NOTES AND COMMENTS

ROCKS THAT CANNOT SUSTAIN HUMAN HABITATION

I. INTRODUCTION

The capacity of islands to generate maritime zones and to influence the location of international maritime boundaries was an international legal concern long before a laconic provision in the 1982 Convention on the Law of the Sea took cognizance of a particular category of islands, "[r]ocks which cannot sustain human habitation or economic life of their own."[1] Questions abound about the meaning of the provision and its consequences for many specific features around the globe. Disputes have arisen in the East Asian region in regard to features in the South China Sea (Pratas Reef, the Paracel Islands, Scarborough Reef and the Spratly Islands), the East China Sea (the Senkaku/Dioayuta/Tioa-yu-tai Islands, Danjo Gunto and certain of the Ryukyu Islands), and the Sea of Japan/East Sea (Liancort Rocks/Tok-do/Takeshima Islands).[2] The problem can be found in the Middle East and the Mediterranean Sea. It may arise in the Persian Gulf (Abu Musa, the Tumb Islands and the Hawar Islands), the Aegean Sea and the Red Sea (the Hanish/Zuqar Islands, Jabal al-Tayr and Zubayr Islands, the Mohabbakahs, the Haycocks and South West Rocks). The Caribbean Sea (Aves Island), among others, also has its share of such features. In the North Atlantic Ocean, Rockall has been controversial. Although the first legal issue to arise is normally the question of national sovereignty, most disputes over these features are actuated by questions regarding their legal effect on zones of national maritime jurisdiction and the delimitation of international maritime boundaries.

To understand the role of rocks in maritime delimitation, one must begin by analyzing those parts of the LOS Convention that concern islands and the rules for identifying the baselines from which the various maritime zones are calculated. The default rules for baselines are found in Articles 3–16,[3] which, with some modifications, reproduce articles found in the 1958 Convention on the Territorial Sea and the Contiguous Zone.[4] The normal baseline is formed by the "low-water line along the coast"[5] and the closing lines of bays and river mouths.[6] Under certain conditions, the coastal state may establish systems of

[1] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Art. 121(3), 1833 UNTS 3 (Arabic), 203 (Chinese), 397 (English), and 1834 UNTS 4 (French), 179 (Russian), 371 (Spanish), *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983) (entered into force Nov. 16, 1994) [hereinafter LOS Convention]. The documents and summaries of the debates at the Third United Nations Conference on the Law of the Sea, as corrected by participating delegations, are published in the 17-volume set, THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, UN Sales Nos. E.75.V.3–5, E.75.V.10, E.76.V.8, E.77.V.2, E.78.V3–4, E.79.V3–4, E.80.V.6, E.80.V.12, E.81.V.5, E.82.V.2, E.83,V.4, and E.84.V.2–3 (1974–82) [hereinafter UNCLOS III OR]. Those records relating to islands are collected in UNITED NATIONS OFFICE FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, THE LAW OF THE SEA: RÉGIME OF ISLANDS, UN Sales No. E.87.V.II (1988) [hereinafter RÉGIME OF ISLANDS].

[2] *See* Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AJIL 724 (1995).

[3] LOS Convention, *supra* note 1.

[4] Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 UST 1606, 516 UNTS 205 (entered into force Sept. 10, 1964).

[5] LOS Convention, *supra* note 1, Art. 5; Convention on the Territorial Sea and the Contiguous Zone, *supra* note 4, Art. 3. The LOS Convention adds the low-water line of fringing reefs. LOS Convention, *supra*, Art. 6.

[6] LOS Convention, *supra* note 1, Arts. 9, 10.

straight baselines or archipelagic baselines to substitute for the normal baseline to locate the limits of the various maritime zones.[7]

An island is defined in the 1958 and 1982 Conventions as "a naturally formed area of land, surrounded by water, which is above water at high tide."[8] Article 121(2) of the 1982 LOS Convention expressly provides that islands are entitled to all maritime zones: a territorial sea, a contiguous zone, an exclusive economic zone and a continental shelf.[9] Unlike the 1958 Territorial Sea Convention, however, the LOS Convention deals, in Article 121, with maritime zones to which rocks may be entitled directly and indirectly.[10]

Article 121 of the LOS Convention states in its entirety:

Régime of islands

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

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

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

A rock referred to in Article 121(3) is an island as defined in paragraph 1 of this article; the title, "Régime of islands," denotes that all the features addressed in the article are islands, including rocks in paragraph 3. Since Article 121(2) expressly recognizes the entitlement of islands to all four zones of maritime jurisdiction mentioned above (except as precluded by Article 121(3), the subsection on rocks), the exception regarding the entitlement of rocks to certain zones would have been unnecessary if such rocks were not islands. Article 121(3) denies only an exclusive economic zone and a continental shelf to rocks; it therefore implies that rocks otherwise qualifying as islands (because they are above water at high tide) are entitled to the remaining maritime jurisdiction—a territorial sea and a contiguous zone.[11]

Thus interpreted, Article 121(3) deviates from previously established international law,[12] especially in regard to the regime of the continental shelf as set out in the 1958 Convention on the Continental Shelf.[13] Article 1 of that Convention entitled all islands to a continental

[7] *Id.*, Arts. 7, 47, 48.

[8] *Id.*, Art. 121(1); Convention on the Territorial Sea and the Contiguous Zone, *supra* note 4, Art. 10(1).

[9] LOS Convention, *supra* note 1, Art. 121(2). *See also* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 4, Art. 10(2). Thus, a rock that has an elevation above high tide is part of the normal baseline unless another article of the Convention denies it that role. A feature surrounded by water at low tide but submerged at high tide is a low-tide elevation, which, pursuant to Article 13, is denied the role of a baseline if it is located beyond the 12-nautical-mile territorial sea generated from the normal baseline of a mainland coast or an island coast. LOS Convention, *supra* note 1, Art. 13.

[10] LOS Convention, *supra* note 1, Art. 121, especially paras. 2, 3.

[11] This view is at least implicit in the recent *Eritrea/Yemen* arbitral award in regard to the Mohabbakahs—"four rocky islets which amount to little more than navigational hazards." Award in the First Stage of the Proceedings (Eritrea/Yemen), Territorial Sovereignty and Scope of the Dispute, para. 4 (Oct. 6, 1998) (visited May 13, 1999) <http://www.euronet.nl/users/pca/> and (visited May 12, 1999) <http://www-ibru.dur.ac.uk/links.html>. *See also* HARITINI DIPLA, LE RÉGIME JURIDIQUE DES ÎLES DANS LE DROIT INTERNATIONAL DE LA MER 48–49 (1984). In the *Anglo/French* arbitration, Eddystone Rock was used as a base point by the tribunal to delimit the equidistant line between the United Kingdom and France even though its status as an island or a low-tide elevation was in question. France was found to have accepted Eddystone Rock as a base point for the delimitation of the UK fishery limits. Delimitation of the Continental Shelf (UK/Fr.), paras. 134–44, 18 R.I.A.A. 3, 70–74 (June 30, 1977), *reprinted in* 54 ILR 6, 79–83, 18 ILM 398, 427, 433–35 (1979) [hereinafter Anglo/French arb.]. *See also* Continental Shelf (Tunis./Libya), 1982 ICJ REP. 18, 89, para. 129 (Feb. 24) [hereinafter Tunisia/Libya case].

[12] *See* Maria Silvana Fusillo, *The Legal Régime of Uninhabited "Rocks" Lacking an Economic Life of Their Own*, 4 ITALIAN Y.B. INT'L L. 47, 47–49 (1978–79); DIPLA, *supra* note 11, at 41, 42, 49.

[13] Convention on the Continental Shelf, Apr. 29, 1958, 15 UST 471, 499 UNTS 311 (entered into force June 10, 1964).

shelf, since they were granted a territorial sea under Article 10 of the companion 1958 Convention on the Territorial Sea and the Contiguous Zone. No exceptions were made for certain types of islands, such as those now encompassed by Article 121(3) of the 1982 LOS Convention. For entitlement purposes, both the continental shelf regime and the regime of islands found in the 1958 Conventions were considered to be codifications of the existing general international law.[14]

Because Article 121(3) states only that rocks are not entitled to certain zones but does not expressly provide that rocks are entitled to a territorial sea or a contiguous zone, one might argue that this question was left unresolved. But that view is hard to sustain in the face of the categorical definition of islands in Article 121(1) exclusively on the basis of elevation.[15] The question focused on by the debate on Article 121 at the Third United Nations Conference on the Law of the Sea was only whether rocks falling within the classification of islands should be especially disabled for other maritime zones. A broader application of Article 121(3) would be unsupportable. Some delegations conceived of the issue as a choice between preserving an expansive area for maritime common spaces beyond national jurisdiction for the benefit of all humankind and recognizing the claims of coastal states to maximized zones of national jurisdiction.[16] Other delegations stated that such small features should play no role in international maritime boundary delimitations.[17] The consensus that emerged was the limited text of Article 121(3).

Some observers may wish to invoke a teleological approach to the scope of Article 121(3) in order to reach a preferred outcome such as maximizing the common spaces of the oceans. But it is the drafters who set the objectives. The Convention was the product of an agreement between states and their goals must perforce carry great weight. Doubts surfaced during the negotiations and continue to this day regarding the regime under the Convention for the common maritime spaces of the deep seabed. Many states clearly seek to promote optimal economic development through technological innovation and economic risk taking. An approach that encourages this goal would be designed to reward states that develop offshore features over which they have sovereignty. Teleologically, this policy objective may be a more reliable one than preserving the oceans' common spaces from inclusion in maritime zones normally allotted to coastal states. In fact, considering the 1982 LOS Convention as a whole, it is plain that the negotiators favored the interests of the coastal states by expanding their maritime areas to new zones and limits set out in the text. Within these areas the interests of other states were protected by specific functional provisions that govern, e.g., innocent passage in the territorial sea, transit passage in certain

[14] Fiji and Cyprus argued this point at UNCLOS III. *See* 2 UNCLOS III OR, *supra* note 1, at 283, para. 50, RÉGIME OF ISLANDS, *supra* note 1, at 58 (Fiji); 2 UNCLOS III OR, *supra*, at 287, para. 18, RÉGIME OF ISLANDS, *supra*, at 64 (Cyprus). There was some difference in the jurisprudence regarding the rules on international maritime boundary delimitation. *See* North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 33–45, paras. 48–81 (Feb. 20), where the Court found that the rule on continental shelf delimitation in the Continental Shelf Convention, *supra* note 13, Art. 6, did not reflect existing general international law. Subsequently, the difference was eliminated. *See* Anglo/French arb., *supra* note 11, paras. 65–69, 18 R.I.A.A. at 43–45, 54 ILR at 54–55, 18 ILM at 420–21; Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 ICJ REP. 38, 58–59, 67–69, paras. 46, 65–68 (June 14) [hereinafter Jan Mayen case]. *See also* Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AJIL 227, 244–47 (1994).

[15] Certainly, the Article 13 rule on the role of low-tide elevations includes rocks that only meet the elevation requirement. Since the Convention carries a binary classification system based on elevation, rocks whose elevation is permanently above high tide fall within the "Régime of islands."

[16] Statements in favor of the commons included 2 UNCLOS III OR, *supra* note 1, at 285, paras. 72, 73, RÉGIME OF ISLANDS, *supra* note 1, at 61 (Singapore); 16 UNCLOS III OR, *supra* note 1, at 106, para. 8, RÉGIME OF ISLANDS, *supra*, at 107 (Denmark); 16 UNCLOS III OR, *supra*, at 106, para. 31, RÉGIME OF ISLANDS, *supra*, at 107 (Trinidad and Tobago). Island states argued in favor of full zonal parity for their features. *See* 17 UNCLOS III OR, *supra* note 1, at 70, para. 70, RÉGIME OF ISLANDS, *supra*, at 110 (Cyprus).

[17] *See* 14 UNCLOS III OR, *supra* note 1, at 77, para. 29, RÉGIME OF ISLANDS, *supra* note 1, at 99 (Dominica); 17 UNCLOS III OR, *supra* note 1, at 72, para. 88, RÉGIME OF ISLANDS, *supra*, at 72 (Romania).

straits, archipelagic sea-lanes passage, and high seas rights in the exclusive economic zone.[18] Thus, while a teleological argument in favor of maximizing the area of the oceans' commons can be made, it is refuted by decisions of the conference to maximize the extent of coastal states' maritime jurisdiction (especially over the natural resources of the continental margin and marine living resources), subject to limited qualifications. These decisions gave coastal states the most valuable mineral and living resources of the seas known at that time. The resources of the common spaces were mostly unproven and assumed to be less valuable.

It follows that 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 ocean. (For the exclusive economic zone, the area around the smallest features would be composed of a circle with a radius of 200 nautical miles; the continental shelf could extend even further seaward.[19]) In fact, there are few circumstances in which rocks would give rise to such claims. More commonly, these features are located in areas subject to conflicting coastal state claims. In those situations, the role that an Article 121(3) rock might play remains murky.

When scholars, government officials and the news media contemplate sovereignty disputes over small islands or rocks, they tend to assume that, once sovereignty is determined, the victor will automatically fall heir to vast areas of maritime space to the detriment of conflicting claimants. This assumption has fueled serious political-military confrontations, especially in the East Asian regions of the South China Sea, the East China Sea and the Sea of Japan/East Sea.[20]

This assumption, however, is misplaced with respect to a true Article 121(3) rock located in the middle of the ocean, beyond the continental shelf or exclusive economic zone of any other feature, for Article 121(3) allows only a 12-nautical-mile territorial sea and a 12-nautical-mile contiguous zone seaward. But if such a rock is located within an area that might be attributed to the continental shelf or exclusive economic zone of another feature belonging to the same sovereign, would Article 121(3) deny it any influence on the delimitation of international maritime boundaries? If not, what influence might it have? In my opinion, an Article 121(3) rock that lies within a continental shelf or exclusive economic zone generated from a baseline of a non–Article 121(3) feature is a relevant circumstance to be considered in the delimitation of the continental shelf or exclusive economic zone boundary. Practically, however, the influence of that circumstance should be minimal, if any. The result would be the same if claims of expansive coastal state jurisdiction were made to maritime common spaces on the basis of an Article 121(3) rock within zones generated from the mainland or islands.

II. DEFINING A "ROCK" UNDER ARTICLE 121(3)

Article 121(3) does not disable all rocks from an exclusive economic zone or continental shelf, but only those that fail the test of sustaining human habitation or economic life of their own. Rocks that do not fail this test are entitled to all four maritime zones. On the other hand, classifying a feature as an Article 121(3) rock will significantly affect the entitlements of the state with sovereignty over it.[21]

[18] LOS Convention, *supra* note 1, Arts. 17–32, 34–45, 49, 52–54, 58.

[19] *Id.*, Arts. 57, 76.

[20] *See* Charney, *supra* note 2; MARITIME BOUNDARY ISSUES AND ISLANDS DISPUTES IN THE EAST ASIAN REGION: PROCEEDINGS OF THE 1ST ANNUAL CONFERENCE (Kim Young-Koo ed., 1998); INTERNATIONAL LAW CONFERENCE ON THE DISPUTE OVER DIAOYU/SENKAKU ISLAND (Taiwan Law Society & Taiwan Institute of International Law eds., 1997).

[21] Consequently, upon joining the LOS Convention, the United Kingdom ordered that Rockall not be used as a base point for defining its 200-nautical-mile fishery limits in the open seas. Fishery Limits Order, S.I. 1997, No. 1750. Rockall is a rock feature that qualifies as an island under Article 121(1). It is located in the North Atlantic

As an island, an Article 121(3) rock must have an elevation above high tide in its natural state.[22] Thus, artificially wrought changes in its elevation will not entitle a rock of a naturally lower elevation to serve as a base point to generate the various maritime zones (unless it qualifies, in its natural state, as a low-tide elevation, in which case it may have a limited effect on the baseline). On the other hand, if in its natural state the feature is an island under paragraph 1 of Article 121, the text of paragraph 3 does not specify that the conditions set out there must also exist naturally.

Such a determination is not irrevocably tied to the time when the rock was simply in its natural state. It depends on the socioeconomic circumstances at the moment of the claim, because "economic life" and "human habitation" are directly linked to human activities and developments. These may vary over time through changes in the value of resources and human capacity to inhabit or economically develop the area, such as by constructing housing and other facilities. If, at the moment of the claim, the feature can sustain human habitation or is capable of having an economic life of its own, it will not fall within Article 121(3). Ocean features that were not capable of sustaining human habitation or did not have an economic life in the past, but subsequently developed those capabilities owing to changes in economic demand, technological innovations or new human activities, would also not be Article 121(3) rocks. Conversely, some features would previously have been entitled to extended maritime zones but today may fall within the Article 121(3) definition and hence would be denied such zones, e.g., guano islands. The possibility that the normative status of these features might change will continue into the future.[23] Several states asserted at the UNCLOS III negotiations that features whose resources, if exploited, would make them economically viable would then be entitled to a continental shelf and an exclusive economic zone.[24] Implicit in those statements is the recognition that human knowledge and capabilities do change over time. Consequently, the application of Article

Ocean far from any other island or mainland, about 200 nautical miles west of the Hebrides. Its small surface area consists of 624 square meters (0.000241 square nautical miles) and is uninhabited. The United Kingdom claims sovereignty over the feature and prior to issuing the Fishery Limits Order had asserted the right to use Rockall to delimit its extended maritime zones. If used, the feature might be relevant to the international maritime boundaries between the United Kingdom and the Republic of Ireland, Denmark (Faeroe Islands) and Iceland. The order marks the United Kingdom's retreat from the use of Rockall for any of these purposes. *See generally* DIPLA, *supra* note 11, at 41, 42, 49; James H. Rodgers, *The Continental Shelf of Ireland: The Law and Politics of Delimitation*, 3 UCLA J. INT'L L. & FOREIGN AFF. 129, 140–41 (1998); E. D. Brown, *Rockall and the Limits of National Jurisdiction of the UK—Part 2*, 2 MARINE POL'Y 275, 289–90 (1978); J. R. V. PRESCOTT, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 328–29 (1985).

[22] "An island is a *naturally* formed area of land, surrounded by water, which is above water at high tide." LOS Convention, *supra* note 1, Art. 121(1) (emphasis added). *See also* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 4, Art. 10(1).

[23] This is consistent with the ambulatory nature of the normal baseline. *See infra* note 25.

[24] Denmark, however, spoke of "islets and rocks which offered no real possibility for economic life and were situated far from the continental land mass." 2 UNCLOS III OR, *supra* note 1, at 279, para. 5, RÉGIME OF ISLANDS, *supra* note 1, at 55. But the United Kingdom suggested that it would be unfair to deny zones to a feature that had the potential for development. 2 UNCLOS III OR, *supra*, at 288, para. 36, RÉGIME OF ISLANDS, *supra*, at 66. Venezuela made a similar observation. It also considered that "economic life of their own" did not require "complete self-sufficiency, but the existence of natural resources which could be exploited economically or the possibility of other uses." 14 UNCLOS III OR, *supra* note 1, at 21, para. 18, RÉGIME OF ISLANDS, *supra*, at 97. In a declaration made at signature, Iran addressed uninhabited islands in semienclosed seas. According to Iran, if they

> potentially can sustain human habitation or economic life of their own but, due to climatic conditions, resource restriction or other limitations have not yet been put to development, [they] fall within the provisions of paragraph 2 of article 121 . . . and have, therefore, full effect in boundary delimitation of various maritime zones of the interested coastal States.

OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR THE LAW OF THE SEA, THE LAW OF THE SEA, STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 17, 18, UN Sales No. E.85.V.5 (1985), RÉGIME OF ISLANDS, *supra*, at 113. For a study of Article 121(3), see Barbara Kwiatkowska & Alfred H. A. Soons, *Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own*, 21 NETH. Y.B. INT'L L. 139 (1990).

121(3) to a feature may vary over time, just as an ambulatory baseline may move in response to geographical changes.[25]

Article 121(3) uses the word "or" between "human habitation" and "economic life of their own." Earlier versions of this provision used "and."[26] This change supports the view that a feature does not need both human habitation and an economic life of its own. Only one of these qualifications must be met to remove the feature from the restrictions of Article 121(3).

The *travaux préparatoires* also show that human habitation does not require that people reside permanently on the feature or that the economic life be capable of sustaining a human being throughout the year. The phrase seems merely to require proof that the rock actually has some capacity for human habitation or economic value for society. Island states therefore argued during the negotiations that small offshore features should be considered appropriate for generating more than the territorial sea (and its associated contiguous zone), despite the fact that they were generally uninhabited, as long as their offshore waters were regularly used for fishing or they were occupied by people for shelter or used as temporary bases for seasonal fishing. These states based their argument on the ground that such features and their offshore waters contributed to the islands' resources, just as large landmasses provide resources for continental states.[27] The contention here, which was not directly contravened, is that "economic life" may include exploitation of the living or mineral resources found in the territorial sea. As noted above, even an Article 121(3)

[25] *See* United States v. Alaska, 521 U.S. 1, 31 (1997); United States v. Louisiana, 394 U.S. 1, 5 (1969) (Texas Boundary Case); Louisiana Boundary Case, 394 U.S. 11, 32–34 (1969); United States v. Louisiana, 389 U.S. 155, 162 n.2 (1967) (Stewart, J., concurring in result); United States v. Louisiana, 382 U.S. 288, 290 (1965); United States v. California, 381 U.S. 139, 177 (1965). One might argue that the ambulatory baselines resulting from geological changes are different in kind and likely significance from those that result from reclassifying an island as an Article 121(3) rock. Such a reclassification would determine whether the feature is entitled to an exclusive economic zone and a continental shelf. Arguments based on the values of stability, and protection against overreaching into the common spaces by coastal states, would support this interpretation. On the other hand, similar category shifts are permitted for low-tide elevations in the cases of systems of straight baselines and archipelagic baselines, depending upon whether "lighthouses or similar installations which are permanently above sea level have been built on them." LOS Convention, *supra* note 1, Arts. 7(4), 47(4). Furthermore, when greater stability has been desired, states have addressed that objective explicitly by establishing special rules for systems of straight baselines (especially such baselines around deltas) and archipelagic baselines. *Id.*, Arts. 7, 47. On this basis, one must conclude that unless such stability was expressly built into the provision on rocks (e.g., by freezing the classification of such features as of a date certain), Article 121(3) should be interpreted to be consistent with the ambulatory nature of baselines in general.

[26] Romania: draft articles on delimitation of marine and ocean space between adjacent and opposite neighboring States and various aspects involved (July 23, 1974), Art. 2(3), 3 UNCLOS III OR, *supra* note 1, at 195, RÉGIME OF ISLANDS, *supra* note 1, at 30; Statement of activities of the Conference during its first and second sessions prepared by the Rapporteur-general: Mr. Kenneth O. Rattray (Jamaica) (Oct. 17, 1974), Working paper of the Second Committee: Main Trends, Provision 243, Formula A, para. 3, 3 UNCLOS III OR, *supra*, at 93, 141, RÉGIME OF ISLANDS, *supra*, at 78 [hereinafter 2d Comm. Working Paper]. The word "or" began to be used only during the third session of the conference in the Informal Single Negotiating Text. Informal single negotiating text, Text presented by the Chairman of the Second Committee (May 7, 1975), Art. 132(3), 4 UNCLOS III OR, *supra* note 1, at 137, 171, RÉGIME OF ISLANDS, *supra*, at 83 [hereinafter ISNT]. It was carried forward in the fourth session into the Revised Single Negotiating Text without comment. Revised single negotiating text, Text presented by the Chairman of the Second Committee (May 6, 1976), Art. 128(3), 5 UNCLOS III OR, *supra* note 1, at 125, 172, RÉGIME OF ISLANDS, *supra*, at 85 [hereinafter RSNT]. In the ninth session, Dominica appeared to suggest that "or" should be interpreted as "and." 14 UNCLOS III OR, *supra* note 1, at 77, para. 29, RÉGIME OF ISLANDS, *supra*, at 99.

[27] *See* 1 UNCLOS III OR, *supra* note 1, at 71, para. 4, RÉGIME OF ISLANDS, *supra* note 1, at 23 (Trinidad and Tobago); 1 UNCLOS III OR, *supra*, at 84, paras. 65, 66, 69, RÉGIME OF ISLANDS, *supra*, at 23 (Western Samoa); 1 UNCLOS III OR, *supra*, at 141, paras. 25, 27, RÉGIME OF ISLANDS, *supra*, at 25 (Netherlands); 1 UNCLOS III OR, *supra*, at 175, para. 40, RÉGIME OF ISLANDS, *supra*, at 27 (Cyprus); 1 UNCLOS III OR, *supra*, at 200, para. 25, RÉGIME OF ISLANDS, *supra*, at 28 (New Zealand); 2 UNCLOS III OR, *supra* note 1, at 278–79, paras. 69–72, RÉGIME OF ISLANDS, *supra*, at 37 (New Zealand); 2 UNCLOS III OR, *supra*, at 190, paras. 46, 47, RÉGIME OF ISLANDS, *supra*, at 39 (Tonga); 2 UNCLOS III OR, *supra*, at 176–77, para. 88, RÉGIME OF ISLANDS, *supra*, at 52 (Cyprus); 2 UNCLOS III OR, *supra*, at 89, para. 27, RÉGIME OF ISLANDS, *supra*, at 53 (Greece); 2 UNCLOS III OR, *supra*, at 89, para. 37, RÉGIME OF ISLANDS, *supra*, at 53 (Iceland); 2 UNCLOS III OR, *supra*, at 283, paras. 48–51, RÉGIME OF ISLANDS, *supra*, at 58 (Fiji); 2 UNCLOS III OR, *supra*, at 288, paras. 34–41, RÉGIME OF ISLANDS, *supra*, at 66 (United Kingdom); Statement by the Chairman of the Joint Committee of the Congress of Micronesia submitted on behalf of the Congress by the United States of America (Aug. 27, 1974), 3 UNCLOS III OR, *supra* note 1, at 84, RÉGIME OF ISLANDS, *supra*, at 28, 29.

feature has the right to a territorial sea and, since sovereignty over the island includes the territorial sea and its natural resources, those resources must be attributed to the feature for the purposes of this article.[28]

The *travaux préparatoires* further show that terms such as "islets" and "small islands" were originally used to define the features that would fall within the provision that ultimately became Article 121(3). Some delegates contended that islets of less than 1 square kilometer, or no larger than a "pinhead," should not be entitled to any maritime areas. Others claimed that islands of less than 10 square kilometers should not be entitled to maritime areas other than a 12-nautical-mile territorial sea.[29] However, the ultimate redaction of Article 121(3) seems to apply to an even narrower range of small features than these—only "rocks"[30] that cannot sustain human habitation *or* have an economic life of their own.

Critical to the identification of an Article 121(3) feature is the meaning of the term "rocks." No definition is found either in the Convention or in the *travaux préparatoires.* Consequently, Venezuela suggested that the term had not been adequately defined.[31] This problem becomes clear if one examines the various definitions in general dictionaries and those used by geographers and geologists.[32] None of them point toward an objective test for

[28] The argument might even be made that the use of an island as a base for the exploitation of resources further offshore would be sufficient to establish an "economic life of its own." Since the right to such resources beyond the territorial sea is the crux of the issue, however, these resources probably should not be taken into account. By definition, such features do not generate their own rights to resources beyond the territorial sea.

[29] *See* 2 UNCLOS III OR, *supra* note 1, at 280, para. 17, RÉGIME OF ISLANDS, *supra* note 1, at 55 (Colombia); 2 UNCLOS III OR, *supra*, at 279, para. 5, RÉGIME OF ISLANDS, *supra*, at 55 (Denmark); 2d Comm. Working Paper, *supra* note 26, Main Trends, Provision 239, Formula C, at 140, RÉGIME OF ISLANDS, *supra*, at 73; 2d Comm. Working Paper, *supra*, Main Trends, Provision 243, Formula C, at 142, RÉGIME OF ISLANDS, *supra*, at 78; Romania: draft articles on definition of and régime applicable to islets and islands similar to islets (Aug. 12, 1974), Art. 1(2), 3 UNCLOS III OR, *supra* note 1, at 228, 228, RÉGIME OF ISLANDS, *supra*, at 40. It was also suggested that the island within the EEZ of a state must be one-tenth of the surface of the state in order to generate its own EEZ. Turkey: draft articles on enclosed and semi-enclosed seas (Aug. 13, 1974), Art. 3(2), 3 UNCLOS III OR, *supra*, at 230, RÉGIME OF ISLANDS, *supra*, at 43; 2d Comm. Working Paper, *supra*, Main Trends, Provision 241, Formula D, para. 1, RÉGIME OF ISLANDS, *supra*, at 75. A primary concern seemed to be that midocean islets might generate huge areas of ocean space. 2 UNCLOS III OR, *supra*, at 279, paras. 1–5, RÉGIME OF ISLANDS, *supra*, at 55 (Denmark); 2 UNCLOS III OR, *supra*, at 280, para. 17, RÉGIME OF ISLANDS, *supra*, at 55 (Colombia); 2 UNCLOS III OR, *supra*, at 285, paras. 72, 73, RÉGIME OF ISLANDS, *supra*, at 61 (Singapore); 16 UNCLOS III OR, *supra* note 1, at 106, para. 8, RÉGIME OF ISLANDS, *supra*, at 107 (Denmark); 16 UNCLOS III OR, *supra*, at 108, para. 31, RÉGIME OF ISLANDS, *supra*, at 107 (Trinidad and Tobago).

[30] The term "rocks" was first introduced at the third session of the Law of the Sea Conference in the ISNT, *supra* note 26, Art. 132(3), at 170–71, RÉGIME OF ISLANDS, *supra* note 1, at 83. It was carried forward at the fourth session into the RSNT without comment. RSNT, *supra* note 26, Art. 128(3), at 72, RÉGIME OF ISLANDS, *supra*, at 85. France expressed its opposition to the entire provision during the ninth session. 13 UNCLOS III OR, *supra* note 1, at 30, para. 72, RÉGIME OF ISLANDS, *supra*, at 95. In the eleventh session, the United Kingdom expressed its opposition to Article 121(3). 16 UNCLOS III OR, *supra* note 1, at 91, para. 57, RÉGIME OF ISLANDS, *supra*, at 105. Japan did so as well. 16 UNCLOS III OR, *supra*, at 96, para. 43, RÉGIME OF ISLANDS, *supra*, at 105.

[31] *See* 14 UNCLOS III OR, *supra* note 1, at 21, para. 18, RÉGIME OF ISLANDS, *supra* note 1, at 97; 16 UNCLOS III OR, *supra* note 1, at 15, para. 15, RÉGIME OF ISLANDS, *supra*, at 103.

[32] *Webster's* unabridged dictionary provides several definitions:

> a usu[ally] bare cliff, promontory, peak, or hill that is one mass . . . consolidated or unconsolidated solid mineral matter composed of one or usu[ally] two or more minerals or partly of organic origin (as coal) that occurs naturally in large quantities or forms a considerable part of the earth's crust <granite, sand, gravel, clay, and glacial ice are [rock]s>.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1965 (P. B. Gove ed., 1993). A geographer's definition is no more helpful: "A coherent, consolidated and compact mass of mineral matter. . . . A place-name for a prominent cliff, peak or sea stack . . . ." JOHN B. WHITTOW, THE PENGUIN DICTIONARY OF PHYSICAL GEOGRAPHY 458–59 (1984). "One of the solid materials of which the earth's crust is mainly composed, being made up of *minerals* . . . . More popularly, a rock is any large mass of the harder portions of the earth's crust." W. G. MOORE, THE PENGUIN DICTIONARY OF GEOGRAPHY 186 (7th ed. 1988). Geological definitions also vary:

> An aggregate of one or more minerals . . . or a body of undifferentiated mineral matter . . . or of solid organic material . . . . Any prominent peak, cliff, or promontory, usually bare, when considered as a mass . . . . A rocky mass lying at or near the surface of a body of water, or along a jagged coastline . . . .

GLOSSARY OF GEOLOGY 553 (Julia A. Jackson ed., 4th ed. 1997).

distinguishing the gradations of hardness and durability of an ocean feature. Nor do the definitions preclude features with mixed characteristics. At one extreme, various unconsolidated features, such as masses of wet sand whose shape or location may be significantly altered by water currents, would not qualify. At the other extreme, a bare solid granite promontory jutting up from the seabed would certainly meet the definition. Little more can be stated with certainty. One should be aware that the legal definition of "rocks" need not conform to scientific or dictionary definitions, just as the term "continental shelf" for the purposes of the law of the sea does not mirror the scientific definitions, although it is generally derived from them.

Thus, one might argue that, if it is not to be classified as an Article 121(3) rock, a feature must have tillable soil and sufficient potable water to sustain human habitation. This may be implicit in the use of the word "rock," which suggests a largely solid, virtually impermeable mass. Perhaps the phrase "human habitation or economic life of its own" is not an additional qualification but merely a further description of what a "rock" is understood to be from a legal perspective. For example, one might take the position that, in its natural state, the feature must be uninhabitable in terms of traditional considerations of ability to sustain crops and to supply water for independent human survival. Certainly, this is a reasonable interpretation that would add a level of stability to the provision and limit the prospective diminution of the commons by coastal state development activities. No reference to this view, however, is found in the *travaux préparatoires*, and contrary opinions were expressed.[33] For instance, some argued that a feature may serve as a base of seasonal fishery operations and its status may depend upon its actual economic worth rather than classic agrarian concepts of viability. This seems to be the better interpretation of Article 121(3) and of the negotiators' intentions.

An example might clarify the point. Let us assume that there is a small rock in the middle of the ocean. New and highly sophisticated research techniques discover that the feature contains an enormous quantity of hydrocarbons deep below the surface. Current economic conditions make these resources economically exploitable, but only by the use of new drilling and recovery techniques. The feature has neither tillable soil nor potable water. Prior to the new discovery and the new economic circumstances, it would have been classified as an Article 121(3) rock. Now, however, the profits from the hydrocarbons could support all the equipment and personnel necessary to extract the resource, as well as the importation of energy, food and water (or its desalination), for a long period of time.

Would this feature still be treated as an Article 121(3) rock in light of this new situation? If Article 121(3) depends strictly on an abstract definition of a rock, why does it also include references to habitability and an economic life of its own? The general rule of treaty interpretation gives meaning to all words of a text, so that references to "habitability" and "economic life" must have meanings independent of the nature of the feature itself. They must narrow the scope of the provision to rocks that *also* are either uninhabitable or have no economic life of their own. Moreover, economic life in this sense is not expressly limited to traditional agrarian activities. Consequently, a feature would not be subject to Article 121(3) disabilities if it were found to have valuable hydrocarbons (or other characteristics of value, e.g., newly harvestable fisheries in its territorial sea, or perhaps even a location for a profitable gambling casino) whose exploitation could sustain an economy sufficient to support that activity through the purchase of necessities from external sources.[34]

[33] *See* 2 UNCLOS III OR, *supra* note 1, at 288, para. 36, RÉGIME OF ISLANDS, *supra* note 1, at 45 (United Kingdom); 14 UNCLOS III OR, *supra* note 1, at 21, para. 18, RÉGIME OF ISLANDS, *supra*, at 97 (Venezuela).

[34] The *travaux préparatoires* mention that military or other governmental installations would not satisfy these requirements. No state disputed this assertion. *See* 2 UNCLOS III OR, *supra* note 1, at 284, para. 63, RÉGIME OF ISLANDS, *supra* note 1, at 45 (Turkey). The text of Article 121(3) leaves this matter unaddressed. Clagett argues, without authoritative support, "that the 'human habitation' formula should be construed to require the actuality (or at least the possibility) of a permanent civilian population; lighthouse-keepers and troops forming a garrison

Further clarification might be obtained by examining the official texts of Article 121(3) in other languages. The French and Spanish texts refer respectively to *une vie économique propre* and *vida económica propia*—"an economic life of its own." They closely follow the English version, allowing the meaning to include the acquisition of necessities from outside sources, based on the economic value or resources of the feature. The Chinese text regarding economic life uses the term *wei chi*, which is translated as "sustain"; it does not use *zhi sheng wei chi*, which means "self-sustaining," indicating that this text does not require the ability to survive independently. The Chinese text does appear, however, to link the requirements of human habitation and economic life, as does the Arabic text. The Russian text employs the phrase *samostoiatel'noi khoziaistvennoi deiatel'nosti*, which may be translated as "self-sustaining economic activity." Native Russian speakers consulted seem to disagree as to whether this text, like the others, would permit the purchase of necessities from outside sources. Given the ambiguity of the Russian text, the clarity of the Chinese text, and the compatibility of the English, French, Spanish and Arabic texts, Article 121(3) ought to be interpreted to permit the finding of an economic life as long as the feature can generate revenues sufficient to purchase the missing necessities.

The scrutiny of the different official languages also highlights the fact that it may be difficult to separate economic life from human habitation, in law, as well as in fact, although no text requires year-round habitation if it is otherwise regular.[35] This linkage may even be derived from the phrase "economic life of their own." An economic life suggests that the mere existence of a valuable natural resource in the abstract may be insufficient if it does not have an economic value that would support its exploitation over some period of time. Today, such development would require human activities at the site, at least to establish the exploitation process and to monitor it, if not to run it.

III. Is Article 121(3) General International Law?

Barbara Kwiatkowska and Alfred Soons suggested in 1990 that Article 121(3) had not been followed by coastal states, and thus was not binding law.[36] This assertion and its context must be examined closely. Their paper was written before the LOS Convention entered into force

and supplied from the outside do not count." Brice M. Clagett, *Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea: Part I*, 13 OIL & GAS L. & TAX'N REV. 375, 386 (1995). Clagett's point is well-taken if one considers the requirement that the feature must have an "economic life of its own." Outside state support for a non–economically viable occupation would be inconsistent with this requirement, and one can assume that the same would hold true for the requirement that the feature be capable of sustaining human habitation. However, Clagett writes:

> It would be an obvious abuse of the Convention for a state to attempt to upgrade the status of an Article 121(3) "rock" by artificially introducing a population, supplied from outside, for the sole purpose of enhancing the state's argument that the rock was entitled to command broad areas of maritime space ....

Id. In my opinion, the actuating reasons for the development of the feature are legally irrelevant; the real question is whether the feature, in fact, has the necessary capabilities, even if the start-up funding might come from outside sources. In some situations the location of the feature may be the essence of its value: it might be the perfect place for an optical telescope or satellite-tracking station for private enterprise. Again, human habitation would probably be a concomitant part of realizing the feature's value.

Kwiatkowska & Soons, *supra* note 24, at 164, have suggested that the posting of Norwegian officials to Jan Mayen constituted habitation relevant to Article 121(3). The fact that Jan Mayen is an island under paragraphs 1 and 2 of Article 121 and not a rock under paragraph 3 was unquestioned, however, in both of the dispute settlement proceedings involving the international maritime boundaries of Jan Mayen. Jan Mayen case, *supra* note 14, 1993 ICJ REP. at 73–74, para. 81; Report and Recommendations of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen (Ice./Nor.), sec. IV, 62 ILR 108, 114 (May 19–20, 1981), 20 ILM 797, 803–04 (1981) [hereinafter Jan Mayen conciliation]. Because of its size alone, Jan Mayen is not a rock, which makes the question of habitation and economic life irrelevant. Jan Mayen is 54.8 kilometers long, far larger than the types of features under consideration at UNCLOS III for inclusion in Article 121(3). Jan Mayen case, 1993 ICJ REP. at 65, para. 61.

[35] For the different language texts, see LOS Convention, *supra* note 1. Translation assistance was provided by Professor Gennady Danilenko, Mr. Kal Helou and Ms. Ying Juan Rogers.

[36] Kwiatkowska & Soons, *supra* note 24, at 174–80.

in 1994 and dealt only with the situation before it became binding on states parties. If disputant states are parties to it, the Convention would now be dispositive unless a superseding international rule has developed, as will be discussed below.

Is Article 121(3) now consonant with general international law and thus binding on states that are not parties to the LOS Convention? The regime of the exclusive economic zone is a direct product of the UNCLOS III negotiations and the resulting treaty, as are the expanded seaward limits of the continental shelf set out in Article 76. Both were qualified from the beginning by Article 121(3) and appear to have merged into general international law. On the other hand, prior to those developments at the UNCLOS III negotiations, rocks that would now fit within the definition of Article 121(3) were entitled to a continental shelf.[37]

The argument can be made that Article 121(3) has not attracted sufficient state practice and *opinio juris* to modify the existing general international law with respect to the areas previously included in the continental shelf regime. Yet the negotiations at UNCLOS III that produced the Convention, the widespread participation by states in those negotiations, the large number of states parties to the Convention from all sectors of the international community, the denial of a right to make reservations to this article and the widely held view that the normative provisions of the Convention reflect general international law—all support the conclusion that Article 121(3) is general international law applicable to the entire continental shelf regime.[38] Moreover, the text of the article (whose genesis can be found in the 1970s) was settled early in the negotiations. Statements made by states accepting the normative provisions of the Convention as general international law lend additional support to this view.[39] Thus, Article 121(3) is law for all states with respect to the seaward limits of the continental shelf. Because it is also an inherent part of the regime of the exclusive economic zone, the same case can be made that Article 121(3) is binding on states that are not parties to the LOS Convention with respect to that regime.

A state party to the LOS Convention wishing to make a contrary argument—that its treaty-based obligation under Article 121(3) has been superseded by later general international law—has an even heavier burden than is normally needed to establish new international law. It must present widespread and well-known state practice supporting a new rule pertaining to the subject of Article 121(3). The development of the necessary *opinio juris* not merely contrary to this article, but specifically intended to override the treaty-based obligation, must also be established.[40] While some situations in which states may have failed to abide by Article 121(3) may be identified, one would be hard-pressed to find widespread state practice, much less the necessary *opinio juris*, that could overwhelm either the binding effect of the LOS Convention or the general international law established in conjunction with the UNCLOS III negotiations and the widespread adherence to the Convention.

Nevertheless, this burden is not insurmountable, even in the law of the sea. In the past, a convention-based norm was successfully overridden by new general international law that permitted fisheries zones beyond the territorial sea, even though states were bound by limitations in Article 1 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and Articles 1 and 2 of the 1958 Convention on the High Seas.[41] This treaty-based law prohibited the exercise of coastal state authority in waters outside the territorial sea except

[37] The change of policy undertaken by the United Kingdom in regard to Rockall is consistent with this history. *See supra* note 21.

[38] There were 130 parties as of April 11, 1999 (visited Apr. 30, 1999) <http://www.un.org/Depts/los/los94st.htm>. *See generally* Jonathan I. Charney, *Universal International Law*, 87 AJIL 529 (1993).

[39] *E.g.*, the United States.

[40] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 cmt. *j* (1987) [hereinafter RESTATEMENT].

[41] Convention on the Territorial Sea and the Contiguous Zone, *supra* note 4; Convention on the High Seas, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82 (entered into force Sept. 30, 1962).

as provided for in the regime of the contiguous zone. However, the 1958 Conventions did not expressly address fishing zones, even though extended fisheries zone claims were widely known in the international community at the time and had been declared by many states. The subject had been extensively debated in reaction to the United States' claim to a continental shelf. The question was resolved in favor of permitting such fisheries zones, first by superseding customary international law, and second by establishing the exclusive economic zone in new treaties such as the LOS Convention.[42] In comparison to this issue, the question considered here regarding Article 121(3) has not attracted a similar degree of attention; whatever contrary state practice or *opinio juris* that may exist is hardly known. Thus, it would be difficult to establish at this time that new general international law has superseded Article 121(3).

Some observers, among them Kwiatkowska and Soons, have cited the use of Aves Island in maritime boundary delimitations as evidence that Article 121(3) has been ignored. They have debated whether, as a matter of law, Aves Island, either as an Article 121(3) rock or simply as an Article 121(1) island, should be attributed full (if any) effect in international maritime boundary delimitation, and particularly whether it should play a role in the delimitation of exclusive economic zones or continental shelves generated from other features.[43] But this case is inapposite since Aves Island has figured only in treaty-based delimitations. While international maritime boundary agreements can be considered to be state practice that may contribute to the creation of general international law, the use of an Article 121(3) rock in an agreement to delimit the maritime boundary between states is not violative of international law because Article 121(3) is not *jus cogens*. States are free to agree among themselves on a delimitation line that may even be inconsistent with general or conventional international law, unless third states are adversely affected.[44] Of course, a claim based on an Article 121(3) rock that would extend an exclusive economic zone or continental shelf into maritime areas beyond the jurisdiction of all states would affect the rights of every nonconsenting state. The latter situation, however, is not posed by the Aves Island agreements or other agreements involving similar features.

Thus, both general international law and conventional international law now appear to deny Article 121(3) rocks their own exclusive economic zone and continental shelf. Furthermore, the status of such rocks may change as a result of human developments. What is yet to be addressed is the effect of such a feature on international maritime boundary delimitations. We now turn to that issue.

IV. THE USE OF MINOR FEATURES IN DEFINING THE BASELINE

This Note began with a listing of small island features that are at the core of contemporary international disputes. The prime stimuli of those disputes are areas of extended maritime jurisdiction that the claimants believe they will be entitled to once sovereignty over the disputed feature has been established. That belief is often unfounded.

An analysis of this issue must begin with the baseline. It is the basis for locating the seaward limits of the various maritime zones, and for delimiting international maritime boundaries if, as is common, the equidistant line, or a derivative thereof, is used. Thus, the

[42] *See* RESTATEMENT, *supra* note 40, §102 reporters' note 4, at 33.

[43] *See* Kaldone G. Nweihed, *France (Guadeloupe and Martinique)-Venezuela*, Report No. 2-11, *in* INTERNATIONAL MARITIME BOUNDARIES 601, 607–08 (Jonathan I. Charney & Lewis M. Alexander eds., 1992); Kaldone G. Nweihed, *The Netherlands (Antilles)–Venezuela*, Report No. 2-12, *in id.* at 615, 623; Kwiatkowska & Soons, *supra* note 24, at 177; PRESCOTT, *supra* note 21, at 352; A. H. A. Soons, *Commentaar*, *in* VOLKENRECHTELIJKE ASPECTEN VAN ANTILLIAANSE ONAFHANKELIJKHEID 269, 278–99 (H. Meijers ed., 1980).

[44] Delimitations submitted to judicial or arbitral tribunals that are charged with applying international law to international maritime boundary disputes would, of course, be more indicative of general international law.

baseline is linked to maritime boundaries derived from it.[45] Minor features may play a role in the establishment of baselines from which various zones of maritime jurisdiction are generated. Under current international law, even a low-tide elevation on which there are no structures may serve as a base point for the normal baseline if it is located within the territorial sea of the mainland or an island. The placement of a strict equidistant line may then be influenced by that base point.[46] If the low-tide elevation is further seaward, however, it may not serve as a base point for the normal baseline, or for systems of straight baselines or archipelagic baselines, except in limited circumstances.[47] Systems of straight baselines, and archipelagic baselines, may be drawn to low-tide elevations if "lighthouses or similar installations which are permanently above sea level have been built on them," regardless of where they are located, so long as they satisfy the other geographical requirements for such baselines.[48] Low-tide elevations may also be used for archipelagic baselines if they are located within the breadth of the territorial sea of the nearest island and, for systems of straight baselines, if these baselines have "received general international recognition."[49] A new provision in the LOS Convention regarding deltas where the actual low-water line is unstable is perhaps even more liberal; a system of straight baselines may be drawn to low-tide elevations and will remain valid even if the elevation of the feature subsequently falls below the mean low-water line.[50]

The LOS Convention contains another new rule regarding reefs: "In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State."[51] This provision permits the baseline for measuring distances seaward of the various coastal zones to be located seaward of the core island's coastline (the traditional rule), and may thus affect delimitations derived from the baseline.

In light of the role that minor features may play in delimiting the baseline, what effect does Article 121(3) assign to the features it covers? As will be recalled, the subsection states: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." But the article does not say whether the features described in paragraph 3 may serve as a base point for zones being delimited that are generated from another, more substantial feature. Proposals were put forward precluding[52] and allowing[53] such use, but the Convention does not deal with this issue directly. Nor does the article address the influence that such features might have on the seaward limit of an economic zone or continental shelf within which they are located. On the assumption that they are too minor to be relevant or would create inequities, one might argue that any use of such features for either purpose would conflict with the spirit of Article 121. That argument, however, is logically inconsistent with the baseline roles accorded to even lesser features such as low-tide elevations, subsiding deltas and reefs.

[45] *See* Louis B. Sohn, *Baseline Considerations, in* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 43, at 153.

[46] LOS Convention, *supra* note 1, Art. 13. *See* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 4, Art. 11(1).

[47] LOS Convention, *supra* note 1, Arts. 7(4), 13, 47(4).

[48] *Id.*, Arts. 7(4), 47(4). Other geographical requirements are found in *id.*, Arts. 7(1)–7(3), 47(1)–47(3), 47(5), 47(7).

[49] *Id.*, Arts. 7(4), 47(4).

[50] *Id.*, Art. 7(2).

[51] *Id.*, Art. 6.

[52] 2d Comm. Working Paper, *supra* note 26, Main Trends, Provision 242, Formula A, para. 4, at 141, RÉGIME OF ISLANDS, *supra* note 1, at 76; Romania: draft articles on definition of and régime applicable to islets and islands similar to islets, *supra* note 29, Art. 2(1), at 228, RÉGIME OF ISLANDS, *supra*, at 40; 16 UNCLOS III OR, *supra* note 1, at 97, para. 53, RÉGIME OF ISLANDS, *supra*, at 106 (Romania).

[53] *See* 17 UNCLOS III OR, *supra* note 1, at 70, para. 70, RÉGIME OF ISLANDS, *supra* note 1, at 110 (Cyprus).

Thus, in regard to international maritime boundaries, a view that conforms with general international law and the LOS Convention is that all such features may play a role in international maritime boundary delimitations of exclusive economic zones and continental shelves generated from other features, but that the dimensions of that role will depend on the factors properly considered in such delimitations. Those factors include taking a variety of circumstances into account, especially size and location, so as to produce an equitable result.[54] Within that context, Article 121(3) rocks may be considered. Certainly, the participants at UNCLOS III were well aware of the international jurisprudence on international maritime boundary delimitations, which, while hardly settled, weighed all geographical circumstances as a matter of law but attributed little or no influence to small features. This jurisprudence and subsequent developments provide an appropriate basis for understanding the role to be played by rocks in delimitations.[55]

A review of the judgments of the International Court of Justice and awards of ad hoc tribunals in international maritime boundary delimitation cases further establishes that, while such features may be relevant considerations, they may be ignored or substantially discounted if their use would have an inequitable distorting effect in light of their size and location. Thus, in its first case on the subject, the Court wrote in the *North Sea Continental Shelf* cases that a delimitation should "ignor[e] the presence of islets, rocks and minor coastal projections [that have a] disproportionally distorting effect."[56] Subsequent tribunals have similarly ignored or discounted small islands when their use would produce an inequitable result; some examples are the *Anglo/French* arbitration,[57] the *Tunisia/Libya* case,[58] the *Libya/Malta* case,[59] the *Gulf of Maine* case,[60] and the *Guinea/Guinea-Bissau* arbitration.[61] While a rule precluding such features from consideration has been inferred,[62] the decisions do not adopt such a rule and it cannot be said that this judicial practice has reached the level of a rule of law precluding their consideration in all circumstances. Rather, in conformity with the general rule of delimitation that all circumstances should be examined in order to produce an equitable result, tribunals do consider small islands, including rocks. Much may be learned from the delimitations by third-party tribunals and analyses of them.[63]

[54] *See* Tunisia/Libya case, *supra* note 11, 1982 ICJ REP. at 59–60, paras. 70–71; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 ICJ REP. 246, 293, 299, 300, 339, 340, paras. 91, 92, 110, 230, 231 (Oct. 12) [hereinafter Gulf of Maine case]; Delimitation of the Maritime Boundary (Guinea/Guinea-Bissau), 77 ILR 636, 675–76, para. 88 (Feb. 14, 1985), 25 ILM 252, 289 (1986) [hereinafter Guinea/Guinea-Bissau arb.]; Continental Shelf (Libya v. Malta), 1985 ICJ REP. 13, 38–39, para. 45 (June 3) [hereinafter Libya/Malta case].

[55] The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 31(3)(*c*), 1155 UNTS 331, states that the relevant rules of international law should be taken into account when interpreting a treaty. This provision was included especially to address not only the legal context in which the treaty articles should be interpreted, but also the effect of subsequent developments giving rise to intertemporal law issues. *See* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 138–40 (1984); OPPENHEIM'S INTERNATIONAL LAW 1282 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). *See* Western Sahara, Advisory Opinion, 1975 ICJ REP. 12, 38–40, paras. 79–84 (Oct. 16).

[56] North Sea Continental Shelf, *supra* note 14, 1969 ICJ REP. at 36, para. 57.

[57] Anglo/French arb., *supra* note 11, paras. 199–202, 244, 245, 18 R.I.A.A. at 94, 95, 113–16, 54 ILR at 101–03, 123, 18 ILM at 427, 444, 445, 454, 455.

[58] Tunisia/Libya case, *supra* note 11, 1982 ICJ REP. at 64, 85, 89, paras. 79, 120, 129 (Djerba (Jerba) Island and the Kerkennah Islands).

[59] Libya/Malta case, *supra* note 54, 1985 ICJ REP. at 48, para. 64 (Filfla).

[60] Gulf of Maine case, *supra* note 54, 1984 ICJ REP. at 329–30, 336, 337, paras. 201, 222 (islands along the back of the Gulf, Seal and Mud Islands).

[61] Guinea/Guinea-Bissau arb., *supra* note 54, 77 ILR at 685, para. 111, 25 ILM at 298 (Alcatraz Island).

[62] *See* Clagett, *supra* note 34, at 385–87.

[63] The tribunal decisions include Anglo/French arb., *supra* note 11 (Channel Islands, Scilly Islands, Eddystone Rock, Isle of Wight and Ushant); Dubai/Sharjah Border (Dubai v. Sharjah), 91 ILR 543 (arb. Oct. 19, 1981) (Abu Musa); Tunisia/Libya case, *supra* note 11 (Djerba (Jerba) Island and the Kerkennah Islands); Gulf of Maine case, *supra* note 54 (islands along the back of the Gulf, Seal and Mud Islands); Guinea/Guinea-Bissau arb., *supra* note 54 (Alcatraz Island); Libya/Malta case, *supra* note 54 (the Maltese Islands, including Filfla); Delimitation of the Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon) (Can./Fr.), 95 ILR 645 (arb.

In fact, third-party tribunals have ignored or heavily discounted small islands because of their size even if they were not Article 121(3) features. Since Article 121(3) rocks are necessarily among the smallest, they are unlikely to influence a delimitation.

In addition to the determinations of international tribunals, a large number of international maritime boundary agreements cover situations in which islands, low-tide elevations and/or rocks are located in the boundary area. Those delimitations are identified in the appendix to this Note.[64] They show that, despite some incipient patterns, the solutions reached by states vary, leaving little basis for finding a state practice or *opinio juris.* Generally, however, islands are discounted; the smaller the feature, the more limited a role (if any) it will play in the delimitation. If a small island is not discounted, its actual influence on the delimitation is often minimal because a similar feature opposite to it neutralizes its effect. In other instances, when located close to another, more substantial feature, the island itself has little influence on the boundary location. Often, the feature's location vis-à-vis the larger coastline of the state of which it is a part is important. It may lie just offshore of its state's coastline; it may lie close to the equidistant line drawn from the larger coastlines of the claimant states; it may be adjacent to the coastline of a third state; or it may be a minor and distant part of a string of islands. In each case, the geographic circumstances taken as a whole determine the influence of the feature on the international maritime boundary, be it full effect, no effect, partial effect or enclaving. While all of these options have been applied in the agreements and in decisions by tribunals, it is apparent that very small features, in and of themselves, have little net effect on the drawing of international maritime boundaries. Minimal effect is especially likely in the case of Article 121(3) rocks, which necessarily are small.[65] Since the conclusion of the LOS Convention, no international tribunal has expressly relied upon an Article 121(3) rock to affect the result of an international maritime boundary delimitation.

The same limited role should be applied to extensions of maritime zones into the seas' common spaces, as the United Kingdom's renunciation of claims based on Rockall illustrates.[66] In fact, the argument against the role of rocks in such situations is all the stronger when they are located within zones generated from other features. The common spaces are diminished by using such rocks as a basis for placing a maritime area under a coastal state's jurisdiction when it would otherwise be beyond national jurisdiction. This practice would directly conflict with the objective of Article 121(3): to protect the commons from nationalization based on minor features with little significance other than being above water at high tide.

V. CONCLUSION

Although this Note has identified the criteria for implementing Article 121(3), attempts to apply them to specific features may excite controversy. Changes in circumstances may cause those features that do qualify as Article 121(3) rocks to be reclassified as islands

June 10, 1992) (St. Pierre and Miquelon, Enfant Perdu and Lamaline Shag Rock); Jan Mayen case, *supra* note 14 (Jan Mayen); Jan Mayen conciliation, *supra* note 34 (Jan Mayen).

[64] The reader might also wish to consult writings that focus on the role of islands in these delimitations. *See* DEREK W. BOWETT, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW (1979); Derek Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations, in* INTERNATIONAL MARITIME BOUNDARIES, *supra* note 43, at 131; DIPLA, *supra* note 11; and HÜSEYIN PAZARCI, LA DÉLIMITATION DU PLATEAU CONTINENTAL ET LES ÎLES (1982); HIRAN W. JAYEWARDENE, THE REGIME OF ISLANDS IN INTERNATIONAL LAW (1990); CLIVE R. SYMMONS, THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW (1979). *See also* Charney, *supra* note 2; Jonathan I. Charney, *Persian Gulf Disputes: Comments, in* CENTER FOR OCEANS LAW AND POLICY, SECURITY FLASHPOINTS: OIL, ISLANDS, SEA ACCESS AND MILITARY CONFRONTATION 359 (Myron H. Nordquist & John Norton Moore eds., 1998); Charney, *supra* note 14.

[65] Although there are exceptions in the international agreements, e.g., Aves Island. *See* text at notes 43–44 *supra.*

[66] *See supra* note 21 and corresponding text.

unencumbered by the limitations placed on such rocks. In theory, Article 121(3) features may also influence the location of international maritime boundaries that delimit exclusive economic zones and continental shelves generated from other features. In practice, however, that potential will almost never be realized. Success in establishing sovereignty over a small feature, such as an Article 121(3) rock, will therefore not guarantee an effect on the delimitation of adjacent areas of exclusive economic zone or continental shelf, regardless of whether the context involves international maritime boundary disputes with other coastal states or claims to areas that would otherwise be part of the oceans' common spaces where the international community retains an interest in resisting encroachment.[67] For these reasons, those who stir up nationalist passions should keep in mind that this effort may gain them little if their goal is to strengthen maritime boundary claims.

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APPENDIX

INTERNATIONAL MARITIME BOUNDARIES INVOLVING NEARBY ISLANDS

This appendix lists all established international maritime boundaries for which the relevant area of delimitation is known to include islands. The agreements are reproduced and analyzed in *International Maritime Boundaries* (Jonathan I. Charney & Lewis M. Alexander eds., 1992, 1998). They are listed here by region, parties to the agreement, and the page on which the relevance of islands to the boundaries is discussed in that compendium.

Middle America/The Caribbean
Colombia–Costa Rica, pp. 468–69 (Kaldone G. Nweihed)
Colombia-Honduras, pp. 511–12 (K. G. N.)
Colombia-Panama, pp. 524–25 (K. G. N.)
France (Guadeloupe and Martinique)-Venezuela, pp. 607–08 (K. G. N.)
The Netherlands (Antilles)–Venezuela, pp. 623–24 (K. G. N.)
Trinidad and Tobago–Venezuela (Gulf of Paria), pp. 644–45 (K. G. N.)
United States (Puerto Rico and the Virgin Islands)–Venezuela, pp. 695–96 (K. G. N.)

Central Pacific/East Asia
Australia–Papua New Guinea, pp. 931–32 (Choon-ho Park)
Indonesia-Malaysia (Continental Shelf), p. 1021 (C. P.)

Indian Ocean/Southeast Asia
Burma (Myanmar)-India, pp. 1331–33 (J. R. Victor Prescott)
Burma (Myanmar)-Thailand, p. 1345 (J. R. V. P.)

[67] In part, expanded baseline and continental shelf claims based on sovereignty over small features will be protected against by the possible publicity resulting from such claims, which must be reported to the UN Secretary-General, *see* LOS Convention, *supra* note 1, Arts. 16(2), 76(9), by the work of the Commission on the Limits of the Continental Shelf with respect to continental shelf limits beyond 200 nautical miles from the baseline, *see id.*, Art. 76(8) & Annex II, and by the International Sea-Bed Authority, *see id.*, Arts. 156–91. Although states may opt to except international maritime boundary disputes from compulsory binding dispute settlement under the LOS Convention, excessive claims regarding baselines and the seaward extent of maritime zones are not subject to exception, *see id.*, Arts. 286–99—other than when the disputes in question concern "historic bays or titles," *see id.*, Art. 298(1)(a)(i). What entity may bring such a case is yet another issue. The duty not to infringe on the oceans' common spaces is owed *erga omnes*, giving all states standing to take appropriate countermeasures. *See* Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57 (1989). To the extent that valuable resources of the superjacent waters may exist, or coastal state claims may infringe on the exercise of freedoms of the seas, directly interested states may also be motivated to respond appropriately. General international support for the common spaces and for the International Sea-Bed Authority may also motivate individual states, intergovernmental organizations and nongovernmental organizations to resist such excessive claims.

* Co-Editor in Chief. Research assistance was provided by Patricia Judd, J.D. Vanderbilt, 1998.