987.

Since the approach of the two parties was extremely different, not only with regard to the method used in order to determine a delimitation line, but also to the course of this line, it became clear that the negotiations would not lead to any concrete result. Taking into account the fact that both conditions regarding the seizing of the ICJ had been fulfilled, the minimum progress achieved (thirty four rounds of negotiation took place, twenty four at plenary level and ten at expert's level) and the lack of any perspective of solving the dispute by continuing this process, the Romanian side considered that submitting the case

⁵² Article 21.

⁵³ Articles 8-14.

⁵⁴ Articles 15-20.

⁵⁵ See Igor Karaman, *Dividing the Black Sea in Revue Hellenique de Droit International*, Editions Ant. N. Sakkoulas, 2005, p. 218.

to the ICJ was the most advantageous manner to solve the dispute: the perspective of finalizing the case in a reasonable and predictable time limit (around 4 years), the guarantee of a correct and equitable application of the international law by a body of professional and impartial judges, with a well-known, undisputed and consolidated expertise in maritime delimitation. Under these circumstances, on 16 September 2004, Romania submitted to the ICJ the Application Instituting Proceedings⁵⁶, with a view to find a solution to the issue of the delimitation of the continental shelf and of the exclusive economic zones of Romania and Ukraine in the Black Sea⁵⁷.

3.5 POINTS OF DIFFERENCE IN OPINIONS

3.5.1 Sovereignty over the Serpents' Island

The Serpents' Island did not generate any economic interest in recent times, because it is a massive limestone formation, with a series of underwater rocks which makes it a useful fishing base. Its economic importance increased after substantial untapped reserves of oil and gas (10 million tons of oil and 1 billion m³ of natural gas deposits)⁵⁸ were found in the subsoil of the continental shelf around the island. The island's coordinates are 45°15'18"N, 30°12'15"E, its area is 17 hectares and has an irregular shape. The island is 662 meters long

⁵⁶ The *Application Instituting Proceedings* is available at:

http://www.mae.ro/poze_editare/Applic_%20Institut_Proceed_DRUMN.pdf

⁵⁷ See press releases ROMANIA-Ministry of Foreign Affairs website:

<http://www.mae.ro/index.php?unde=doc&id=10766>

⁵⁸ The natural resources are not significant as they can be exhausted in 2-3 years of exploration.

east-to-west and 440 meters wide north-to-south. The depth of the sea near the island ranges between 4 and 25 meters⁵⁹.

The history of the territorial affiliation of the island is as follows. From the medieval times the island was *de facto* ruled by Romanian (Moldavian and Wallachian) princes. The first time Serpents' Island was mentioned in an international treaty was in 1878, when the Berlin Peace Treaty, concluded by the then European superpowers, awarded that island to Romania, whose independence from Turkey was recognized in the same document. In the early 19th century the Russian Empire made an attempt to take the control of the island by occupation. In 1940 the island was eventually annexed to the USSR by the Ribbentrop – Molotov Pact. In the same time the USSR made an ultimatum to Romania, which led to the incorporation of northern Bucovina, Bessarabia and the Hertza district into the Soviet Union. It did not mention the island, though. Only in August 1944, the Red Army troops *de facto* occupied the island, few days after Romania switched sides to its World War II allies, and from 1944 till 1948 the island remained under Soviet occupation. In February 1948 Romania agreed to cede the island to the USSR, after a visit of Romanian first communist Prime Minister Petru Groza to Moscow. An official protocol stipulating the transfer of sovereignty was signed on the island itself by the Romanian Deputy Foreign Minister Eduard Mezincescu and the Soviet representative Veaceslav Molotov on 23 May 1948. The 1948 Protocol was the first document which among other issues formally fixed the affiliation of the Serpents' Island to the USSR.

On the other hand, Romania claims that the Protocol, from a legal point of view, is in complete unconstitutionality. No part from Romanian territory could be ceded without the approval of the Parliament, which never ratified the Protocol after it had been signed. Thus, from the point of view of the constitutional law, the document is invalid and the Serpents' Island was never relinquished *de jure*.

⁵⁹ See Aurelian Teodorescu, *Serpents' Island: Between Rule of Law and Rule of Force*, 1999.

Following the dissolution of the former USSR, the Serpents' Island was taken over by Ukraine, which was also a successor to all the international treaties in force at the date of the secession. Making use of the decision to extend the belt of territorial waters to 12 nautical miles, Ukraine started a series of activities in the area but never consult Romania to secure its former agreement. The former Soviet Republic had never recognized the existence of a territorial dispute and claims that the territories including the island incontestably belong to it according to the treaties mentioned above and no one could challenge their Ukrainian attribution.

However, after signing the 1997 Basic Political Treaty reaffirming the inviolability of the existing Romania – USSR borders and the 1997 Additional Agreement stating that the Serpents' Island (Islands of Snakes, as stated in this Agreement) belongs to Ukraine, Romania accepted the sovereignty of Ukraine over the island⁶⁰.

In 2004, when Romania decided to file the complaint against Ukraine before the ICJ, it acted according to the provisions of the 1997 Additional Agreement to the Political Treaty between the two parties, concluded by exchange of letters. This instrument provided for the competence of the ICJ to decide only with regard to the problem of the delimitation of the continental shelf and the exclusive economic zones in the Black Sea and not on the sovereignty over Serpents' Island. Moreover, the same Agreement provides in its Article 3 that the island belongs to Ukraine and that, in the delimitation process, none of the parties will contest the sovereignty of the other side over any part of its territory, adjacent to the area under delimitation. Thus, the issue of the appurtenance of Serpents' Island is not part of the object of the case currently before ICJ⁶¹.

⁶⁰ See Igor Karaman, *Dividing the Black Sea* in *Revue Hellenique de Droit International*, Editions Ant. N. Sakkoulas, 2005, p. 220.

⁶¹ See press releases ROMANIA-Ministry of Foreign Affairs website:

http://www.mae.ro/poze_editare/2008.07.29_CaseRvU.pdf

3.5.2 Status of the Serpents' Island

The main point of difference is the status of the island which may considerably affect the delimitation of the maritime zones⁶². If Snakes' Island is not an island, but a rock, then in accordance with international law the maritime boundary between Romania and Ukraine should be drawn without taking into consideration the isle location. If Snakes' Island is an island, then the continental shelf around the island should be considered as Ukrainian water. It is therefore important to determine if the Serpents' Island is an "island" according to UNCLOS III Article 121(1), if it falls under qualifications of Article 121(3) being seen as a rock, or if it has the rights under Article 121(2).

The 1982 Convention did not retain a legal definition of what a rock is. Although the Law of the Sea Conference made a great effort to find a consensus on the definitions of the various insular features, it did not succeed in reaching a consensus on the definition of rocks.

However, pursuant to UNCLOS III Article 121(1):

*"An island is a naturally formed area of land, surrounded by water, which is above water at high tide."*⁶³

⁶² See Annex

⁶³ This definition was first formulated at the 1930 Codification Conference where the Sub-Committee's Report referred to an island being an area of land, surrounded by water, which is permanently above the high

Under this definition any naturally formed insular feature, whatever the size, shape, habitation or economic condition that stands above the tides, is considered an island and therefore entitled to claim a territorial sea, a contiguous zone and a continental shelf⁶⁴. All these three requirements are satisfied as applied to the Serpents' Island:

- 1) Is a naturally formed area of land, with a rich underwater archaeological heritage⁶⁵
- 2) It is in fact surrounded by the waters of the Black Sea; and
- 3) It has always been above water at high tide

The Serpents' Island has therefore all legal grounds to fall under the definition of an "island" according to UNCLOS III Article 121(1); therefore it has the territorial sea and contiguous zone. But further, UNCLOS III, specifies what kinds of islands are regarded as "rocks" and which therefore cannot have the exclusive economic zone and the continental shelf. Pursuant to Article 121(3):

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

This is perhaps the most important (as well as the most ambiguous) proviso to which the special attention will be drawn. The exact meaning of Article 121(3) has repeatedly been

- water mark. This definition was subsequently followed by the International Law Commission and adopted in Article 10 of the Territorial Sea Convention. The definition of an island, and particularly the meaning of "above water at high tide" was considered in *US v. Alaska*, 521 US 1 (1997).

⁶⁴ See J. L. Jesus, *Rocks, New-born Islands, Sea Level Rise and Maritime Space*, in T. Eitel, *Negotiating for peace: liber amicorum*, Springer, 2003.

⁶⁵ Since the ancient times the island was used by vessels for temporary calls. Frequent storms were the reason of many vessels wrecks and therefore now its underwater slopes are abundant with the items of a high historical value.

queried by academia⁶⁶. It is also vague why at all UNCLOS III employed the term “rock”, which only provides now a room for contradictions and differences in opinion as well as unnecessary discussions by some scholars. The factors that really matter are two: the abilities of the rocks to sustain human habitation or to have their own economic life. Then any land elevation, no matter how it might be called – island, islet, rock, etc. – can generate maritime zones. Article 121(3) is part of Article 121 entitled “Regime of Islands” clearly connoting that “rocks” are also “islands” in legal terms. Therefore, it has correctly been observed that it would have been more appropriate if Article 121(3) also referred to “islands” and not to “rocks”⁶⁷.

However, since the UNCLOS III fails to consider which islands are to be seen as rocks and, among the rocks, which ones are to be considered as not capable of sustaining human habitation and an economic life of their own, the task of making this determination is left to doctrinal writings, judicial and arbitral decisions, as well as to negotiations⁶⁸.

UNCLOS III Article 121(3) differs from previously established international law, particularly in regard to the regime of shelf as set out in the Shelf Convention, which empowered all islands with a continental shelf⁶⁹, since they were entitled to a territorial sea under the Territorial Sea Convention⁷⁰. The primary purpose of Article 121(3) was to ensure that insignificant features, particularly those far from areas claimed by other States, could not generate broad zones of national jurisdiction in the middle of the ocean⁷¹.

⁶⁶ E. D. Brown in this regard refers to this proviso as to “intolerably imprecise” which appears to be “a perfect recipe for confusion and conflict”, see E. D. Brown, *Rockall and the Limits of the UK*, Marine Policy, 1978.

⁶⁷ See B. Kwiatkowska, 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, 1990.

⁶⁸ See J. L. Jesus, *Rocks, New-born Islands, Sea Level Rise and Maritime Space*, in T. Eitel, *Negotiating for peace: liber amicorum*, Springer, 2003.

⁶⁹ Article 1 of the Shelf Convention.

⁷⁰ Article 10 of the 1958 Territorial Sea Convention.

⁷¹ Pardo and Borgese illustrate the importance of the purpose of this Article by an example that a small island like Amsterdam in the Indian Ocean, which can sustain habitation, can generate an exclusive economic zone

The first question that now arises is whether both of the conditions set out in Article 121(3) – “human habitation” and “economic life of their own” – must be met, or only one of them would suffice in order not to fall under Article 121(3). This issue arises since the wording contains the disjunctive particle “or” and not the copulative conjunction “and”⁷². Such wording implies that a feature does not need to have both human habitation and an economic life of its own at the same time. Only one of these qualifications must therefore be met to remove the feature from the restrictions of Article 121(3)⁷³. In practice, however the two criteria merge, in the sense that the presence of one naturally imposes the occurrence of the other. Activities related to a rock “economic life” entail a certain degree of human habitation or, conversely, “human habitation” requires a certain degree of a rock’s economic life⁷⁴.

The second question refers to the implication of the wording of the “cannot sustain”. Does it mean that the island must in fact have the economic life or be inhabited, or the reference is given only to its potential capacity to sustain human habitation or economic life? The question that follows directly from this one is the “of their own” implications. Does it mean that the rock has to have its own means in order to sustain human habitation or economic life or external support is possible?

larger than that of Belgium, The Netherlands, and Germany put together. See A. Pardo. E. M. Borgese, *The New International Economic Order and the Law of the Sea*, 1976.

⁷² Earlier versions of this provisions contained “and”, though. See, e. g. Romania: Draft Articles on delimitation of marine and ocean space between adjacent and opposite neighboring States and various aspects involved (23 July, 1974), Article 2(3), 3 *UNCLOS III Official Records*, at 195. This proposal was not incorporated in the present Article 121(3). Denmark stated that it interpreted the word “or” in the first line to mean “and”, Romania stated the same in 1996 when it ratified the UNCLOS III.

⁷³ See Igor Karaman, *Dividing the Black Sea* in *Revue Hellenique de Droit International*, Editions Ant. N. Sakkoulas, 2005, p. 228.

⁷⁴ See J. L. Jesus, *Rocks, New-born Islands, Sea Level Rise and Maritime Space*, in T. Eitel, *Negotiating for peace: liber amicorum*, Springer, 2003.

Kwiatkowska and Soons are right in explaining that the use of the words “cannot sustain” instead of “do not sustain”, covers the *capacity* of rocks to sustain human habitation or economic life, rather than the actual situation of such sustaining/not sustaining. In other words, the definition refers to uninhabitable rather than to uninhabited islands (rocks). They then conclude that islands which qualify as rocks under Article 121(3) and are, thus, deprived of any title to an exclusive economic zone/continental shelf seem to be those which do not sustain and cannot sustain human habitation or economic life. On the contrary, islands which do not sustain, but can sustain human habitation and economic life, do not qualify as rocks and, thus, are entitled to the shelf and EEZ.

The Secretary of UNCLOS III Drafting Committee, Mr. Nelson, also expressed the view that “cannot sustain” must mean that we are dealing with the present. Whatever may have happened centuries ago would not be relevant to the notion of what a rock is not able to sustain today. So one has to look at what is happening today, the capacity of that rock-like formation at the present time.

Indeed, the features which were not capable of sustaining human habitation or economic life of their own in the past and thus qualified to UNCLOS III Article 121(3) could subsequently develop these capacities owing to changes in economic demand, technological innovations or new human activities and therefore are now excluded from the application of that article⁷⁵. Conversely, some features which would previously have been entitled to extended maritime zones, today may fall within the definition of Article 121(3)

⁷⁵ See in this regard the opinion of Venezuela expressed during UNCLOS III: “the capacity of an island to sustain human habitation referred not only to the abstract possibility of habitation, but also to the practical situation, since the continental or insular territory of a State could be developed to suit the interest of the State concerned”. It, however added that there would need to exist e.g. “natural resources which could be exploited economically or the possibility of other uses”. Also, in its declaration upon signature of UNCLOS Iran stated: “islets situated in enclosed or 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 put to development, fall within the provisions of paragraph 2 of the Article 121 [...] and have, therefore, full effect in boundary delimitation of various maritime zones of the interested Coastal State”, *LOS Bull.* 1985, 50.

and hence may be denied such zones, e.g. guano islands⁷⁶. Human knowledge and capabilities change over time. Consequently, the application of Article 121(3) to a feature may vary over time⁷⁷.

The point relevant here, it seems, is to ascertain, under the current living standards, if the rock has the capacity or the potentials to have an economic life of its own, irrespective of whether it is or will become actually populated or not or whether the economic life actually takes place or not in the present or even in a distant future.

Once the capacity or potentials to sustain an economic life of its own, under the current standards, has been asserted, the point of how such economic life might develop or human habitation might settle in on the rock becomes moot.

What is the meaning of the capability of the island to sustain human habitation or economic life? The capacity to sustain human habitation requires much more than the capacity to host human presence or to receive, permanently or temporarily, a group of individuals, for whatever purpose.

Human habitation implies much more than the capacity to raise tent or any other accommodation or much more than hosting a scientific or weather group or even giving shelter to fishermen seasonal stay. It might also imply or presuppose amongst others, schools, entertainment space, hospital services, churches or other religious structure.

The size of the rock is an important element also. A rock whose negligible size is, for example, 500 square meters cannot be said, by the limitations dictated by its very size, to have conditions to sustain human habitation if this is to be understood as more than a mere presence of human beings.

⁷⁶ See J. Charney, *Rocks that Cannot Sustain Human Habitation*, A. J. I. L., 1999, p. 867.

⁷⁷ See Igor Karaman, *Dividing the Black Sea* in *Revue Hellenique de Droit International*, Editions Ant. N. Sakkoulas, 2005, p. 229.

The criterion of economic life of their own seems to raise similar issues. As in the case of human habitation, there are different elements that have been highlighted in scholarly writings as factors that would establish the fulfillment of this criterion.

A number of possibilities have been suggested by such writings as fulfilling this requirement. From the presence of a radio station, a light-house or other navigation aid or stations, to guano harvesting, to collecting of birds eggs, shells or turtles, to the installation of an oil platform or of other industrial complexes and to tourism potentials. In accordance with this writings the presence on a rock of any one of these resources or structures would, per se, meet the rocks requirement of the economic life criterion.

This approach seems to have been too narrow by having recourse only to a single and isolated factor. While such factor can have or represent some economic value and therefore may have an impact on the rocks' economic life, in most cases this might not be enough to meet the criterion of "economic life of their own".

It would seem that the criterion of economic life of their own is more than the existence of a given resource or the presence of a given installation of an economic nature, however important it might be.

This criterion appeals to the idea of the rock having the capacity or potentials of bearing an independent, though not necessarily self-sufficient economic life – countries economic life are hardly self-sufficient – that normally characterizes the economic life of an island proper. It might imply the potentials or capacity to develop its own sources of production, distribution and exchange in a way that, if it were to have human habitation, it would constitute the material basis that would justify the existence and development of a stable human habitation or community on the rock⁷⁸.

⁷⁸ See J. L. Jesus, *Rocks, New-born Islands, Sea Level Rise and Maritime Space*, in T. Eitel, *Negotiating for peace: liber amicorum*, Springer, 2003.

Moreover, the notion of “economic life of their own” does not necessarily exclude islands obtaining external support⁷⁹ but, as D. J. Attard argues, the words “of their own” ensure that “no state may artificially create the necessary conditions”⁸⁰.

Applying all above-said to the Serpents’ Island, the following picture arises. The island, covering 17 hectares and having no vegetation and fresh water, is currently inhabited by 100 people, mostly frontier guard servicemen with their families. Since 2003 a permanent expedition by Odessa National University has been located on the island. In addition to a helicopter platform, in 2002 a pier has been built for ships with up to 8 meters draught, and harbor construction is underway. The island is supplied with navigation equipment, including 150-year old light-house. Electric power is provided by a dual wind-diesel power station.

The Romanian side claims that Ukraine is developing the island in order to prove its “island” status (as contrary to a cliff) and it seems to be right: Ukrainian authorities have opened on the island in recent years, a post office, a bank branch⁸¹, satellite television and a hotel without sewerage but the supply of water is made through helicopters. The fact that the island does not have potable water is a strong argument that is not able to sustain human habitation. Further, Ukraine sustains that the island does not need to have tillable soil, potable water, vegetation or climate in order to be able to sustain human habitation or economic life. From Ukraine’s point of view, the island is not subject to Article 121(3) disabilities if it is able to generate profits (from exploiting hydrocarbons or even from

⁷⁹ See *Jan Mayen case, Denmark v. Norway*.

⁸⁰ See D. J. Attard, *The Exclusive Economic Zone in International Law*, Clarendon Press, Oxford, 1987.

⁸¹ As far as opening of a structural division of the Ukrainian Aval Bank is concerned, which took place on 20 September 2004, the Ministry of Foreign Affairs of Romania in the same day sent a verbal note to the Ukrainian Embassy in Bucharest expressing its “surprise” and alleging that in this way Ukraine endeavors to “artificially alter the judicial status of the Serpents’ Island, forcing, in this way a favorable solution [...] of delimitation of Romania’s and Ukraine’s maritime zones in the Black Sea”. See

<http://www.mae.ro/index.php?unde=doc&id=9619>

setting a profitable casino), which are sufficient to support the purchase of necessities from external resources⁸². Under this interpretation, it would probably be near to impossible to find a rock which would not meet at least one of the both criteria. If such arguments were to be acceptable, then the rock provision from UNCLOS III would be without any purpose⁸³.

3.5.3 The maritime frontier line

According to the 1997 Additional Agreement, the following principles and procedures, identical from either party, were proposed for negotiating an Agreement on the delimitation of the shelf and the EEZ's:

- a) The principle stated in Article 121 of the UNCLOS III as applied in the practice of States and in international jurisprudence⁸⁴;
- b) The principle of the equidistance line in areas where the coasts are adjacent and median line where the coasts are opposite;
- c) The principle of equity and the method of proportionality;
- d) The principle according to which neither of the two States shall contest the sovereignty of the other State over any part of its territory adjacent to the zone submitted to delimitation;
- e) The principle of taking into consideration the special circumstances of the area submitted to delimitation;

⁸² See Igor Karaman, *Dividing the Black Sea* in *Revue Hellenique de Droit International*, Editions Ant. N. Sakkoulas, 2005, p. 230.

⁸³ See J. L. Jesus, *Rocks, New-born Islands, Sea Level Rise and Maritime Space*, in T. Eitel, *Negotiating for peace: liber amicorum*, Springer, 2003.

⁸⁴ The Additional Agreement does not specify which exactly principle of Article 121 should be applied, since Article 121 contain two main principles – that to be applied to islands and that to be applied to "rock" islands.

- f) The refraining from exploitation of the shelf until the parties reach the agreement on its delimitation;⁸⁵

The main points of difference in the opinions of the two countries during the negotiations were the following: Ukraine held that the starting point of the beginning of the maritime delimitation must be the ending point of the land boundary between Ukraine and Romania. Romanian diplomacy rejected this proposal claiming that the resulting boundary, as proposed by Ukraine, does not correspond to the relevant provisions of the Additional Agreement that have to be applied to the case.

The other moot point was the methodology of delimitation of the shelf and the EEZs. The 1997 Additional Agreement provides for the application of the principle of equidistance line where the coasts are adjacent and the principle of median line where the coasts are opposite. The main difference in the opinions concerns Serpents' Island: Kiev suggests taking into consideration special circumstance of the island, whereas Bucharest prefers not to take this island into consideration.

In its Application to the ICJ, Romania alleged that Ukraine failed to respect the principles and procedures of the Article 4 of the Additional Agreement in force between the two countries, thus being in breach with the obligation incumbent to all subjects of law, of *bona fide* respect of the obligations assumed by international agreements⁸⁶.

⁸⁵ Article 4 of the Additional Agreement.

⁸⁶ Article IV (10) of the Application of Romania.

3.5.4 Basis of the jurisdiction of the ICJ

Neither Romania nor Ukraine have accepted the compulsory jurisdiction of the ICJ in conformity with Article 36 of its Statute⁸⁷. However, the Additional Agreement concluded by the two parties stipulates⁸⁸ that:

“If these negotiations shall not determine the conclusion of the abovementioned agreement [on the delimitation of the continental shelf and the exclusive economic zones in the Black Sea] in a reasonable period of time, but not later than 2 years since their initiation, the Government of Romania and the Government of Ukraine have agreed that the problem of delimitation of the continental shelf and the exclusive economic zones shall be solved by the UN International Court of Justice, at the request of any of the parties, provided that the Treaty on the regime of the State border between Romania and Ukraine has entered into force. However, should the International Court of Justice consider that the delay of the entering into force of the Treaty on the regime of the State border is the result of the other Party’s fault, it may examine the request concerning the delimitation of the continental shelf and the exclusive economic zones before the entering into force of this Treaty”.

From Romania’s point of view, the conditions set forth in Article 4(h) of the Agreement for invoking the jurisdiction of the ICJ are accomplished.

⁸⁷ The Statute of the International Court of Justice is available at: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

⁸⁸ Article 4(h) of the Additional Agreement

Ukraine, on the other hand, claims that even if the bilateral negotiations were initiated in 1998 and lasted six years, the negotiations of the maritime boundaries delimitation treaty started in May 2003. Therefore, from Ukraine's point of view, the negotiations on the maritime boundaries lasted only one year before Romania decided to apply to the ICJ.

The fact is that the negotiations on the Agreement for the delimitation of the continental shelf and the exclusive economic zones of Romania and Ukraine began in 1998 and have been lasting six years thus "exceeding by far the required reasonable period". At the same time, the treaty referred to in the Additional Agreement – the Treaty between Romania and Ukraine on the Romanian-Ukrainian State Border's Regime, Collaboration and Mutual Assistance in Border Issues – was signed at Chernovtsy, on the 17th of June 2003 and entered into force on the 27th of May 2004, the date of exchange of the instruments of ratification by the two countries⁸⁹. Therefore, it seems that the two conditions have been fulfilled.

3.6 THE FINALIZATION OF THE CASE

3.6.1 The proceedings before the ICJ

The proceedings before the ICJ, having as subject the delimitation of the continental shelf and exclusive economic zones of Romania and Ukraine, were initiated on 16 September 2004, when this international court was seized by Romania.

⁸⁹ Article III (5) of the Application of Romania.

On the occasion of a visit to Kiev of the minister of foreign affairs of Romania, on 22 March 2005, it was decided for the bilateral Romanian-Ukrainian talks on the delimitation of the maritime spaces to be resumed, in parallel with the proceedings in front of the ICJ, without affecting these proceedings in any way. The same conclusion was also reached on the occasion of the official meetings that took place between the President of Romania, Mr. Traian Basescu, and the President of Ukraine, Mr. Viktor Youschenko (Bucharest, 21 April 2005 and Kiev, 2 February 2006).

Bilateral discussions took place in parallel with the proceedings before the ICJ – four reunions at expert level took place at Kiev, Constanta and Bucharest. The Romanian and Ukrainian delegations participating to these rounds of negotiations reaffirmed their confidence in the capacity of the ICJ to solve the problem of the delimitation of the maritime spaces of the two States in an equitable and impartial way, reiterating the position according to which the bilateral talks should not in any way prejudice the proceedings before the ICJ.

By an Order dated 19 November 2004, the International Court of Justice fixed 19 August 2005 as the time-limit for the filing of Romania's Memorial and 19 May 2006 as the time-limit for the filing of Ukraine's Counter-Memorial.

On 15 August 2005 the Romanian Agent, filed, at the Registry of the Court, Romania's Memorial, comprising the Romania's position. The Memorial encloses a series of annexes, including documents and maps, which represent pieces of evidence supporting the argumentation of the Romanian Party.

On 16 May 2006 the Counter-Memorial of the Ukrainian party was filed with the Registry of the ICJ – an ordinary stage of the proceedings, within the written proceedings before this Court. By an Order of the Court, issued on 3 July 2006, the deadlines for the filing of the Romanian Reply (22 December 2006), respectively, the Ukrainian Rejoinder (15 June 2007) were fixed.

On 19 December 2006, the Reply of Romania in this case was filed with the Registry of the ICJ, document which includes the counter-argumentation of the Romanian party as to the contentions of the Ukrainian party in its Counter-Memorial, as well as a reiteration and consolidation of the position expressed by the Romanian party in its Memorial. By an Order of 8 June 2007 the Court extended the time-limit for the filing by Ukraine of the Rejoinder until 6 July 2007. The Rejoinder was filed by the Ukrainian party with the Registry of the ICJ on 5 July 2007.

According to Article 53(2) of the Rules of Procedure of the Court⁹⁰, the contents of the Memorial, of the Counter-Memorial and of other documents filed by the Parties are confidential, until the opening of the oral proceedings, when the Court may decide, after ascertaining the views of the Parties, to make them accessible to the public.

During the period 2-19 September 2008, the public hearings of the parties are to take place, according to a press release issued by the ICJ on 24 July 2008. This stage represents the oral phase of the proceedings and consists in the public presentation of the pleadings which include the legal argumentation of two parties before the ICJ judges, at the Peace Place. The hearings are to take place during two rounds, as follows: between 2 and 5 September 2008 – the first round of oral argument of Romania, as applicant; between 9 and 12 September 2008 – the first round of oral argument of Ukraine, as respondent; between 15 and 16 September 2008 – Romania's second round of oral argument and its conclusions as to the solution for delimitation it deems equitable and in accordance with international law; between 18 and 19 September 2008 – Ukraine's second round of oral argument and its conclusions⁹¹.

⁹⁰The *Rules of Procedure of the International Court of Justice* are available at: <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>

⁹¹ See press releases ROMANIA-Ministry of Foreign Affairs website: http://www.mae.ro/poze_editare/2008.07.29_CaseRvU.pdf

3.6.2 Possible settlement of the dispute

Assuming that the ICJ finds its jurisdiction in this dispute, the following outcome may be expected. If the Serpents' Island were to be considered a "rock" under UNCLOS III Article 121(3) then according to the Convention it could not generate the EEZ and have a shelf. It would only be entitled to have a territorial sea and contiguous zone⁹². In general, the islands are "special" or "relevant" circumstances to be considered in each act of delimitation effected either by States themselves or with a help of a third party, such as the ICJ, and depending on the peculiarity of a given situation, considerations of equity may lead to giving islands full, partial or even no effect in determining entitlement to maritime areas.

However, in practice of States even rocks are often given effect during maritime delimitation, leaving alone fully-fledged islands. For example Aves Island was given full effect in the US/Venezuela Maritime Boundary Agreement despite its very small size and lack of habitation. Furthermore, most States do not distinct the islands from "rocks" according to UNCLOS III Article 121(3) and claim the shelf and the EEZ for all their rocks and islands. Examples include the UK (with regard to Rockall Island), Japan (with regard to Okinotorishima), the US (with regard to Hawaiian and many other uninhabited islands along the equator), France (with regard to Clipperton and other islands), Norway (with regard to Jan Mayen), Yemen, Nicaragua, Sri Lanka etc.

The practice of international courts, tribunals and other third-party dispute settlement bodies is less uniform. On the one hand, even alleged Article 121(3) "rocks" are taken into account in delimiting the maritime boundaries. On the other hand, even though the islands

⁹² This conclusion can be reached by the negative implication of UNCLOS III Article 121(3).

are not Article 121(3) “rocks”, they may well be either ignored or substantially discounted if their use would have an inequitable distorting effect in light of their size and location. Even if such islands are not discounted their actual influence on the delimitation is often minimal. For example in the *North Sea Continental Shelf* the ICJ opined that delimitation should “ignor[e] the presence of islets, rocks [...] [that have] disproportionately distorting effect”⁹³. In the *Anglo – French Arbitration*, the *Tunisia/Libya* case, the *Libya/Malta* case, the *Golf of Maine* case, and the *Guinea/Guinea-Bissau Arbitration* the ruling was similar to that of the ICJ in the *North Sea Continental Shelf* case. These all decisions cannot, however, be said to have reached that level of uniformity to become rule of law. Although there have as well been some other instances where the issue similar to that between Ukraine and Romania was directly or implicitly involved⁹⁴, there has not so far been any direct third-party international review of whether a particular feature is a UNCLOS III Article 121(3) “rock” or is an Article 121(2) “island”. Therefore, the Romanian – Ukrainian dispute may be the first case where the question of whether or not the island constitutes a “rock” with all the following implications under UNCLOS will be examined by the main international adjudicative forum⁹⁵.

In conclusion, the decision of the ICJ in this case is not that easy to predict and may be unexpected for either party.

⁹³ See *ICJ Reports* 1969, 36, paragraph 57.

⁹⁴ In *Eritrea/Yemen Arbitration*, the Tribunal was asked to delimit the southern areas between the small Eritrean islands and the Yemeni mid-sea islands. Due to the narrow distances involved (the combined territorial seas of each State in this area were no more than five miles wide), the Tribunal did not need to consider whether the particular features were rocks or islands under UNCLOS III Article 121. If wider distances were at stake, then the issue would probably have arisen. See the *Eritrea/Yemen Arbitration* (Phase One: Territorial Sovereignty and Scope of the Dispute), 114 *ILR* 1, 241-242, paragraphs 467, 493.

In the *Jan Mayen* case, Denmark argued that Jan Mayen was not capable of sustaining human habitation or economic life.

⁹⁵ See Igor Karaman, *Dividing the Black Sea in Revue Hellenique de Droit International*, Editions Ant. N. Sakkoulas, 2005, p. 230

4 CONCLUSIONS

The UNCLOS contains provision for an island in relation to the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf. For practical purposes, the area of an island may be negligible, but it can have a considerable area of EEZ and continental shelf. A circular shaped island, for instance, having a 7-mile radius will be 154 square miles by way of EEZ, and more seabed and subsoil if the continental shelf extends beyond 200 nautical miles.

In the view of the development of science and technology, it would not be difficult for a State – particularly for a developed State – to make any “island” or “rock” habitable. The regime for islands provided by Article 121 appears to be a recipe for confusion and conflict⁹⁶.

I have also examined the Romania v. Ukraine case. The main point of difference between the two countries is the Serpents’ Island situated directly in the area where the common maritime border should be drawn. Although Romania does not contest the Ukrainian title over the island, it is disputing the status of the island, alleging that it is the UNCLOS III Article 121(3) “rock” and therefore it does not have a capacity to generate the maritime zones which can affect the maritime delimitation. These allegations of Romania

⁹⁶ See M. Habibur Rahman, *The Impact of the Law of the Sea Convention on the Regime for Islands: Problems for the Coastal State in Asserting Claims to the “New-Born” Islands in Maritime Zones* in *International and Comparative Law Quarterly*, The British Institute of International and Comparative Law, 1985, p. 369.

seem to be founded since the island is not capable to sustain human habitation and/or economic life of its own.

It is not clear if the ICJ would be faster and cheaper than the bilateral negotiations on the same issue could have been. In any event, whichever means of dispute settlements turns out to be successful in this case, the latter will hopefully be resolved to the mutual satisfaction of good neighbors Romania and Ukraine.

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Annex

Map with the Romanian Ukrainian border:

