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REPORT

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REGIME OF ISLANDS

(Article 121 of the 1982 United Nations Convention on the Law of the Sea, UNCLOS III)

Once again, I am very pleased to have the occasion of addressing you, this time on the Regime of Islands. Even though it occupies only one of the 320 Articles of UNCLOS III, Article 121, the topic of islands is an important issue of the law of the sea, as evidenced by the extensive discussions in the early stages of the UN Conference (1973-82) and in the preparatory stage preceding it (1970-73) in the Seabed Committee, as outlined in the DOALOS publication "Regime of Islands – Legislative History". It is very much a live issue today, especially in the Pacific Ocean, but also in several other parts of the world.

What I propose to do during the limited time available this morning, is to outline the historical introduction to the regime of islands; trace its evolution during the Conference itself following the earlier discussions in the Subcommittee II of the Seabed Committee; indicate the distinction between islands and rocks; briefly review how Article 121 was applied by international courts and tribunals; touch on, but not go into detail, the current international disputes involving islands and as applied in practice; and provide conclusions as to how such disputes, and those which no doubt will arise in future, should be solved peacefully, as required by the UN Charter on the basis of the applicable rules of the Law of the Sea.

In doing so I shall rely on my experience of the past four decades as the representative of my country, Cyprus, in the Seabed Committee, the Third United Nations Conference on the Law of the Sea and as an academic writer in various forums and publications in more recent years (most recently, in a chapter of a volume under preparation in honour of Satya Nandan). I was also honoured to speak on behalf of Cyprus at the UN General Assembly on 10 December last year on the occasion of the Thirtieth Anniversary of UNCLOS III which I had signed in Montego Bay, Jamaica, in 1982.

International law rules on islands were initially developed through state practice and then through negotiations during successive codification conferences on the Law of the Sea. The status of islands was a question raised in a number of international forums. For example, discussions focused on the type of insular formations which should be accorded fishery zones in the North Sea at the Hague Conference for the Regulation of North Sea Fisheries, 1881. Attempts were made in finding a definition for an island at the Hague Codification Conference 1930.

This paper was originally presented by Ambassador Andreas Jacovides at a lecture at the Rhodes Academy of Maritime Law and Policy on July 5th, 2013.

It was not until 1956 that the UN International Law Commission (ILC) initially elaborated rules regarding islands, which were negotiated at the first United Nations Conference on the Law of the Sea. They were then enshrined in the Convention on the Territorial Sea and the Contiguous Zone, as well as in the Convention on the Continental Shelf in 1958. These documents constituted the groundwork for the work of the Third United Nations Conference on the Law of the Sea (UNCLOS III), 1973-82, on the specific question on the Regime of Islands.

Article 10 of the ILC Report of 1956 stipulated that "Every island has its own territorial sea. An island is an area of land, surrounded by water which in normal circumstances is permanently above high-water mark". The commentary to Article 10 specified that elevations which are above water at low tide only and technical installations built on the sea bed are not considered islands and have no territorial sea. Articles 10 and 67 of the ILC Articles were consolidated in the 1958 Convention on the Territorial Sea and the Contiguous Zone. An island was defined as "A naturally formed area of land, surrounded by water, which is above water at high tide". In the 1958 Conference it was recognized that islands generate their own territorial sea and continental shelf. The principle that islands should be treated as any other land territory for the purpose of entitlement to territorial sea, contiguous zone and continental shelf was expressly recognized in Article 10 (1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone and Article 1 of the 1958 Convention on the Continental Shelf. It is noteworthy that Article 1(b) of the 1958 Convention on the Continental Shelf expressly provided that the term "continental shelf" is used as referring also "to the sea bed and subsoil of similar submarine areas adjacent to the coasts of islands", thus dispelling any doubts based on the etymology of the term "continental" as opposed to "insular" shelf ("insula" of course means "island"). Thus the 1958 Convention clearly established that islands are entitled to continental shelf as much as continents do.

In November 1973 the UN General Assembly adopted Resolution 3067 (XXVIII) convening the first session of UNCLOS III and dissolved the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction. The topic of Islands, which had been dealt with in the Seabed Committee by Subcommittee II, was referred to the Second Committee of the Conference (under the Chairmanship of Ambassador Aguilar of Venezuela).

During the early stages of the Conference, the attempt systematically pursued by a number of continental states also in the Second Subcommittee of the Seabed Committee, was to differentiate between various kinds of islands and to apply criteria such as size, population, contiguity to the principal territory, geological and geomorphological factors as relevant to the entitlement of islands to the zones of maritime jurisdiction-which now included the EEZ in addition to the territorial sea, contiguous zone and continental shelf.

On the opposite side, small island states (among them Cyprus and Trinidad-Tobago) but also the United Kingdom and Greece firmly argued that

> *"no distinction whatsoever should be made between islands, irrespective of their size and population, and continental land masses; and that the principles for determining the territorial sea, the continental shelf and the exclusive economic zone should be exactly the same in the case of islands and continental land masses"*

These states

> *"were not prepared to accept any attempt at discrimination against islands in the form of artificial distinctions based on legally untenable considerations. Any deviation from the existing rules, as set out in the 1958 Conventions, should be in favour of islands since, generally speaking, their populations depended on the resources of the marine environment for their development, and even survival to a greater extent than continental territories"*

(p. 27 of the DOALOS Regime of Islands, Legislative History – Caracas session 1974).

The relevant proposals and arguments from both sides are detailed in the DOALOS Legislative History, Regime of Islands, to which you are referred if you are interested to pursue the subject.

This hotly contested issue, in the preparatory stage of the Seabed Committee and in the Conference itself, was settled through the adoption by the Conference of Article 121.

Article 121, Regime of Islands, reads as follows:

"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 have no exclusive economic zone or continental shelf".

The definition of an island is identical to that in Article 10 (1) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone which – as already stated – was elaborated by the International Law Commission and had been framed in accordance with the traditionally held view.

This definition marks the rejection of the attempt, persistently pursued by a number of states (where Turkey played an active role) in the Seabed Committee and UNCLOS III, to establish different categories of islands with correspondingly different rights of entitlement to maritime jurisdiction.

The basic proposition of article 121 that the same criteria apply for determining the maritime zones of jurisdiction of islands as for other land territory follows the traditional line. In customary international law it had always been considered that islands generated a territorial sea. This was expressly recognized in Article 10(1) of the 1958 Convention of the Territorial Sea and Contiguous Zone. With regard to the newer notion of the continental shelf (Truman Declaration 1948), Article 1 of the 1958 Convention of the Continental Shelf expressly provided that it be applied to islands. This was recognized to be the customary rule of international law by the International Court of Justice in the North Sea Continental Shelf cases, 1969. Article 121(2) simply recognizes this rule. The Exclusive Economic Zone (EEZ), which was the creation of UNCLOS III, was also covered by Article 121(2).

Thus, the position stated in Article 121(2) conclusively marks the acceptance of the views of a number of states participating in the Conference, including several island states, that no distinction whatsoever should be made between islands irrespective of their size, population or political status and the continental land masses; and that the criteria for determining maritime zones of jurisdiction apply to islands in the same way as they apply to continental land. Correspondingly, Article 121(2) marks the rejection of the proposition that the maritime spaces of islands should be determined by the special circumstances of each island, such as size, population, contiguity to the principal territory, the physical, geographical and the geomorphological area involved, the general configuration of the respective coasts and even whether they were "situated on the continental shelf of another state".

A valid reply to the argument that inequity might result if the position in Article 121(2) was accepted, would be no more than other inequities created by nature. Why should maritime zones of islands of a small size or population be questioned while, for example, the same zones of continental countries consisting largely of deserts or otherwise unpopulated or underpopulated had not been open to dispute? It was argued that, if

any discrimination was to be made on the islands on the one hand and continental land masses on the other, this should be in favour rather than at their expense, because ordinarily the populations of islands are dependent on the resources of the sea for their economic development or ever survival, while the populations of continental territories could rely on the resources of the hinterland.

Article 121(3) gave rise to additional arguments. Unlike the 1958 Territorial Sea Convention, a distinction was made between "islands" and "rocks", the latter being defined as incapable of "sustaining human habitation or economic life of their own". It is noteworthy that Japan and the United Kingdom made proposals to delete 121(3). Under Article 121(3), rocks generate territorial sea (12NM) and contiguous zone (24NM) but not EEZ or continental shelf. In practical terms, this distinction has given rise to difficulties over interpretation and borderline cases may occur where there is a difference of opinion (the case of Okinotori-shima comes readily to mind). In such cases the dispute settlement system of the Convention, Chapter XV can usefully come into play.

For those of you interested there is a considerable amount of literature devoted to the subject by such distinguished writers as J. Charney, B. Kwiatkowska, A. Soons, B. Oxman, H. Dipla. Borderline cases may occur as subsequent economic changes and economic developments may change the capacity of rocks to host human population or produce human activity.

Departure from the traditional position on the case of rocks is, in any case, more apparent than real. First, the exception from the general rule of full entitlement for islands, does not cover the territorial sea and the contiguous zone. Hence, islands which are no more than rocks (eg Rockall) continue to generate these zones of jurisdiction. Second, under the 1982 Convention, the breadth of the territorial sea over which sovereignty exists extends up to 12NM, unlike the situation in 1958. Third, under the 1958 Convention, "rocks" generated continental shelf, the applicable criteria then being depth and exploitability. The criteria of distance and natural prolongation under the 1982 Convention are considerably wider. Thus, in practical terms, the solitary exception of "rocks" to the principle in 121(2) should not be considered of major significance. Conversely, to insist on full rights of the EEZ and the equivalent continental shelf area on the basis of distance (200NM) and natural prolongation (up to 350NM) for rocks might reasonably have been criticized as unduly excessive and therefore indefensible.

On the whole, therefore, the exception in Article 121(3), when properly interpreted and applied, does not materially affect the fundamental principle set out in Article 121(2).

Subsequently to the adoption of the 1982 UNCLOS III and its Article 121 on islands, international courts and tribunals have had the occasion to apply this article in various contexts, especially in the context of delimitation situations. They include the Eritrea/Yemen Arbitration; Denmark/Norway (Jan Mayen); Libya/Malta; Barbados/Trinidad-Tobago; Qatar/Bahrain; Nicaragua/Honduras; Romania/Ukraine (where the ICJ concluded that it did not "need to consider whether Serpents' Island falls under paragraphs 2 or 3 of Article 121 of UNCLOS nor its relevance to this case"); Bangladesh/Myanmar (ITLOS, on the effect of St. Martin's Island); Nicaragua/Colombia (where the ICJ applied the customary law principle reflected in Article 121 of UNCLOS, Colombia not being a party to UNCLOS and also referred to Article 121(3) as producing no entitlement to continental shelf or EEZ). It will not be possible to examine this in any detail now.

Today there exist several situations in the world which involve islands in dispute. In some of these cases the issue is disputed sovereignty and in others the issue is the delimitation between states the coasts of which are opposite or adjacent to each other.

One of the most intractable disputes over islands is the case of Falklands/Malvinas between the United Kingdom and Argentina, which occasioned a two month armed conflict in 1982 and which is still unresolved.

In the Mediterranean, the dispute between Greece and Turkey is primarily over the delimitation and the continental shelf (and indeed of the EEZ once declared) of the Greek Islands in the Aegean as well as the issue of the breadth of the territorial sea, which is still currently 6NM, rather than 12NM as allowed by Article 3 of UNCLOS III.

Further east, around Cyprus, the issue is basically one of delimitation between Turkey and Cyprus. Cyprus has already reached Agreements on the delimitation of its EEZ with Egypt (2003), Lebanon (2007- still unratified by Lebanon) and Israel (2010), on the basis of the median line and with a provision for arbitration as the way of solving any disputes arising. Those of you who are interested are referred to my lecture of last year on "Recent Delimitation Practice in the Eastern Mediterranean (Erpic website 25 July 2012 http://www.erpic).

The Pacific Ocean provides a number of situations involving disputes over islands, particularly issues of sovereignty and not only. Currently there is the situation in the Kuriles (Japan/Russia); Dokdo/Takeshima (Japan/Republic of Korea); Senkaku/Diaoyu (Japan/China); several situations in the South China Sea (where China's claims are disputed by the Philippines in a case currently being brought to Annex VII Arbitration by the Philippines against China, on which you will hear authoritatively next week by Paul Reichler).

For situations involving China's nine-dash line and island groups such as the Paracels, the Spratlys, the Pratas, Scarborough Shoal etc, I would recommend that you read the January 2013 issue of the American Journal of International Law, "Agora: The South China Sea", where opposing viewpoints are put forward and argued in three learned articles, and also to several other presentations on the subject (including Columbia Law School last October and the 2013 Proceedings of the American Society of International Law).

As a general proposition and without referring in particular to these situations, where different parties involved may have their own viewpoints, it is self-evident that these and any other similar situations which may arise in the future, should be settled by the application of Articles 2(3) and 33 of the UN Charter on the peaceful settlement of disputes, in combination with Chapter XV of UNCLOS III. However, in an imperfect world, it may be unavoidable that political realities and other extralegal factors may prevent this approach from being followed. If matters get out of hand, it is for the UN Security Council to meet its responsibilities to maintain and restore international peace and security.

In conclusion, it can be safely asserted that the international law definition and the rule giving islands full entitlement to maritime zones of jurisdiction (territorial sea of 12NM, contiguous zone of 24NM, exclusive economic zone of 200NM and continental shelf of 200NM under the distance criterion and up to 350NM under the natural prolongation criterion), as stated in Article 121 of UNCLOS III, reflect customary international law. Criteria have also been introduced for establishing a distinction between islands and rocks. On the whole, the exception in Article 121(3), when properly interpreted and applied, does not materially affect the fundamental principle stated in Article 121(2). Artificial islands, reefs, low tide elevations are, of course, not covered by Article 121.

In terms of delimitation, islands as such are not "special circumstances". Consequently, the general rule, that is of starting from the median line in delimiting the coasts of opposite or adjacent states, applies as much to islands as to other territories. The party to a delimitation dispute alleging that a particular island should be considered "special circumstances" in order to depart from the application of the median line so

as to reach "an equitable solution" under Articles 74 and 83 of UNCLOS III, has the burden to prove this before any international tribunal (onus of proof).

It is inevitable that disputes arise when the maritime zones of islands overlap with those of other countries thus creating issues of delimitation. Much depends on the particular circumstances of each case. International judges, in the ICJ, ITLOS and Annex VII Arbitral Tribunals, have contributed to the formulation of rules conducive to as much stability and predictability as possible in resolving such disputes, with the median line as the starting point and aiming at an equitable result taking into account the particular circumstances of each case. But the fundamental rule is that, under the 1982 UNCLOS III Article 121 and customary international law, islands are no less entitled to all the zones of maritime jurisdiction than continental territories.

