



Hans Köchler

Kastellorizo

The Geopolitics of Maritime Boundaries and the Dysfunctionality of the Law of the Sea



INTERNATIONAL PROGRESS ORGANIZATION

The development of international law does not necessarily mean progress towards the rule of law. The law of the sea is a case in point. Instead of establishing a precise and comprehensive legal régime for maritime spaces, the United Nations Convention on the Law of the Sea (UNCLOS) has opened a Pandora's box of unresolved, at times almost intractable, disputes and conflicts around the globe. (...) Since the second half of the 20th century, the assertion of national interests has increasingly included efforts to control and exploit the resources of the sea – with major implications for the global power struggle in the 21st century.

(From the introductory chapter)

The controversy around Kastellorizo, the most remote Greek island – situated more than 500 km from mainland Greece, but less than 3 km from the Turkish coast, in the Eastern Mediterranean, has highlighted major systemic problems of the law of the sea in its present state. The position paper of the International Progress Organization examines the development of international law since President Truman's "Proclamation on the Continental Shelf" shortly after World War II, analyzes the problems that result from the rapid expansion of national jurisdictions over vast areas of the ocean, and describes the conflictual constellation in the Eastern Mediterranean. The dispute over maritime jurisdiction around Kastellorizo goes well beyond the bilateral or regional dimension. It has laid bare the difficulties, legal as well as political, that follow from the application of the principle that "the land dominates the sea."

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Cover picture: Kastellorizo (Megisti), easternmost Greek island in the Levantine Sea, facing the mountains of Turkey (around the resort town of Kaş, Province of Antalya), with Ottoman era mosque at the center; moored at port, Greek naval vessel HS Daniolos, 22 September 2018.

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Editorial Note

The present paper links up to earlier research projects of the International Progress Organization on maritime affairs. Among those are studies on the dispute over sovereignty in the Falklands/Malvinas archipelago (1982),* geopolitical implications of conflicts in the Gulf region (1987), and questions of national self-determination in the South Pacific (1987/1988).

Historical references are only given in the context of a specific legal issue. Unless otherwise indicated, the maps attached in the Annex are not official documents or do not depict agreed maritime borders. The purpose of their reproduction is to illustrate the disputes in question.

The text published here reflects the state of affairs as of November 2020.

Vienna, 31 December 2020

* *Le conflit des Malouines*. Studies in International Relations, Vol. IX. Vienna: International Progress Organization, 1984.

(I)

Law and Politics of the Continental Shelf

Development of international law does not necessarily mean *progress* towards the rule of law. The law of the sea is a case in point. Instead of establishing a precise and comprehensive legal régime for maritime spaces, the United Nations Convention on the Law of the Sea (UNCLOS)¹ has opened a Pandora's box of unresolved, at times almost intractable, disputes and conflicts around the globe.

Since the second half of the 20th century, the assertion of national interests has increasingly included efforts to control and exploit the resources of the sea – with major implications for the global power struggle in the 21st century. This has effectively curbed Grotius's principle of *mare liberum*² ("freedom of the seas"). Under an essentially economic agenda of coastal states, the areas of international waters have become ever more limited. This particularly regards the seabed and subsoil the resources of which – in the international domain – are part of the common heritage of mankind. The progress of technology has further accelerated this development.³

In the context of this paper, a brief historical overview appears to be in place. We shall refer to documents and debates

¹ Adopted on 10 December 1982, entered into force on 16 November 1994.

² Hugo Grotius, *Mare liberum sive de iure quod Batavis competit ad Indicana commercia dissertatio* [Dissertation on The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade]. Leiden: Elzevir, 1609.

³ For the economic-technological reasoning and the unilateral approach of states in that regard cf., *inter alia*, George Elian, *The Principle of Sovereignty over Natural Resources*. Alphenaan den Rijn (NL) / Germantown, Maryland (USA): Sijthoff & Noordhoff, 1979, esp. pp. 124ff.

selectively, insofar as they are relevant for the analysis of present problems and disputes.

In a period that, in official parlance, is labeled “post-colonial” (post-World War II), the paradigm of the “continental shelf” became the tool for the projection of power over vast maritime areas.⁴ According to this notion, a coastal state may extend its sovereignty far beyond its territorial waters – simply because the land beneath the sea is defined as an extension of the land mass of that state. This was the rationale of President Harry Truman’s “Proclamation On The Continental Shelf” (1945)⁵ that triggered a worldwide search of maritime countries for “their” continental shelf. The approach, driven by the pursuit of national interests, was eventually set into law by the United Nations Convention on the Law of the Sea (1982). The title of the President’s Proclamation minces no words about the essentially *economic* motivation behind the concept: “Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf.” The preamble to the Proclamation emphasizes the United States’ awareness of “the long range world-wide need for new sources of petroleum and other minerals.”⁶ Accordingly, in the wording of the Proclamation, the United States “regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.”⁷ In a triumphant, self-confident move

⁴ For the history of the concept of “continental shelf” cf. Auguste-Raynald Werner, *Traité de droit maritime général: Éléments et système, définitions, problèmes, principes*. Geneva: Librairie Droz, 1964, pp. 30ff.

⁵ United States, *Presidential Proclamation No. 2667*, 28 September 1945.

⁶ *Op. cit.*

⁷ *Op. cit.*

upon the end of World War II, the United States launched the paradigm, and the world followed suit.

Following discussions about the legal concept of the “continental shelf” in the International Law Commission of the United Nations,⁸ the Geneva *Convention on the Continental Shelf* (1958)⁹ defined the term as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters.¹⁰ This was in line with the recommendations (1956) of the International Law Commission for the drafting of Article 1 of the Convention.¹¹ However, the Convention ultimately deviated from this reasonable approach, based on the facts of physical geography,¹² by stating that the “continental shelf” may *also* include the seabed and subsoil “beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.”¹³ This effectively invalidates the first, “geographical,” part of the definition. Linking the concept to the technical possibilities of the moment, the phrasing essentially subordinates the definition to the economic interests of

⁸ Cf. *Yearbook of the International Law Commission 1956*, Vol. I: *Summary of records of the eighth session, 23 April – 4 July 1956*. “Regime of the high seas,” esp. pp. 130f.

⁹ Done at Geneva on 29 April 1958; entered into force on 10 June 1964. The Convention has been superseded by UNCLOS.

¹⁰ Article 1(a).

¹¹ *Op. cit.*, p. 131, Par. 46.

¹² The International Law Commission described the “continental shelf” as “[t]he zone around the continent, extending from the low water line to the depth at which there is a marked increase of slope to greater depth.” The text further explains: “Where this increase occurs, the term ‘shelf edge’ is appropriate. Conventionally, the edge is taken at 100 fathoms (or 200 metres) [of depth / H.K.], but instances are known where the increase of slope occurs at more than 200 or less than 65 fathoms.” (*Op. cit.*, Par. 46, item 1) (“Fathom”: a unit of length equal to 1.8 meters.) This definition would have been strictly based on the facts of physical geography.

¹³ Article 1(a).

states. It makes it fluid and legally imprecise. Due to the switch from a criterion of physical geography to a purely technical one,¹⁴ the limits of the continental shelf – as a fictitious entity – can be extended indefinitely, depending on the state of technology. With this determination, that effectively encourages states to arrogate sovereignty in the high seas, the Convention set the tone for the further development of the law of the sea. The Convention's definition was at the roots of the problematic and conceptually contradictory approach of the United Nations Convention on the Law of the Sea (UNCLOS), adopted by the Third UN Conference on the Law of the Sea (UNCLOS III).¹⁵ Opening the door to a projection of national sovereignty over vast maritime spaces, the definition particularly favors states – such as France or the United Kingdom – with overseas possessions, or incorporated territories, in distant oceans.¹⁶

¹⁴ The later UNCLOS has made the conflict between geographical and economic categories in the definition of “continental shelf” even more obvious. For details of the incompatibility of the criteria of the definition, see the analysis below.

¹⁵ However, as will be shown below, UNCLOS III did not follow the “indefinite” approach of the Geneva Convention, but set a geographical outer limit of the continental shelf. In regard to an “allowance” of 200 nm, irrespective of whether a continental shelf exists or not, UNCLOS followed the Geneva Convention’s “fictitious” approach nonetheless. – For a general analysis of the underlying shortcomings of UNCLOS III cf. Christopher C. Joyner & Elizabeth A. Martell, “Looking back to see ahead: UNCLOS III and lessons for global commons law,” in: *Ocean Development & International Law*, Vol. 27, Issue 1-2 (1996), pp. 73-95.

¹⁶ In terms of the implications for a country’s control of maritime spaces, totally disproportionate to the geographical size and length of coastline of the mainland, cf. the French government’s official statistics: *Areas of France’s maritime spaces of sovereignty and jurisdiction*, <https://maritimelimits.gouv.fr/resources/areas-frances-maritime-spaces-sovereignty-and-jurisdiction>, accessed 12 November 2020. Due to the islands under its control, France – with a land territory of 643,801 km² – claims an area of 10,760,5006 km² of maritime spaces, including continental shelf and continental shelf extensions, according to the criteria of UNCLOS. – In a similar vein, though in a different category as regards the length of its coastline, the United States claims “at least one million square kilometers” as area of its *extended* continental shelf alone, according to Article 76(4) of UNCLOS. Cf., *About the U.S. Extended Continental Shelf Project*. U.S. Department of State, Office of Ocean and Polar Affairs, Washington, DC, no date,

In a Judgment of 1969, the International Court of Justice (ICJ) aptly characterized the “doctrine” of the continental shelf as “a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one.”¹⁷ The Court further stated that the doctrine is an application of the principle “that the land dominates the sea.”¹⁸ In the analysis of the Court, this means, “the land is the legal source of the power which a State may exercise over territorial extensions to seaward.”¹⁹ In its decision, adjudicating maritime disputes between Germany and Denmark and Germany and the Netherlands respectively, the Court further stated that, in terms of a country’s continental shelf, “what is involved is no longer areas of the sea (...), but stretches of submerged land; for the legal régime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea.”²⁰

Emphasizing the principle of the domination of the land over the sea, the ICJ described an approach that also underlies the definition of the “continental shelf” in the later adopted United Nations Convention on the Law of the Sea. Paragraph 1 of Article 76 of the Convention determines that “[t]he continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation

<http://www.state.gov/about-the-u-s-extended-continental-shelf-project>, accessed 12 November 2020.

¹⁷ International Court of Justice, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*. Judgment of 20 February 1969, Par. 96.

¹⁸ *Ibid.*

¹⁹ *Ibid.* – Cf. also Bing Bing Jia, “The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges,” in: *German Yearbook of International Law*, Vol. 57 (2014), pp. 1-32.

²⁰ *Op. cit.*, Par. 96. – For the doctrine in the post-colonial context, cf. also fn. 148.

of its land territory to the outer edge of the continental margin.” Though following the Geneva Convention’s approach, UNCLOS allows a wider margin in terms of physical geography and geology of the sea. While the Geneva Convention set a depth (of sea) of 200 meters as outer limit of the (physical) continental shelf, UNCLOS defines the limit by reference to the actual extension of the shelf, which will have to be determined, in each case, by a rather complex and difficult geological survey. However, similar to the conceptually flawed “alternative” criterion of the Geneva Convention,²¹ UNCLOS, in the second part of Article 76, Paragraph 1, determines that the continental shelf alternatively (“or”) extends “to a distance of 200 nautical miles (nm)²² from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.” As in the earlier Convention, this additional provision is purely owed to economic considerations.²³ It is incompatible with the rationale of physical geography (geology) of the sea as outlined in the earlier quoted judgment of the ICJ, and makes Paragraph 1 of Article 76 conceptually inconsistent. As we shall explain below, this has particular bearing for the status of island territories under UNCLOS.

²¹ Text (Article 1[a]) referred to in fn. 13 above.

²² Equal to 370.4 kilometers. (1 nautical mile equals 1.852 kilometers.)

²³ In the above-mentioned session of 1956, the International Law Commission already considered adding the “criterion of equality” to the legal regulations regarding the “continental shelf.” This came at the initiative of Latin American states (see *Inter-American Specialized Conference on “Conservation of Natural Resources: The Continental Shelf and Marine Waters.” Ciudad Trujillo, March 15-28, 1956. Final Act.* Pan American Union, 1956), which emphasized that “there were several states, such as the countries on the Pacific coast of Latin America and the Dominican Republic, off whose coasts there was no continental shelf.” (Quoted according to: *Yearbook of the International Law Commission 1956*, p. 131, Par. 49.) Thus, the scientific definition of the term was compromised for the sake of economic equality.

In the comments on its “Draft Articles on the Continental Shelf” (1951),²⁴ the International Law Commission of the United Nations was well aware of the *disparity* between, or incompatibility of, a *geological* definition of “continental shelf” and one that is based on criteria of *technological* capability or economic interests. Combining both in *one* definition will make that definition not only inconsistent, but will render an approach based on the facts of physical geography virtually meaningless. In its Draft Articles, the Commission tried to camouflage this inconsistency by focusing on the economy, stating “that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community.”²⁵

Thus, bearing in mind the apparent primacy of economic interests in the international community’s codification efforts, the Commission chose to depart from the geological concept of the term.²⁶ Rather straightforwardly, it explained the reason in purely pragmatic terms: “The mere fact that the existence of a continental shelf in the geological sense might be questioned in respect of submarine areas where the depth of the sea would nevertheless permit exploitation of the subsoil in the same way as if there were a continental shelf, could not justify the application of a discriminatory legal system to these ‘shallow waters’.”²⁷

²⁴ *Draft Articles on the Continental Shelf and Related Subjects Prepared by the International Law Commission*. United Nations, International Law Commission, Third Session, 30 July 1951.

²⁵ *Draft Articles*, Article 2, Note 6.

²⁶ *Op. cit.*, Article 1, Note 1.

²⁷ *Op. cit.*, Article 1, Note 2. – Today, in view of technological progress, this pragmatic maxim would also apply to not-so-shallow waters, a possibility the drafters indeed seem to have imagined when commenting on their reasons for departing from a geological definition that, based on conventional wisdom of the

Though this plain and simple “non-geological” definition would have avoided conceptual inconsistency, the Convention of 1958 eventually adopted a bifurcated approach, including the geological definition at the very beginning of the definitional article.²⁸ In structural terms, this was the avenue followed ever since, up to the adoption of UNCLOS. However, unlike UNCLOS, the 1958 Convention, mixing criteria of physical geography with considerations of technical capacity in one definitional sentence, did do so in plain language, frankly stating, as non-geological criterion, the possibility of “exploitation of the natural resources of the said areas.”²⁹

In its structurally similar approach, the UN Convention on the Law of the Sea does so only obliquely. Departing from the geological definition in the first part of the definitional sentence, Article 76(1) of UNCLOS states, in the second part of the sentence (after “or”), a kind of alternative “juridical” definition that grants a continental shelf to any and every coastal state – up to a limit of 200 nm.³⁰ Under the auspices of the economy, the continental shelf becomes a “*lucus a non lucendo*.” For all instances where there is no physical continental shelf, the term is defined on a purely fictional basis: by definitional fiat, there must be a continental shelf exactly because there is no (physical) continental shelf. The underlying economic consideration

time, included a limit of 200 meters depth for the demarcation of the (geological) continental shelf (Geneva Convention, Article 1[a]). Cf. *Draft Articles*, Article 1, Note 6: “Technical developments in the near future might make it possible to exploit resources of the sea-bed at a depth of over 200 meters. (...) Hence, the Commission decided not to specify a depth-limit of 200 metres in Article 1.” In fact, it suggested no limits at all (except those of technical capacity). This ultra-liberal approach, if it had been adopted by UNCLOS, would, over time, make the entire area of the high seas a (fictitious) continental shelf.

²⁸ Cf. above, fn. 10.

²⁹ Article 1(a), second part of the sentence.

³⁰ See wording referred to in fn. 22 above.

in the definition of UNCLOS is also obvious in the fact that the 200 nm limit is coextensive with the maximum breadth of the “Exclusive Economic Zone” (EEZ) according to Article 57 of the Convention. Nothing, however, can do away with the duality, indeed conceptual oddity, of a definition³¹ according to which the “continental shelf” may be, at the same time, a structure of physical geography or, alternatively, an area of fixed distance (if a real shelf does not exist). Thus, even if the actual breadth of the shelf is shorter than 200 nm, or if there is no shelf at all³² – as “juridical shelf,” it extends up to 200 nm nonetheless. As real (physical) shelf, it may further extend up to a breadth of 350 nm (648.2 km).³³

The UNCLOS regulations on the continental shelf must also be seen in the context of the gradual departure of the international community, since 1945, from the age-old maxim of the Freedom of the Seas. The process was driven by the collective egoism of coastal states and fuelled by the rapid progress of technology in the exploitation of maritime resources. The course of events was already foreseen by the International Law Commission of the United Nations, during its discussions on the “continental shelf.” In the *Draft Articles*, the Commission conceded that “the exercise of control and jurisdiction by the coastal State may to a limited extent affect the freedom

³¹ It is worthy of note that Article 76 explicitly uses the term “definition” for the introduction of the concept of “continental shelf” while Article 55, introducing the concept “Exclusive Economic Zone,” avoids that term, merely explaining the meaning under the heading, “Specific legal regime of the exclusive economic zone.”

³² In the debates in the course of its session of 1956, the Chairman of the International Law Commission explicitly referred to this possibility (that there are coastal states without continental shelf) under the aspect of “equality.” Cf. fn. 23 above.

³³ Article 76(6).

of the seas.”³⁴ Thus, the space of international waters has been increasingly narrowed. Not only has the “territorial sea” been extended to a breadth of up to 12 nm and a “contiguous zone” established up to a breadth of 24 nm. In addition, under UNCLOS, each coastal state may claim an “exclusive economic zone” up to a breadth of 200 nm where it has full sovereign control over all living and non-living resources “of the waters superjacent to the seabed and of the seabed and its subsoil.”³⁵ The fact that the EEZ is co-extensive with the “notional” continental shelf further underlines the international community’s unspoken “imperial” doctrine that the land dominates the sea.³⁶ The rationale for the claim of exclusive economic rights is that these relate to an area that is considered an extension of the coastal state’s land mass. That the “physical” continental shelf may extend a further 150 nm beyond the EEZ offers states an additional expansion of economic rights, albeit at a level that is more limited. The Convention allows a coastal state to exploit – up to an outer limit of 350 nm from shore³⁷ – all “mineral and other non-living resources

³⁴ *Draft Articles on the Continental Shelf*, Article 2, Note 3.

³⁵ Article 56(1)(a).

³⁶ Cf. the observation of the ICJ, fn. 18 above.

³⁷ The delineation of the outer edge of the continental shelf (beyond 200 nm) depends on the facts of physical geography and must be established by each coastal state in coordination with and on the basis of recommendations by the “Commission on the Limits of the Continental Shelf” (CLCS) (Article 76[8]). This may require a highly complex (and costly) geological survey that must determine the foot of the continental slope (FOS) according to Article 76(4). – Cf. for instance, the Submission by the United Kingdom concerning the existence of an extended continental shelf around Ascension Island. Contrary to the United Kingdom’s position, the Commission on the Limits of the Continental Shelf concluded that the island is a “volcanic edifice,” namely a “pinnacle surrounded by the deep ocean floor” (Par. 51), thus effectively without a physical continental shelf. In its “Recommendations,” the Commission concluded that the UK Submission “does not satisfy the test of appurtenance, and therefore the United Kingdom is not entitled to delineate the outer limits of its continental shelf beyond 200 M [nm].” (Par. 50) (United Nations Convention on the Law of the Sea / Commission on the Limits of the Continental Shelf. *Summary of Recommen-*

of the seabed and subsoil together with living organisms belonging to sedentary species.”³⁸ (This excludes exploitation of resources of the waters superjacent to the seabed.)

The position of the International Court of Justice according to which UNCLOS’ (conceptually inconsistent) definition of “continental shelf” is to be considered customary international law³⁹ has made disputes over exploitation of resources even more complicated in cases where non-States Parties of UNCLOS are involved.

It is certainly true that *freedom* of the seas has often resulted in *anarchy* of the seas and that the drastic extension of the margins of state sovereignty brought about by UNCLOS has reduced the risk of clashes over fishing rights and exploitation of resources in previously international waters. Aiming to justify the special rights of coastal states over the continental shelf, the International Law Commission made the point that referring to the seabed and subsoil (in the area of the continental shelf) as *res nullius*, “capable of being acquired by the first occupier,” might lead to chaos.⁴⁰ The wording implies that the risk can be averted by subjecting the continental shelf to the control of coastal states.

dations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by the United Kingdom of Great Britain and Northern Ireland in Respect of Ascension Island on 9 May 2008. Adopted by the Commission on 15 April 2010, https://www.un.org/Depts/los/clcs_new/submissions_files/gbr08/gbr_asc_isl_rec_summ.pdf.)

³⁸ Article 77(4). – “Sedentary species” is defined as “organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil.” (*Ibid.*)

³⁹ International Court of Justice, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, Par. 118.

⁴⁰ *Draft Articles on the Continental Shelf*, Article 2, Note 4.

However, the new regime has resulted in an increasing number of international disputes over the delimitation of maritime zones, with the risk of armed conflict. Instead of providing a framework for the rule of law on the high seas, UNCLOS has, to a considerable extent, contributed to the emergence of new areas of geopolitical conflict, e.g. in the Eastern Mediterranean or the South China Sea. Dispute-solving mechanisms such as those under Annex VII of UNCLOS have proven entirely ineffective in the latter case.⁴¹

By drastically expanding the sovereign maritime space of coastal states, the Convention has somewhat undermined the relevance of two of its basic principles, namely (1) that “[t]he high seas shall be reserved for peaceful purposes” (Article 88), and (2) that the “area” and resources of the ocean floor and its subsoil beyond the limits of national jurisdiction⁴² are *res communis omnium*, “common heritage of mankind” (Article 136). The Convention provides a complex international regime for the exploitation of the resources of the “Area” for the “benefit of mankind as a whole,” including landlocked states (Article 140). To administer the resources, the Convention establishes an “International Seabed Authority,” composed of all States Parties of UNCLOS and with headquarters in Jamaica.

⁴¹ Permanent Court of Arbitration, *Case N° 2013-19 in the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between The Republic of the Philippines and The People’s Republic of China. AWARD*, 12 July 2016. – Cf. Stefan Talmon, “The South China Sea Arbitration and the Finality of ‘Final’ Awards,” in: *Journal of International Dispute Settlement*, Vol. 8 (2017), pp. 388-401.

⁴² Defined as “The Area” in Part XI of the Convention.

The provisions cannot do away with the fact that UNCLOS, by effectively reducing the “global commons” area of the sea, has unduly privileged maritime states.⁴³ In view of equitable principles frequently proclaimed by the Convention, one might ask why, if the *physical* continental shelf is defined as extension of the land mass of a coastal state, that space should be exclusively controlled by that state alone. The territory of an adjacent land-locked state undeniably is part of that same land mass (continent) which extends below the sea. Thus, in the name of equitable rights, should such a state not also have a share in the use of resources of the continental shelf? It is to be recalled that, under the provisions of UNCLOS, the geological definition of the continental shelf was compromised in the name of equal (economic) opportunities of coastal states without or with only a small continental shelf.⁴⁴ Why did one not – in the name of fairness and equality – consider a system where *all* states situated on a particular land mass would share the rights over the respective continental shelf, and in particular those states that border on coastal states? The Convention is certainly inconsistent in the application of equitable principles.

As regards the exclusive rights granted to coastal states, a representative of the Maldives rightly said that UNCLOS initiated “a

⁴³ In the commentary to its 1951 *Draft Articles on the Continental Shelf*, the International Law Commission has referred to this concern and to the position “that the exploitation of the natural resources of submarine areas should be entrusted, not to coastal States, but to agencies of the international community generally.” It discarded the idea, merely because of “insurmountable practical difficulties.” (*Draft Articles*, Article 2, Note 2) However, the 1982 United Nations Convention on the Law of the Sea appears to judge the difficulties as manageable as regards the “Area” of the sea beyond national jurisdiction (Articles 133ff).

⁴⁴ Cf. fn. 23 above.

land-grab not seen since the 19th century scramble for Africa.”⁴⁵ This was also noticed earlier by the authors of the *Atlas of the European Seas and Oceans* who spoke of “expansionism triggered by the third UNCLOS.”⁴⁶ In particular, the Convention’s definition of and provisions regarding the continental shelf disproportionately favor former colonizing countries such as France or the United Kingdom, granting them specific sovereign rights over vast stretches of ocean floor around islands still under their possession.⁴⁷ Among those are, for instance, the British Overseas Territories of the Chagos Archipelago (including the island of Diego Garcia, in the Indian Ocean)⁴⁸ and the Falkland (Malvinas) Islands off the coast of Argentina,⁴⁹ or overseas

⁴⁵ Ahmed Shaheed, *Continental Shelf for the Maldives?* OSA and Dhivehi Observer, 26 August 2009. Open Society Association (OSA), <http://opensocietymaldives.blogspot.com/2009/08/continental-shelf-for-the-maldives-my-foot.html>, accessed 14 November 2020.

⁴⁶ Juan Luis Suárez de Vivero with Juan Carlos Rodríguez Mateos, *Atlas of the European Seas and Oceans: Marine jurisdictions, sea uses and governance*. Barcelona: Ediciones de Serbal, 2007, ch. 3: “Areas of the world under national jurisdiction.” The authors refer to the Convention (UNCLOS) insofar as it was negotiated and adopted by the Third United Nations Conference on the Law of the Sea (UNCLOS III). See text referred to in fn. 15 above.

⁴⁷ Voelckel and Lucchini have accurately diagnosed this trend in their early analysis of the codification efforts since the first United Nations Conference on the Law of the Sea (UNCLOS I) in 1958: Laurent Lucchini and Michel Voelckel, *Les États et la mer: le nationalisme maritime*. (Notes et études documentaires, nos. 4451-4452.) Paris: La documentation française, 1978.

⁴⁸ On the legal disputes resulting from conflicting continental shelf/EEZ claims around these islands cf., *inter alia*, Peter H. Sand, “The British Indian Ocean Territory: International legal black hole?,” in: *Questions of International Law / Questions du droit international*, 30 December 2018, ch. 5: “Law of the sea,” https://www.researchgate.net/publication/330728851_The_British_Indian_Ocean_Territory_International_legal_blackhole, accessed 23 November 2020.

⁴⁹ On the conflicting claims of the United Kingdom and Argentina see Annex, map no. 13. Because of the unresolved dispute between Argentina and the United Kingdom over territorial sovereignty in the Falkland Archipelago, delimitation of jurisdictional zones lacks a sound legal basis. For the position of Argentina cf. the country’s submission (partially revised in 2016) to the Commission on the Limits of the Continental Shelf: *El Límite exterior de la plataforma continental Argentina*

possessions of France such as the Kerguelen Archipelago (French Southern and Antarctic Lands, in the southern Indian Ocean), Saint-Pierre et Miquelon (Overseas Collectivity in the North Atlantic, off the coast of Canada), and Clipperton Island / Île de la Passion (“State Private Property” of France in the eastern Pacific Ocean). These and other small island territories have been instrumental for their possessors to project strategic power and/or secure control over exploration and exploitation of strategically important natural resources, often in conflict with the closest mainland state or at the expense of the global commons. In the case of Clipperton Island, for instance, a small uninhabited atoll with an emergent land surface of 1.7 km² and a circumference of approx. 12 km generates, in addition to a territorial sea of 1,812 km², an exclusive economic zone in the size of 434,619 km².⁵⁰

The “submarine land-grab” enabled by UNCLOS is particularly consequential because the Convention treats islands in the same way as mainland territory. According to Article 121 (Regime of islands), any “naturally formed area of land, surrounded by water, which is above water at high tide,” is entitled, whether it is inhabited or not, to an exclusive economic zone (of up to 200 nm) and possesses a continental shelf of at least 200 nm, irrespective of whether one actually exists or not. Only “rocks which cannot sustain human habitation or economic life” have no exclusive economic zone

/ *Outer Limit of the Continental Shelf – Argentine Submission – Executive Summary*, 21 April 2009, https://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/arg2009e_summary_eng.pdf. – On the question of territorial sovereignty see, *inter alia*, Eric David, “Aspets juridiques du conflit des Malouines,” in: Hans Köchler (ed.), *Le conflit des Malouines*. Studies in International Relations, Vol. IX. Vienna: International Progress Organization, 1984, pp. 9-88.

⁵⁰ Cf. *Areas of France's maritime spaces*, *loc. cit.*

or continental shelf.⁵¹ Apart from the disproportionate advantage for countries with post-colonial maritime possessions, the island regime of UNCLOS also results in numerous, often almost intractable, legal disputes over maritime rights. The Convention is problematic in two basic respects: (1) It makes no distinction between islands in the open sea – outside the continental shelf of another state’s mainland – and those *within* the continental shelf (whether geological or notional) or exclusive economic zone of another state. (2) In terms of privileged zones, single islands – even the tiniest – that may be thousands of miles away from their "mainland" are treated the same way as archipelagic states. (The breadth of the EEZ and the continental shelf of such states is determined by way of drawing straight “archipelagic baselines” between the outermost points of the outermost islands.⁵²)

As regards the definition of the continental shelf in the real, i.e. geological, sense, the absence of a distinction under (1) becomes even more dubious. It borders on the absurd if islands that sit on a continental shelf, which extends from the land mass of another state, should be able to claim a continental shelf of their own. Such a shelf at the meta-level, so to speak, is a contradiction in itself. Islands within the range of another country’s continental shelf should only be allocated a “territorial sea” under Article 3 of UNCLOS, and on the basis of a median line where the distance to the other state’s mainland is less than 24 nm.

⁵¹ Par. 3 of Article 121.

⁵² Articles 47 and 48. – The similarity does not relate to the method of determining the privileged zone (via archipelagic baselines), but to the fact that both, single islands and island states, are entitled to the same "allowances" in terms of continental shelf/EEZ.

UNCLOS stipulates an “equitable solution” for the delimitation of the exclusive economic zone or the continental shelf between states with opposite or adjacent coasts, and specifically refers to the dispute-solving principles enumerated in Article 38 of the Statute of the International Court of Justice.⁵³ In the case of islands opposite the coast of another state, delimitation of the zones has proven a most difficult task of arbitration. Except for the territorial sea where, in general, the rule of the “median line” applies,⁵⁴ the privileged zone of such islands cannot unambiguously be determined. With their continental shelf, whether real or notional, stretching in all directions up to a distance of 200 nm, and, if real, up to 350 nm, thus potentially “occupying” a vast portion of another state’s privileged zone, islands opposite the coast of another state are indeed a case *sui generis*. It is important to note that this is not simply a matter of *overlapping* zones. Under these geographical conditions, the zone (continental shelf / exclusive economic zone) claimed for an island under Article 121(2) is *implanted* into, or superimposed unto, the *real* (physical) continental shelf of a coastal state.

It is not surprising that undetermined situations of this kind (for the structuring of which UNCLOS has no procedures, except vague references to principles of arbitration) have led, in practically all corners of the globe, not only to bilateral or regional tensions, but also have aggravated geopolitical rivalries that may make jurisdictional disputes even more intractable.

⁵³ UNCLOS Article 74(1) and Article 83(1) respectively.

⁵⁴ Article 15.

(II)

Kastellorizo and the Contradictions of Maritime Demarcation

The inconsistencies and doctrinaire problems of the law of the sea, and their geopolitical implications, are crystallized in the controversy over the Greek island of Kastellorizo.⁵⁵ In recent years, the island has become the focal point of tensions between more than two states of the Mediterranean, east and west. What is at stake in the initially bilateral dispute between Greece and Turkey about the demarcation of maritime zones around the island are the “equitable principles” of the law of the sea, so frequently invoked in the United Nations Convention on the Law of the Sea.

Kastellorizo is situated in the Levantine Sea (Eastern Mediterranean), less than 3 km off the coast of Turkey and about 570 km from the Greek mainland (Athens). The distance from the nearest other Greek island, Rhodes, is approximately 145 km. With a territory of less than 12 km² and a coastal perimeter of around 15 km, as compared to the 320 km coastline of southern Turkey between Marmaris and Antalya alone, the island “generates,” based on unilateral claims under the provisions of UNCLOS (of which Turkey is not a State Party), an area of around 40,000 km² as exclusive economic zone cum continental shelf for Greece.⁵⁶ In view of the

⁵⁵ Official Greek name: Μεγίστη (Megisti); Turkish name: Meis.

⁵⁶ For details of the debate over the size of the area claimed, and the location of the island, cf., *inter alia*, “Τούρκος ΥΦΥΠΕΞ για Καστελλόριζο: Δεν είναι λογικό να διαθέτει υφαλοκρηπίδα 40.000 τετραγωνικών χιλιομέτρων” [Turkish Deputy Foreign Minister on Kastellorizo: It does not make sense to have a continental shelf of 40,000 square kilometers]. *Η ΚΑΘΗΜΕΡΙΝΗ / Kathimerini*, Athens, 22 July 2020, <https://www.kathimerini.gr/world/1088788/toyrkos-yfypex-gia->

facts of physical geography and UNCLOS' equitable principle, this claim of maritime jurisdiction appears neither fair nor reasonable.⁵⁷ As outlined in Chapter I above, the Convention's regime of islands (Article 121) entitles even the smallest island with a notional (juridical) continental shelf of at least 200 nm. In the case of Kastellorizo, this means overlapping jurisdictional claims between Greece and Turkey on the continental shelf of which Kastellorizo is situated.⁵⁸ Because Turkey is not a State Party to UNCLOS, arbitration by the International Tribunal for the Law of the Sea and other arbitration procedures under the Convention are excluded. The only avenue would be submission of the dispute by joint decision of Greece and Turkey to the International Court of Justice or an ad hoc tribunal, or a bilateral agreement. (In similar disputes between State Parties, UNCLOS also stipulates an agreement "on the basis of international law [...], in order to achieve an equitable solution."⁵⁹)

In the present case, however, a bilateral agreement may be difficult to achieve due to the geopolitical tensions and rivalries in the

kastellorizo-den-einai-logiko-na-diathetei-yfalokripida-40-000-tetragonikon-chiliometron/, accessed 20 November 2020.

⁵⁷ For the conflicting positions of Greece and Turkey see, *inter alia*, "Tension in the Mediterranean: Competing Turkish and Greek Claims on the Island of Kastellorizo." *OE – Orlando Economos*, USA, <http://www.orlandoeconomis.com/kastellorizo>, accessed 18 November 2020; Serhat S. Çubukçuoğlu, *Turkey's Exclusive Economic Zone in the Mediterranean Sea: The Case of Kastellorizo*. MA Thesis, The Fletcher School, Tufts University, USA, July 14, 2014; and Jack Dulgarian, "Kastellorizo Is The Key To Turkish & Greek Ambitions In The Eastern Mediterranean," in: *Global Security Review*, 29 July 2020, <https://globalsecurityreview.com/kastellorizo-key-to-turkish-greek-ambitions-eastern-mediterranean/>, accessed 7 November 2020.

⁵⁸ Regarding the conflicting claims of Greece and Turkey see Annex, maps 9 and 10.

⁵⁹ Articles 74(1) and 83(1) respectively. – Cf. also Andreas Kluth, "International Law Can't Solve the Greco-Turkish Island Problem." *Bloomberg Opinion*, 17 October 2020, <http://www.bloomberg.com/opinion/articles/2020-10-17/international-law-can-t-solve-greece-and-turkey-s-kastellorizo-island-problem>, accessed 17 November 2020.

Mediterranean that evolved in the post-Cold War period, and in particular in the last decade.⁶⁰ Greek claims around Kastellorizo, if acted upon, would result in the mapping of a zone of maritime jurisdiction that connects the EEZ/continental shelf areas of Greece and Cyprus, carving out a substantial part of the EEZ/continental shelf area of Turkey, the country with the longest coastline in the Eastern Mediterranean. This was openly acknowledged in a Greek research paper, which characterizes Kastellorizo as “vital for the Greek national interests, as its influence, if recognized, can connect the Hellenic EEZ to the Cypriot EEZ.”⁶¹ If implemented, and internationally recognized, the demarcation would eventually create a contiguous zone of cooperation between these two states and others – such as Egypt and Israel – whose EEZs border on the EEZs of Greece and Cyprus. It would make it effectively impossible for Turkey to connect its area with EEZs of the countries of the southern Mediterranean.

The island of Kastellorizo appears to be the main element in the strategy of connecting the EEZs of the two Eastern Mediterranean member states of the EU. If – on the basis of the island’s fictional continental shelf under UNCLOS of up to 200 nm – lines are drawn from the island’s southern shores in a south-westerly and south-easterly direction, an additional EEZ area would be generated for Greece – more than three thousand times larger than the surface

⁶⁰ For details cf., *inter alia*, Michaël Tanchum, “How Did the Eastern Mediterranean Become the Eye of a Geopolitical Storm?,” in: *Foreign Policy*, 18 August 2020, <https://foreignpolicy.com/2020/08/18/eastern-mediterranean-greece-turkey-warship-geopolitical-showdown>, accessed 18 November 2020.

⁶¹ Petros Siousiouras and Georgios Chrysochou, “The Aegean Dispute in the Context of Contemporary Judicial Decisions on Maritime Delimitation,” in: *Laws*, 2014, No. 3, pp. 12-49; p. 17, <https://www.mdpi.com/2075-471X/3/1/12/htm>.

of the island. This is the method used by the drafters of an unofficial map (reproduced in the Annex) that outlines Greece's maritime borders.⁶² The delimitation would effectively separate the two triangle-shaped areas to the east and west that the map accords to Turkey (south of the coastline Marmaris-Kaş and south of the coast of Antalya, respectively). This "jurisdictional," indeed unilateral, point of view is a typical case of what the authors of the "Atlas of the European Seas and Oceans," referring to the Aegean, have rather euphemistically described as "an obstacle to the full implementation of a neighbor State's jurisdictions."⁶³ It is a drastic example of how, under UNCLOS, islands can be instrumental to claim, unilaterally, "extensive areas of sovereignty and economic control over the sea and its resources," enabling a state to project its "territorial and maritime capacity towards distant areas of the ocean."⁶⁴

Another map that delineates the Greek and Cypriot EEZs in the most generous terms,⁶⁵ to the detriment of Turkey, is not merely an annex to a research or policy paper of a university or think tank.⁶⁶ It has been officially published by the European Commission, in 2015, as "info graphic" under the title: *The EU and international ocean governance*.⁶⁷ In a fashion similar to France's earlier-quoted

⁶² Annex, map 9.

⁶³ Juan Luis Suárez de Vivero with Juan Carlos Rodríguez Mateos, *Atlas of the European Seas and Oceans: Marine jurisdictions, sea uses and governance*, ch. 19: "Islands and Maritime Jurisdictions."

⁶⁴ *Ibid.*

⁶⁵ The method is similar to that used in the above-described Greek map (Annex, map no. 9).

⁶⁶ See an enlarged excerpt of the map: Annex, map no. 1.

⁶⁷ European Commission / Maritime Affairs and Fisheries, *The EU and international ocean governance: Experience and commitment towards sustainable and multilateral management*. 15 October 2015,

https://ec.europa.eu/maritimeaffairs/content/eu-and-international-ocean-governance_en, accessed 19 November 2020. See Annex, map no. 1.

proclamation of its maritime zones,⁶⁸ the document quasi-authoritatively states, “20 million km² is the total area of the combined Exclusive Economic Zone of the EU Member States,” and further asserts that this marine territory “is around 380% larger than its land counterpart, and is the world’s largest.”⁶⁹ As far as the Eastern Mediterranean is concerned, it goes without saying that the map is without legal basis because its demarcation of the zones of Greece and Cyprus was not agreed upon with Turkey.⁷⁰

The authors of the earlier published “Atlas of the European Seas and Oceans” (2007), Juan Luis Suárez de Vivero and Juan Carlos Rodríguez Mateos from the Geography Department of the University of Seville (Spain), have created a similar map for the geographical area around the European mainland, which is often referred to as “Map of Seville.”⁷¹ However, this unofficial map differs from the later (2015) published document of the European Commission, and in a peculiar respect. While not allocating to Turkey any EEZ area to the west of Antalya, it draws a Turkish EEZ in a triangle-shaped form south of the Gulf of Antalya exactly towards the southern limits of the EEZs of Greece and Cyprus, thus effectively *separating* them, whereas the European map connects them. It is to be noted that, in distinction from the quasi-finality of the later “European Map,” the authors describe the areas as “claimed or

⁶⁸ Cf. fn. 16 above.

⁶⁹ *Op. cit.*, second poster of the info graphic. The figures have changed with the exit of the United Kingdom from the European Union on 31 January 2020. – On the maritime policy of the EU after the 2004 enlargement, with the admission of the Republic of Cyprus, cf., *inter alia*, Juan Luis Suárez de Vivero and Juan Carlos Rodríguez Mateos, “Maritime Europe and EU enlargement. A geopolitical perspective,” in: *Marine Policy*, Vol. 30(2), March 2006, pp. 167-172.

⁷⁰ For a depiction of the conflicting claims of Cyprus, Greece and Turkey see Annex, map no. 11.

⁷¹ Annex, map no. 2.

hypothetical.” However, when drawing the lines they did not pay attention to Turkish claims.

In view of the release of the 2015 document by the Directorate-General of Maritime Affairs and Fisheries of the European Commission, it is evident that the unilateral jurisdictional claims of the two eastern Mediterranean member states of the EU are de facto endorsed by the European Union. The earlier so-called “Map of Seville” was not a European Commission document. Should the “Atlas of the European Seas and Oceans” have had any quasi-official quality,⁷² it has anyway become obsolete after the release of the European Commission document. The ongoing debates and controversies over maritime jurisdiction in the region⁷³ should thus

⁷² It was claimed that the European Commission published an English version of the Atlas with the permission of the authors. (Foras na Mara / Marine Institute, Republic of Ireland, “EU Commission Publish Atlas of the European Seas and Oceans,” <https://www.marine.ie/Home/site-area/news-events/news/eu-commission-publish-atlas-european-seas-and-oceans>, accessed 22 November 2020.) However, the link to the web site of the European Commission (where the document, according to the Foras na Mara announcement, is said to be posted) did not exist as of November 2020.

⁷³ See fn. 56 and 57 above. – See also, “The Seville Map that Challenges Turkey, Greece, US and the EU.” *Keep Talking Greece – Greek News*, 22 September 2020, <https://www.keeptalkinggreece.com/2020/09/22/seville-map-us-turkey-greece>, accessed 19 November 2020; Admiral Cem Gürdeniz, “The Map of Seville and the plot to cut Turkey off from the Aegean and Mediterranean seas.” *UW – United World*, 17 September 2020, <https://uwidata.com/13877/the-map-of-seville-and-the-plot-to-cut-turkey-off-from-the-aegean-and-mediterranean-seas>, accessed 18 November 2020; “US Embassy in Turkey says Seville Map has no ‘legal significance.’” *International New York Times – Kathimerini English Edition*, Neo Faliro, Greece, 22 September 2020, <https://www.ekathimerini.com/257235/article/ekathimerini/news/us-embassy-in-turkey-says-seville-map-has-no-legal-significance>, accessed 20 November 2020.

refer to the “Map of Europe” (or “Map of the European Commission”) instead of to the “Map of Seville.”⁷⁴

Before assessing the situation with a view to a resolution, it appears appropriate to take stock on where matters stood before the collective run on maritime resources in the post-colonial era, i.e. after World War II. With the exception of three short intermissions,⁷⁵ Kastellorizo was part of the Ottoman Empire roughly since the end of the Middle Age.⁷⁶ When Greece was established as a state after the War of Independence (1830), the Dodecanese Islands, including Kastellorizo, remained under Ottoman rule.⁷⁷ In 1912, the islands were occupied by Italy, with the exception of Kastellorizo.⁷⁸ After the Balkan Wars, the Great Powers, in the “London Ambassadors’ Summit” of February 1914, decided that Kastellorizo shall remain under Ottoman sovereignty.⁷⁹ In 1915, in the course of World War I,

⁷⁴ Cf. the commentary by Theodoros Kariotis, *Who cares about the map of Seville – there are the official maps of the EU*. Slpress / Stavros Lygeros, <https://slpress.gr/english-edition/who-cares-about-the-map-of-seville-here-are-the-official-maps-of-the-eu/>, accessed 19 November 2020.

⁷⁵ 1659: conquered and briefly controlled by Venice; 1828-1833: under control of Greek insurgents; 1913-1914: local uprising, temporary Greek control.

⁷⁶ At the beginning of the 14th century, Kastellorizo was conquered by the Knights of Saint John. Around the middle of the 15th century, after an occupation by the Sultan of Egypt, the island came under the rule of the Crown of Aragon (Kingdom of Naples). It was conquered by Ottoman Sultan Suleiman I in 1512.

⁷⁷ Cf. “The London Protocol”: *PROTOCOL, No. 1, of the Conference held at the Foreign Office, on the 3d of February, 1830*, § 2.

⁷⁸ Accordingly, in the “Treaty of Peace between Italy and Turkey” of 18 October 1912 (alias “First Lausanne Treaty” or “Treaty of Ouchy”), Italy’s commitment to withdraw from the islands (Article 2) did not apply to Kastellorizo, because it was not held by Italy.

⁷⁹ In the *Treaty of London* (1913), Article V, the Emperor of the Ottomans and the Allied Sovereigns entrusted to the “Six Great States,” namely Austria-Hungary, France, Germany, Great Britain, Italy and Russia, “the task of determining the title to all the Ottoman islands in the Aegean Sea (except the island of Crete).” Accordingly, at their meeting in London, the representatives of those countries determined that the islands of Gökçeada, Bozcaada and Kastellorizo would remain under Ottoman sovereignty. The decision was communicated to Greece

Kastellorizo came under French occupation. The Treaty of Sèvres (1920),⁸⁰ which never entered into force because of the lack of Turkish ratification, stipulated that the island would be under Italian sovereignty. Subsequently, Italy took control from the French in 1921. However, only after the war, in the Treaty of Lausanne (1923), did Turkey renounce sovereignty over Kastellorizo in favor of Italy.⁸¹ On 4 January 1932, Turkey concluded an agreement with Italy on the delimitation of the maritime border between the two countries in the area of Kastellorizo, including attribution of the islets around it.⁸² Italian rule ended with the country's capitulation in 1943 and the subsequent occupation of the island by Allied British forces. Only in 1947 did Kastellorizo become part of Greece. In the Paris Treaty of 1947, Italy ceded the Dodecanese Islands, including Kastellorizo, to Greece.⁸³ The Treaty included the obligation, still in force, that the islands "shall remain demilitarised."⁸⁴ According to declassified documents of the United States' Central Intelligence Agency, Greece, in 1964, discussed in confidential talks with a U.S. representative a return of the Dodecanese Islands, including Kastellorizo, to Turkey, in exchange for a solution to the Cyprus problem.⁸⁵

and the Ottoman Empire on 13 and 14 February 1914 respectively. For details cf. Yüksel İnan and Yücel Acer, *The Aegean Disputes*. Foreign Policy Institute (FPI), Ankara, no date, pp. 3ff, <http://www.foreignpolicy.org.tr/documents/251202.pdf>, accessed 24 November 2020.

⁸⁰ *Treaty of Peace with Turkey Signed at Sèvres, August 10, 1920*.

⁸¹ *Treaty of Peace with Turkey Signed at Lausanne, July 24, 1923*, Article 15.

⁸² *Accordo italo-turco relativo alla delimitazione delle acque territoriali tra l'Isola di Castellorosso e la Costa d'Anatolia. Ankara, 4 gennaio 1932*, Article 3. See Annex, map no. 3.

⁸³ *Treaty of Peace with Italy*, signed at Paris, February 10, 1947, Article 14(1).

⁸⁴ Article 14(2).

⁸⁵ "Kastellorizo part of 1964 US proposal on Cyprus." *International New York Times – Kathimerini English Edition*, Neo Faliro, Greece, 28 September 2020, <https://www.ekathimerini.com/257423/article/ekathimerini/>

Due to its location between the Aegean and Levantine Sea (Eastern Mediterranean), in close proximity to the Turkish coast, Kastellorizo was always of strategic importance to powers from outside the region. The above-mentioned events during the two world wars are evidence of this. With the evolution of the law of the sea, after World War II, in the direction of extending the jurisdictions of coastal states, the location again became an asset for the projection of power in a wider regional context, involving, as of today, the European Union as a major player. This seems to have encouraged Greece, supported by the European Union, to put forward claims to maritime jurisdiction under UNCLOS in such a way as to connect its EEZ/notional continental shelf area to that of Cyprus.⁸⁶ It is to be noted, however, that, at official state level, Greece has not yet unilaterally determined its EEZ/continental shelf area vis-à-vis Turkey. Under UNCLOS too⁸⁷ (of which Turkey is not a State Party), such a step would require a bilateral agreement or an arbitral decision by a mutually agreed procedure. The bilateral agreements concluded between Turkey and Libya (2019)⁸⁸ and Greece and Egypt (2020)⁸⁹ respectively may now have created a situation of *fait accompli* concerning any future agreement between Turkey and Greece.

The new policy based on extended jurisdiction has meant a major departure from the traditional, more cautious position. The authors of the so-called “Map of Seville” correctly observed that the

news/kastellorizo-part-of-1964-us-proposal-on-cyprus, accessed 19 November 2020.

⁸⁶ See text referred to in fn. 61 above, and Annex, map no. 9.

⁸⁷ Article 59 and Article 83.

⁸⁸ See fn. 97 below.

⁸⁹ See fn. 98 below.

coastal states of the Mediterranean did show “restraint in declaring jurisdictional rights beyond the territorial sea for a (relatively) long period of time.”⁹⁰ Under the Treaty of Lausanne, the breadth of territorial waters in the area between Turkey and Greece was 3 nm.⁹¹ This limit was consecutively extended to 6 nm. A unilateral step by Greece in 1936⁹² was followed by Turkey’s decision in 1964.⁹³

Because of the geographical circumstances in the Aegean, restraint in matters of the territorial sea was essential to preserve freedom of navigation and, consequently, peace between the two countries. The situation changed when UNCLOS⁹⁴ opened the gates for excessive jurisdictional claims, defining a minimum “allowance” for coastal states of up to 200 nm under the conception of the continental shelf cum exclusive economic zone.⁹⁵ Unavoidably, under the conditions of a semi-enclosed sea such as the Mediterranean, a multitude of overlapping, mutually exclusive claims en-

⁹⁰ Juan Luis Suárez de Vivero and Juan Carlos Rodríguez Mateos, “Maritime Boundaries: The End of the Mediterranean Exception,” in: *Routledge Handbook of Ocean Resources and Management*. Abingdon: Routledge, 26 October 2015, Abstract (Routledge Handbooks Online).

⁹¹ Would it not have been for the exceptional clause of Article 15 of the Treaty of Lausanne, the island of Kastellorizo would have remained under Turkish sovereignty. See the wording of Article 12, last sentence: “Except where a provision to the contrary is contained in the present Treaty, the islands situated at less than three miles from the Asiatic coast remain under Turkish sovereignty.”

⁹² *Law No. 230/1936 concerning the extension of the territorial waters of the Kingdom of Greece* (17 September 1936). Published in: Official Gazette, 13 October 1936, No. 450, p. 1, reproduced at <http://extwprlegs1.fao.org/docs/pdf/gre21140.pdf>, via InforMEA – United Nations Information Portal on Multilateral Environmental Agreements, <https://www.informea.org/en/legislation/law-no-2301936-concerning-extension-territorial-waters-kingdom-greece>, accessed 10 November 2020.

⁹³ Article 1 of *Law No. 476* (“Territorial Waters Law”), ratified and promulgated on 15 May 1964, <http://extwprlegs1.fao.org/docs/pdf/tur2187.pdf>, accessed 10 November 2020.

⁹⁴ The Convention entered into force on 16 November 1994.

⁹⁵ See chapter I above.

sued. This has become a major factor of destabilization, with elements of anarchy, in the Eastern Mediterranean basin.

A chain reaction of claims and counter-claims, fuelled by a run for offshore resources,⁹⁶ was triggered by Greek and Cypriot efforts to get EU endorsement for the demarcation of their continental shelf/EEZ areas, to the detriment of Turkey. Israel has recognized the Greek-Cypriot claims. Greece, Cyprus und Israel have reached agreement on gas exploration and extraction in the Eastern Mediterranean. However, the exclusive economic zone claimed by Cyprus is disputed by Turkey. In 2019, Turkey concluded a maritime boundary treaty with the Tripoli-based Libyan government.⁹⁷ The agreement covers an area that crosses through the continental shelf/exclusive economic zone claimed by Greece. Likewise, in 2020, Greece and Egypt concluded an agreement on the demarcation of the exclusive economic zone between the two countries,⁹⁸ a move rejected by Turkey since, in Turkey's assessment, the agreement infringes on its continental shelf/EEZ. The zone agreed between Greece and Egypt also overlaps with the maritime

⁹⁶ Cf. Angelos Giannakopoulos (ed.), *Energy Cooperation and Security in the Eastern Mediterranean: A Seismic Shift towards Peace or Conflict?* Tel Aviv: The S. Daniel Abraham Center for International Regional Studies, 2016.

⁹⁷ *Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the National Accord-State of Libya on delimitation of the maritime jurisdiction areas in the Mediterranean*. Signed on 27 November 2019, entered into force as of 8 December 2019. Source: <https://nordicmonitor.com/2019/12/the-full-text-of-turkey-libya-maritime-agreement-revealed/>, accessed 15 November 2020.

⁹⁸ Cf. "Statement of the Minister of Foreign Affairs, Nikos Dendias, following the signing of the agreement on the delimitation of EEZ between Greece and Egypt (Cairo, 6 August 2020)." *Hellenic Republic / Greece in Egypt*. Ministry of Foreign Affairs, 6 August 2020, <https://www.mfa.gr/missionsabroad/en/egypt-en/news/statement-of-the-minister-of-foreign-affairs-nikos-dendias-following-the-signing-of-the-agreement-on-the-delimitation-of-eez-between-greece-and-egypt-cairo-august-2020.html>, accessed 15 November 2020.

zone agreed between Turkey and Libya. Parallel to these rival claims, deals and agreements, coastal countries started exploration activities for offshore energy resources in mutually claimed areas. This included the dispatch of energy exploration ships with naval escort. The sortie, most recently in October 2020,⁹⁹ of a seismic survey ship of Turkey to the waters near Kastellorizo was immediately condemned by Greece,¹⁰⁰ which considers the area as located within its continental shelf (in spite of the undeniable fact that, in terms of physical geography, the area is part of the Anatolian continental shelf).

The disputes over maritime jurisdiction in the Eastern Mediterranean are typical of the state of affairs of the law of the sea at the present stage. The controversy around Kastellorizo has indeed become one of the focal points of a conflict for which there appears to be no resolution under existing statutes.

⁹⁹ Cf. Turkey's Navtex, or maritime advisory, of 11 October 2020 concerning the dispatch of the exploration ship Oruç Reis.

¹⁰⁰ "Greece says no talks with Turkey as long as survey ship in area." *Reuters / World News*, 13 October 2020, <https://www.reuters.com/article/us-greece-turkey-talks-idUSKBN26Y10X>, accessed 23 November 2020.

(III)

Pragmatic Solutions in a Dysfunctional System?

What could be the way forward for Turkey and Greece in light of precedents set by the International Court of Justice and international arbitral tribunals, in similar situations or cases of disputes over maritime jurisdiction? As we have stated earlier, for Turkey, the United Nations Convention of the Law of the Sea is *ius tertii*. As a non-State Party, Turkey is not *directly* bound by the Convention's provisions. However, an *indirect* obligation exists. According to the determination of the International Court of Justice (2012), the Convention's definition of the continental shelf has become customary international law.¹⁰¹ This at the same time also implies that Turkey has the same rights over its continental shelf as any State Party to UNCLOS. Furthermore, according to Article 77(2) of UNCLOS, a coastal state's rights over the continental shelf "do not depend on occupation, effective or notional, or on any express proclamation."¹⁰²

Ultimately, however, whether a coastal state is a Party to UNCLOS or not is immaterial for the settlement of the jurisdictional disputes we have described here. In the cases where the Convention's rules and definitions – in particular concerning delimi-

¹⁰¹ Cf. fn. 39 above.

¹⁰² Cf. also Par. 19 of the Judgment of the ICJ in the *North Sea Continental Shelf Cases* (1969), *op. cit.*, where the Court, referring to Article 2 of the 1958 Geneva *Convention on the Continental Shelf* (then in force), confirmed that the rights to the continental shelf "exist *ipso facto* and *ab initio*," by virtue of the coastal state's "sovereignty over the land," bearing in mind that the continental shelf constitutes a "natural prolongation" of the state's land territory. Hence, according to the ICJ, existence of the continental shelf "can be declared (...) but does not need to be constituted" or formally proclaimed.

tation of the continental shelf/exclusive economic zone – lead to conflicting claims, UNCLOS provides no answers¹⁰³ – except an emphasis on an “equitable solution.”¹⁰⁴ The Convention merely stipulates resolution through direct negotiation between the parties concerned – “by agreement on the basis of international law”¹⁰⁵ – or some form of “conciliation procedure,”¹⁰⁶ whereby states have the choice between the International Tribunal for the Law of the Sea,¹⁰⁷ the International Court of Justice or an arbitral tribunal constituted under Annex VII or Annex VIII of UNCLOS.¹⁰⁸

In view of the many overlapping jurisdictional claims in the Mediterranean basin, directly resulting from the indeterminate provisions of UNCLOS, the Convention’s regulatory system is highly dysfunctional. In the delimitation of jurisdictional zones (with the exception of the territorial sea), states with opposite or adjacent coasts are essentially left to themselves. Apart from arbitration, they have the options of bilateral or, where necessary because of geography, multilateral (regional) negotiations. In this geopolitically sensitive region, the Convention’s “law of the sea” is indeed of no help. It only refers to general principles of “international law” for the resolution of disputes as set out in Article 38(1) of the Statute of the International Court of Justice.¹⁰⁹ In the absence of legal clarity, it will, thus, be important to explore the avenues for an equitable solution of disputes in the Mediterranean *on the basis of precedent*, and in

¹⁰³ Only for disputes over the delimitation of the territorial sea, the Convention provides the rule of the “median line” (Article 15).

¹⁰⁴ Article 74(1).

¹⁰⁵ *Ibid.*

¹⁰⁶ Article 284.

¹⁰⁷ Annex VI of the Convention.

¹⁰⁸ Article 287(1).

¹⁰⁹ Articles 74(1) and 83(1) of UNCLOS.

particular in regard to decisions of the International Court of Justice and special arbitral tribunals.

In practically all cases where the area of the continental shelf/EEZ between states with opposite or adjacent coasts was subject to arbitration, the general – and generous – assignment for islands, under UNCLOS, of a breadth of up to 200 nm was either severely curtailed in view of equitable principles, and in particular proportionality,¹¹⁰ or was entirely denied in place of limits equal to the breadth of the territorial sea.¹¹¹

The latter was the case with judgments of the International Court of Justice in a dispute between Romania and Ukraine,¹¹² and of the special Court of Arbitration set up for the resolution of a dispute between the United Kingdom and France.¹¹³ In both cases, the courts ruled that the continental shelf around islands in the disputed areas is effectively equal to what, under UNCLOS, is the breadth of the territorial sea. In the Romania-Ukraine case, the ICJ decided, *inter alia*, that the boundary delimiting the continental shelf and exclusive economic zone around Ukraine's Serpents' Island shall follow "the arc of the 12-nautical-mile territorial sea."¹¹⁴ In the British-French case over delimitation of the continental shelf in the

¹¹⁰ On the concept in general cf. Tanaka Yoshifumi, "Reflections on the Concept of Proportionality in the Law of Maritime Delimitation," in: *The International Journal of Marine and Coastal Law*, Vol. 16 (2001), pp. 433-463.

¹¹¹ Up to 12 nm (UNCLOS Article 3).

¹¹² International Court of Justice, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. Judgment of 3 February 2009.

¹¹³ "Case concerning the delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic. Decision of 30 June 1977," in: *Reports of International Arbitral Awards*, Vol. XVIII. United Nations, 2006, pp. 3-129. For details see E. D. Brown, "The Anglo-French Continental Shelf Case," in: *San Diego Law Review*, Vol. 16 (1979), pp. 461-530.

¹¹⁴ *Judgment of 3 February 2009*, § 218. See Annex, map. No. 5. For the rival claims of Romania and Ukraine see Annex, map no. 6.

area of the Channel Islands, the Court established, as “primary boundary of the continental shelf,” a mid-Channel median line.¹¹⁵ The Court further decided that, around the islands, the boundary “shall be drawn at a distance of 12 nautical miles from the established base-lines of the territorial sea”¹¹⁶ (which is equidistant with the already established fishery-zone).¹¹⁷ One of the considerations of the Court was, “to accord to the French Republic a substantial band of continental shelf in mid-Channel which is continuous with its continental shelf to the east and west of the Channel Islands region.”¹¹⁸

The former – namely a substantial curtailment of the area of continental shelf/EEZ around islands opposite another state – was the case with the decision of a special Court of Arbitration in the jurisdictional dispute between France and Canada over the continental shelf/EEZ around the French islands of Saint-Pierre et Miquelon off the coast of Newfoundland.¹¹⁹ Rejecting France’s claim to roughly 57,000 km² of continental shelf/EEZ for its overseas possession,¹²⁰ a self-governing “*collectivité territoriale*” of only 242

¹¹⁵ *Op. cit.*, Article 201. See Annex, map 7.

¹¹⁶ *Op. cit.*, Article 202.

¹¹⁷ Cf. Annex, map no. 7.

¹¹⁸ *Op. cit.*, Article 202.

¹¹⁹ “Court of Arbitration for the Delimitation of Maritime Areas between Canada and France: Decision in Case concerning Delimitation of Maritime Areas (St. Pierre and Miquelon)” [10 June 1992], in: *International Legal Materials* (ILM), Vol. 35, Issue 5, September 1992, pp. 1145-1219. For details see also Ted L. McDorman, “The Canada-France Maritime Boundary Case: Drawing a Line Around St. Pierre et Miquelon,” in: *American Journal of International Law*, Vol. 84(1), January 1990, pp. 157-189; Marc Plantegenest, “The French Islands of Saint-Pierre et Miquelon: A Case for the Construction of a Discontinuous Juridical Continental Shelf?” *Paper presented to the Advisory Board on the Law of the Sea*. International Hydrographic Bureau, 2003; Malcolm D. Evans, “Less than an Ocean Apart: The St Pierre and Miquelon and Jan Mayen Islands and the Delimitation of Maritime Zones,” in: *The International and Comparative Law Quarterly*, Vol. 43, No. 3 (July 1994), pp. 678-696.

¹²⁰ According to Ted L. McDorman, *op. cit.*

km², the Court awarded France with an area of less than one seventh of the area claimed.¹²¹ The Court drew an equidistant line between the French islands and Canadian Newfoundland, following the bilateral agreement of 1972 on the territorial waters,¹²² and defined an area in the breadth of 24 nm towards the west and a narrow corridor of a width of 10.5 nm and a length of 188 nm to the south, as EEZ of the islands.¹²³ Accordingly, the islands' EEZ (as an enclosed "juridical" continental shelf) cannot cut through the physical continental shelf area of Canada. Quite obviously, the Court's decision was informed by equitable principles and consideration of proportionality.

Even in the case of delimitation of the continental shelf between Libya and Malta, the ICJ reduced the area of Malta – an island state – in view of equitable principles and after a test of proportionality,¹²⁴ in particular as regards the length of coastlines. Instead of applying the geographical median line to determine the limits of the continental shelf between the two countries, the Court adjusted the line northwards (in favor of Libya) in order "to avoid in the delimitation any excessive disproportion between the extent of the continental shelf areas appertaining to the coastal State and the

¹²¹ As of today, the official French figure for the EEZ around Saint-Pierre et Miquelon is 8,734 km² (equivalent to 3372 square nautical miles). Cf. *Areas of France's maritime spaces of sovereignty and jurisdiction*, loc. cit.

¹²² *Agreement between the Government of Canada and the Government of the French Republic on Their Mutual Fishing Relations, 27 March 1972(1)*, Article 8. (DOALOS/OLA – United Nations, Delimitation Treaties Infobase)

¹²³ See Annex, map. no. 4.

¹²⁴ International Court of Justice, *Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*. Judgment of 3 June 1985, <https://www.icj-cij.org/public/files/case-related/68/068-19850603-JUD-01-00-EN.pdf>.

length of the relevant part of its coast, measured in the general direction of the coast-lines.”¹²⁵

These precedents may be useful for the formulation of guidelines for a resolution to jurisdictional disputes in the Aegean and Eastern Mediterranean, and in particular concerning Kastellorizo, which is the most clear-cut case where UNCLOS has been instrumentalized for purposes that are diametrically opposed to equitable principles and the requirement of proportionality. The excessive jurisdictional claim of an EEZ/continental shelf “superimposed” over the prolongation of Turkey’s Anatolian land mass has laid bare multiple extra-legal factors and motives that are not only related to national – and in particular economic – interests, but also to wider regional and geopolitical rivalries. The latter means that issues of maritime demarcation overlap – in a mutually reinforcing way – with ongoing power struggles and armed confrontations, also involving global players, in the Middle Eastern and North African region.¹²⁶ The position of France in support of Greece is a case in point.¹²⁷

¹²⁵ *Op. cit.*, Par. 79(B)(3). – See Annex, map. no. 13.

¹²⁶ Cf., *inter alia*, Hüseyin I. Çiçek, “Der französisch-türkische Wettstreit,” in: *Der Standard*, Vienna, 12 November 2020, <https://www.derstandard.at/story/2000121638061/der-franzoesisch-tuerkische-wettstreit>, accessed 22 November 2020.

¹²⁷ Cf., *inter alia*, “France warns Turkey against redeploying research ship at heart of row with Greece.” *France 24 with AFP and Reuters*, 12 October 2020, <https://www.france24.com/en/20201012-turkey-to-redeploy-to-eastern-mediterranean-disputed-waters-research-ship-at-heart-of-greece-row>, accessed 22 November 2020. – “France supports Greece in escalating row in east Mediterranean over gas reserves.” *MercoPress – South Atlantic News Agency*, 14 August 2020, <https://en.mercopress.com/2020/08/14/france-supports-greece-in-escalating-row-in-east-mediterranean-over-gas-reserves>, accessed 22 November 2020.

The dispute around Kastellorizo has indeed become a symbol of the contradictions and inconsistencies of the incomplete, and thus defective, legal régime of the sea since the entry into force of UNCLOS. Under the confined conditions of the Mediterranean, with numerous mutually exclusive claims, and with the potential of armed confrontation,¹²⁸ there is no alternative to either direct negotiations (bilateral or multilateral) or joint resort to arbitration. As, for Turkey, the United Nations Convention on the Law of the Sea is *res inter alios acta*,¹²⁹ arbitration can only take place outside the statutory framework of UNCLOS.

In view of the above-mentioned precedents, and in particular the decisions of the ICJ in the case of Serpents' Island (Ukraine-Romania) and of the Court of Arbitration in the case of the British Channel Islands, it appears reasonable to attribute to the islands that are located on/within the continental shelf/EEZ of another state an area of exclusive jurisdiction that is coextensive with the territorial sea. Between Greece and Turkey, the breadth of the territorial sea is 6 nm.¹³⁰ A median line should be drawn between the coastlines of Turkey and Greece,¹³¹ and the Greek islands to the east of the line should be allocated an exclusive economic zone of 6 nm, except

¹²⁸ On the complexity of disputes in the Mediterranean in general cf. also Andrew Filis and Rafael Leal-Areas, "Legal Aspects of Inter-state Maritime Delimitation in the Eastern Mediterranean Basin," in: *OGEL – Oil, Gas & Energy Law Intelligence*, Vol. 11, Issue 3, April 2013 (Special Issue on "Eastern Mediterranean Oil and Gas").

¹²⁹ In addition to Turkey, Israel and Syria are the other Mediterranean countries that are not State Parties to UNCLOS.

¹³⁰ Consecutive unilateral decisions by Greece and Turkey have extended the territorial sea from 3 nm (Treaty of Lausanne) to 6 nm. See fn. 97 and 98 above.

¹³¹ See Annex, map no. 8.

where the distance between opposite coasts is less than 12 nm.¹³² This has anyway been the status quo between the two neighboring countries since 1964, because no formal declaration on the delimitation of the EEZ/continental shelf has been made by either side. (Turkey's recent exploratory activities on its continental shelf in the area of Kastellorizo have taken place outside Greek territorial waters.) A delimitation of this kind would meet the criteria of proportionality and equity, in terms of the length of coastlines, distance from the mainland, etc.

It is also to be noted that Greece is not an archipelagic state (in the meaning of the definition of Article 46 of UNCLOS) that would be entitled to "draw straight archipelagic baselines joining the outermost points of the outermost islands."¹³³ Accordingly, Kastellorizo cannot in any way be used to draw jurisdictional lines that would create an enclosed space of jurisdiction with other Greek islands.¹³⁴

According to the Agreement concluded in Bern in 1976,¹³⁵ which is still in force, Turkey and Greece have pledged to study state practice and international rules "with a view to eliciting such principles and practical criteria as might be of use in the case of the

¹³² Cf. also Serhat S. Çubukçuoğlu, *Turkey's Exclusive Economic Zone in the Mediterranean Sea: The Case of Kastellorizo*, p. 41.

¹³³ Article 47(1).

¹³⁴ In a Greek paper, drawing "archipelagic-type baselines in the Aegean insular complex" is frankly characterized as a kind of tactical move – so as to have a bargaining chip to counter Turkey's claims in future international arbitration: Ioannis Th. Mazis & G.-A. Sgouros, "The Greek EEZ: Principles of a Geopolitical Analysis," in: *Civitas Gentium*, Vol. 3, Issue 1 (2013), pp. 109-132; ch. IV.

¹³⁵ *Bern Agreement between Turkey and Greece*, jointly signed on 11 November 1976 by the heads of the Hellenic and Turkish delegation, Mr. Jean Tzoujnis and Mr. Ali Suat Bilge. Source: www.turkishgreek.org/kuetuephane/item/50-bern-agreement-between-turkey-and-greece-11-november-1976, accessed 10 November 2020.

delimitation of the continental shelf between the two countries.”¹³⁶ In the absence of a bilateral arrangement so far, the two neighboring countries still have the option of arbitration either by the International Court of Justice or an ad hoc arbitral tribunal (similar to the courts of arbitration in the above-mentioned disputes between Canada and France, and the United Kingdom and France respectively). As regards the ICJ, both states would have to accept jurisdiction of the Court, under Article 36(2) of its Statute, for the disputes in question (relating to the continental shelf/EEZ, territorial waters, national airspace, demilitarized status of islands, etc.). In a judgment of 19 December 1978, concerning an application by Greece in the continental shelf case,¹³⁷ the Court found that “it is without jurisdiction” to entertain the application of the Hellenic Republic.¹³⁸ In its application, Greece had referred to a “Joint Communiqué” of the Prime Ministers of Greece and Turkey according to which the problems between the two countries “should be solved peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague.”¹³⁹ The reason for the Court’s rejecting the application was that, in the Court’s interpretation, the communiqué “was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Governments, to

¹³⁶ Article 8 of the Agreement.

¹³⁷ International Court of Justice, *Aegean Sea Continental Shelf Case (Greece v. Turkey)*. Judgment of 19 December 1978.

¹³⁸ Par. 109 of the Judgment.

¹³⁹ “Brussels Communiqué of 31 May 1975.” Quoted according to Andrew Wilson, “Attempts at a solution,” in: *The Aegean Dispute*. Adelphi Papers, Vol. 19, Issue 155 (1979), pp. 10-16; p. 10.

accept unconditionally the unilateral submission of the present dispute to the Court.”¹⁴⁰

In the absence of resolution by way of arbitration, direct negotiations between coastal states seem to be the only option. Under the geographical conditions of the Mediterranean, in many instances *bilateral* negotiations may not be sufficient, however. Because of overlapping jurisdictional zones, third parties will have to be included in certain cases. This has been evident in the above-mentioned negotiations and agreements between Turkey and Libya or Greece and Egypt in particular. Any two countries cannot – so to speak, “unilaterally” – agree on a contiguous continental shelf/EEZ area that encroaches upon a third party’s continental shelf. In the present regional and geopolitical constellation in the Mediterranean, *regional cooperation* beyond ideological lines – and independent of influence from players from outside the region – will be indispensable. As the authors of the “Atlas of the European Seas and Oceans” have pointed out, under UNCLOS, too, the core mechanism for the management of semi-enclosed seas (in the absence of applicable legal rules) is *cooperation*.¹⁴¹ A “Mediterranean Conference on Maritime Demarcation and Cooperation” may be a far-fetched idea. Ultimately, however, a sustainable régime of maritime zones in the Eastern Mediterranean can only be achieved in a wider regional context. A comprehensive format of cooperation could go beyond mere demarcation of boundaries and include agreements on the co-sharing of resources

¹⁴⁰ *Op. cit.*, Par. 107.

¹⁴¹ Juan Luis Suárez and Juan Carlos Rodríguez Mateos, “The Mediterranean and Black Sea: Regional Integration and Maritime Nationalism,” in: *Marine Policy*, Vol. 26(5), September 2002, pp. 383-401.

in areas of overlapping jurisdictional claims (as between Turkey and Greece).¹⁴² The experience of intergovernmental cooperation in Europe since the 1950s may offer some guidelines – although, as of today, the European Union, itself being a party to Mediterranean disputes, cannot be an effective or credible negotiator in the cases in question.

¹⁴² Cf. Mehmet Ozay, “Co-ownership: a just solution to Greco-Turkish maritime dispute,” in: *News in Cyprus*, 5 September 2020, <http://www.newsincyprus.com/news/261515/co-ownership-a-just-solution-to-greco-turkish-maritime-dispute>, accessed 15 November 2020.

Epilogue

In semi-enclosed areas of sea such as the Mediterranean, the United Nations Convention on the Law of the Sea creates more confusion than clarity, namely chaos of overlapping claims.¹⁴³ The Convention's rules and definitions are simply not applicable in this context. Statutory reference to direct negotiations or established procedures of arbitration is nothing that goes beyond what already exists as conventional wisdom in international law. In the vacuum of regulation, each party feels under pressure to make unilateral claims in order to position itself for future negotiations.

The strange *duality*, in fact *duplicity*, of the Convention's concept of "continental shelf" – as *reality* of physical geography and, at the same time, up to a limit of 200 nm, as *fictional* shelf in the sense of entitlement – is indicative of the powerful vested interests of coastal states. The coextensive "exclusive economic zone" is the reason why there *must* be a continental shelf even if none exists. That it can be extended up to a breadth of 350 nm – if there is proof that it *actually* exists – has further intensified the run on resources of the seabed and subsoil. The development of technology has drastically increased the reach and impact of national interests,¹⁴⁴ often at the expense of the environment and, thus, the global commons.¹⁴⁵

¹⁴³ Cf. Friso Dubbelboer, "UNCLOS under Pressure: Law of the Jungle or Law of the Sea?," in: *Clingendael Spectator*, 28 July 2020, <https://spectator.clingendael.org/en/publication/unclos-under-pressure-law-jungle-or-law-sea>, accessed 23 November 2020.

¹⁴⁴ For a statement that is typical of the underlying approach, in terms of priority of the "national interest," cf. Paul L. Kelly, "Statement on Behalf of the National Ocean Industries Association," in: *Territorial Sea Extension. Hearing before the Subcommittee on Oceanography and Great Lakes of the Committee on Merchant*

The United Nations Convention on the Law of the Sea has created a new kind of *anarchy of the seas* instead of preventing it. It has further encouraged policies of “maritime nationalism”¹⁴⁶ all around the globe. The Convention’s generous, and often ambiguous, “entitlements” may tempt states to make exaggerated jurisdictional claims. Because of the lack of precise rules – or because of the inapplicability of those rules exactly in the areas where it most counts –, these claims further undermine the “rule of law on the oceans” the Convention was meant to uphold.

The unresolved disputes not only in the Eastern Mediterranean, but also in the South China Sea, do not bode well for the future. Arbitral decisions – whether by the Convention’s tribunal,¹⁴⁷ the ICJ or ad hoc courts – are practically unenforceable against powerful national interests. The concept of “continental shelf,” launched upon the conclusion of World War II by one of the then dominant global players,¹⁴⁸ has given quasi-legal shape and

Marine and Fisheries. House of Representatives, One Hundred First Congress, First Session on Examination of the President's Proclamation Extending the Territorial Sea of the United States from 3- to 12-Miles. March 21, 1989. Serial No. 101-7. Washington: U.S. Government Printing Office, 1989, pp. 87-93.

¹⁴⁵ Cf. also, *10 Principles for High Seas Governance*. International Union for the Conservation of Nature (IUCN), https://www.iucn.org/downloads/10_principles_for_high_seas_governance-final.pdf, accessed 20 November 2020.

¹⁴⁶ The term is used by Suárez and Mateos, *The Mediterranean and Black Sea*, *loc. cit.*

¹⁴⁷ International Tribunal for the Law of the Sea.

¹⁴⁸ As regards the history of decolonization after World War II, it is worthy of note that the Declaration of Independence of the former Republic of Biafra (proclaimed by Lt. Col. C. Odumegwu Ojukwu on 30 May 1967) mentioned the territory of Eastern Nigeria “together with her continental shelf and territorial waters” as forming part of the new sovereign state. (“The Declaration [Made by Col. Ojukwu],” in: C. Odumegwu Ojukwu, *Biafra: Selected Speeches and Random Thoughts of C. Odumegwu Ojukwu*. New York: Harper & Row, 1969, pp. 191-196.)

recognition to the doctrine that “the land dominates the sea.”¹⁴⁹ In the name of this doctrine, coastal states, and in particular states with overseas possessions, have been able to project their interests at the expense of landlocked states, and to the detriment of the common heritage of mankind.

Under the flawed “Constitution of the Sea,” which UNCLOS has become as a result of vested interests, states – whether Parties to the Convention or not – may, for the foreseeable future, have to live with compromises and ad hoc deals. Like the run for control of outer space, the global run on the resources of the ocean, poorly restrained by law, is now a defining feature of globalization. In this environment, the controversy around the tiny island of Kastellorizo has become a symbol of gluttony in the pursuit of power and national interests – where geopolitics, more often than not, defeats law.

¹⁴⁹ Cf. Bing Bing Jia, *op. cit.*, and the Judgment of the ICJ of 20 February 1969, referred to in fn. 18 above.

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Annex

- Map no. 1: Delimitation of maritime zones in the Eastern Mediterranean according to a European Commission map (2015): “Exclusive Economic Zone (EEZs)”
- Map no. 2: “Atlas of the European Seas and Oceans” (2007)
- Map no. 3: Delimitation of territorial sea between Turkey and Italy in the area of Kastellorizo (1932)
- Map no. 4: Continental shelf / exclusive economic zone around Saint-Pierre et Miquelon
- Map no. 5: Maritime delimitation in the Black Sea / maritime boundary in the vicinity of Serpents’ Island
- Map no. 6: Maritime delimitation in the Black Sea / maritime boundary lines claimed by Romania and Ukraine
- Map no. 7: Maritime boundaries between the United Kingdom and France in the area of the British Channel Islands (Îles Anglo-Normandes)
- Map no. 8: EEZ/continental shelf demarcation between Greece and Turkey according to a Greek map
- Map no. 9: EEZ/continental shelf areas claimed by/agreed between states of the Eastern Mediterranean, except Turkey
- Map no. 10: Demarcation of EEZ/continental shelf area claimed by Turkey in the Eastern Mediterranean
- Map no. 11: Overlapping jurisdictional claims of Cyprus, Greece and Turkey
- Map no. 12: Demarcation of the continental shelf between Libya and Malta
- Map no. 13: Overlapping continental shelf zones of Argentina and the British Overseas Territory of the Falkland Islands

Map no. 1

Delimitation of maritime zones in the Eastern Mediterranean according to a European Commission map (2015): “Exclusive Economic Zones (EEZs)”

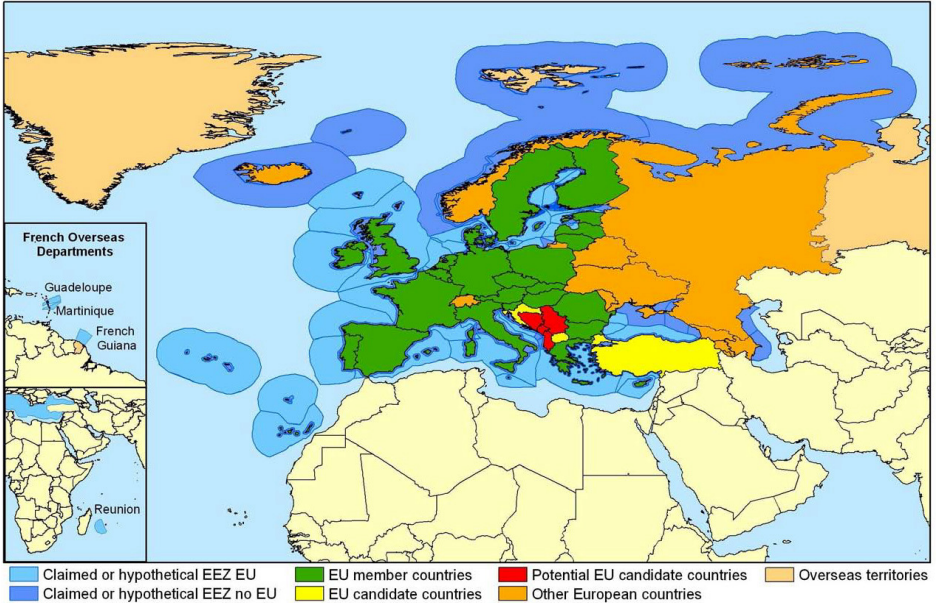
Source: European Commission / Maritime Affairs and Fisheries, *The EU and international ocean governance: Experience and commitment towards sustainable and multilateral management*, 15 October 2015.



Map no. 2

“Atlas of the European Seas and Oceans” (2007)

Source: Juan Luis Suárez de Vivero with Juan Carlos Rodríguez Mateos, *Atlas of the European Seas and Oceans: Marine jurisdictions, sea uses and governance*. Barcelona: Ediciones de Serbal, 2007.



Enlarged excerpt of map, depicting the continental shelf/EEZ area assigned to Turkey between the areas drawn around Rhodes and Kastellorizo to the west, and Cyprus to the east.

The small Turkish area is in the shape of a triangle that separates the large areas of Greece and Cyprus, while connecting the Turkish area to the southern Mediterranean waters. It is important to note that this map of 2007 classifies all areas as “claimed or hypothetical.” Since then, the situation has changed because of bilateral delimitation agreements.

Map no. 3

Delimitation of territorial sea between Turkey and Italy in the area of Kastellorizo (according to the Ankara Agreement of 4 January 1932)

Source: globalsecurityreview.com, 29 July 2020.

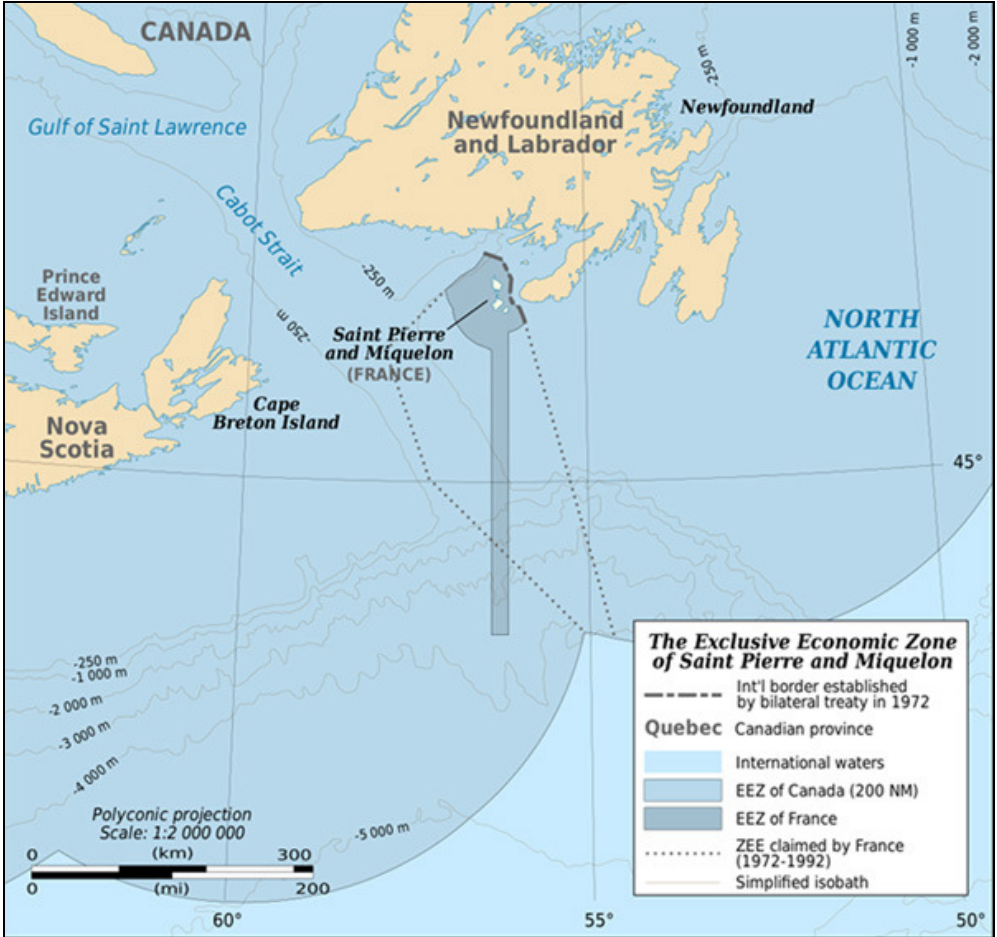


N.B.: The actual period of Italian sovereignty over Kastellorizo is 1923-1947. The Treaty of Sèvres (1920), which never entered into force, cannot be interpreted as legal title for the Italian occupation of the island in 1921.

Map no. 4

Continental shelf / exclusive economic zone around Saint-Pierre et Miquelon
(according to the decision of the special Court of Arbitration of 10 June 1992)

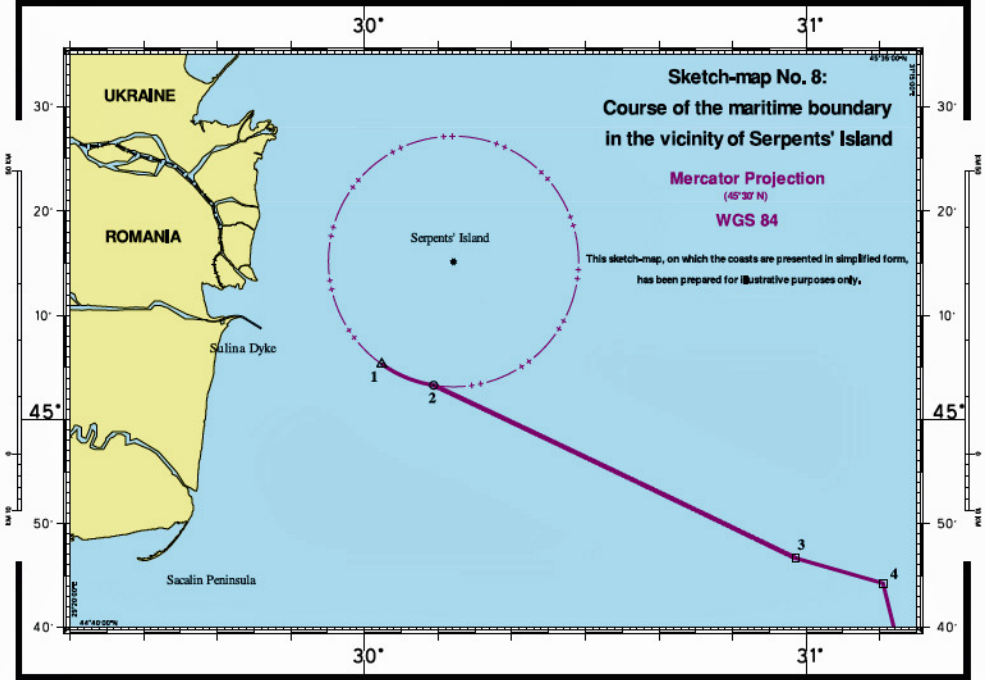
Source: NGDC World Data Bank II.



Map no. 5

Maritime delimitation in the Black Sea / maritime boundary in the vicinity of Serpents' Island

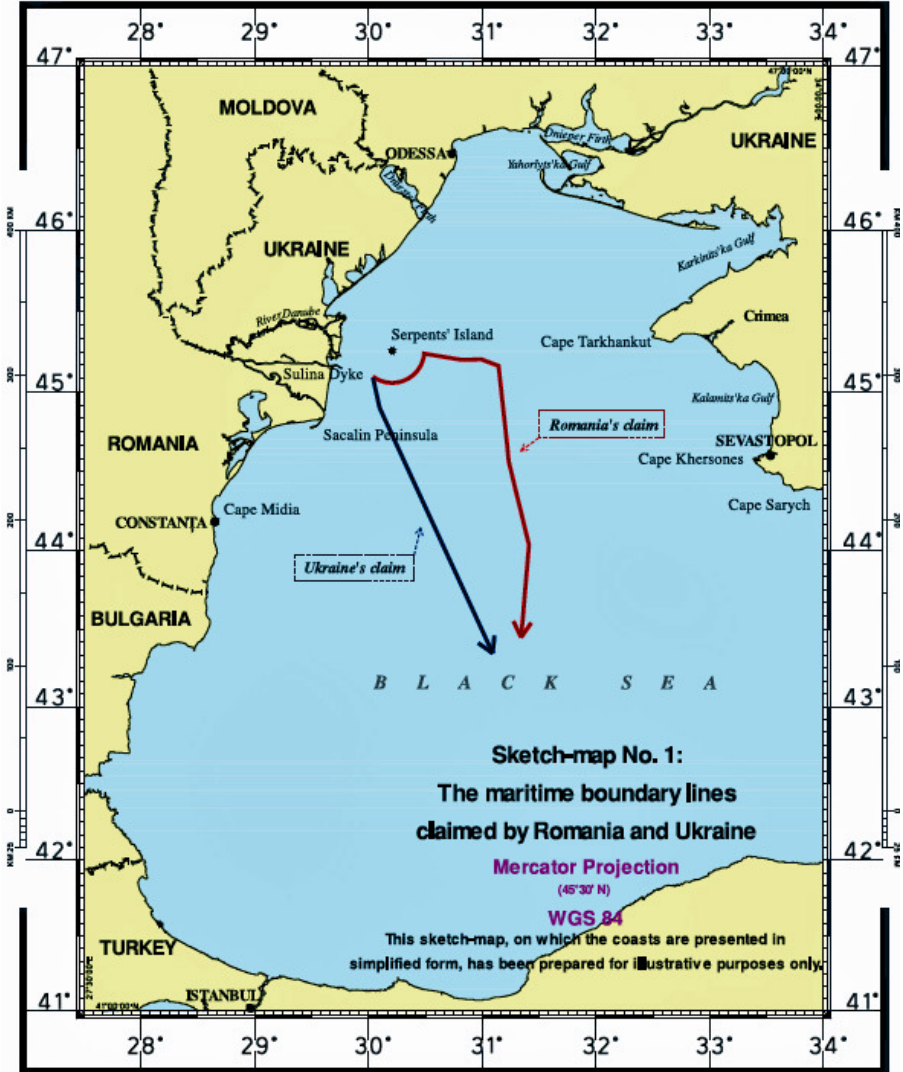
Source: International Court of Justice, Romania v. Ukraine, Judgment of 3 February 2009, Sketch-map No. 8.



Map no. 6

Maritime delimitation in the Black Sea / maritime boundary lines claimed by Romania and Ukraine

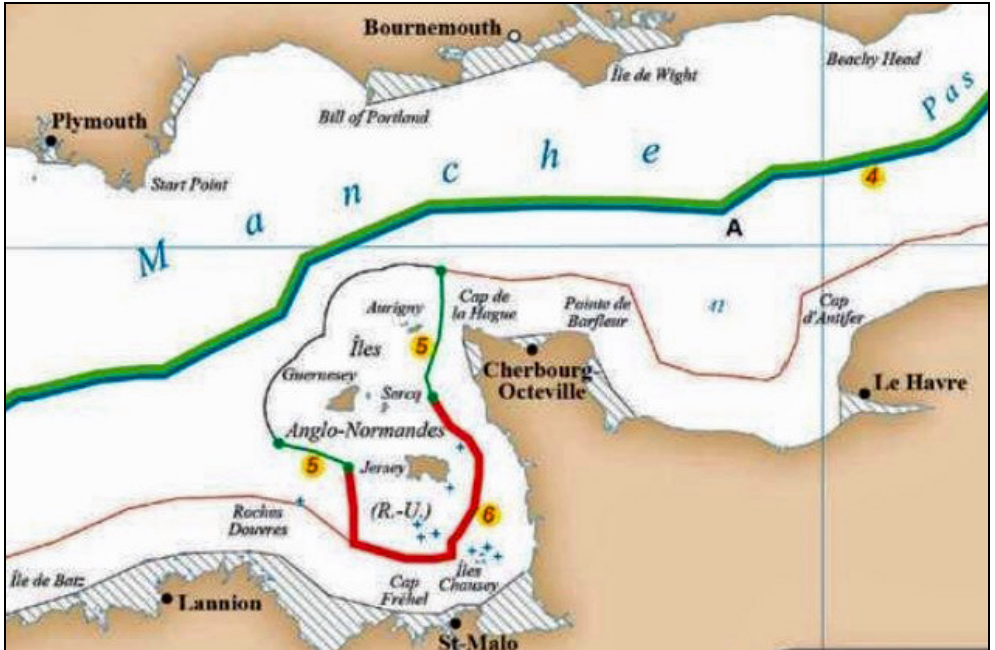
Source: International Court of Justice, Romania v. Ukraine, Judgment of 3 February 2009, Sketch-map No. 1.



Map no. 7

Maritime boundaries between the United Kingdom and France in the area of the British Channel Islands (Îles Anglo-Normandes)

Source: Wikimedia Commons.

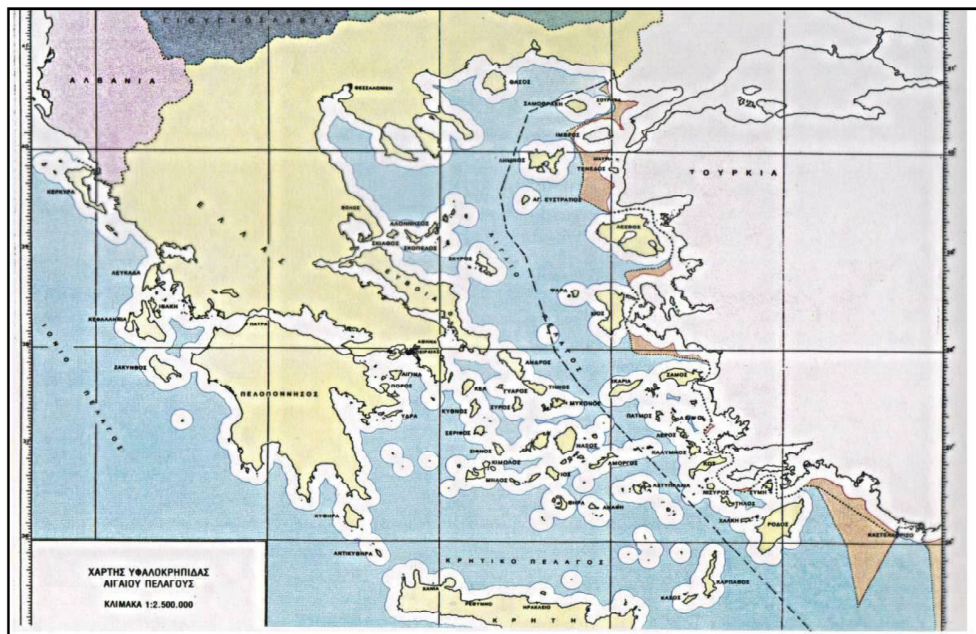


The median line (green) delimits the continental shelf between the UK and France according to the arbitral award of 30 June 1977.

Map no. 8

EEZ/continental shelf demarcation between Greece and Turkey according to a Greek map

Source: Hellenic National Hydrographical Service.



The thick dotted line depicts a maritime median line between Greece and Turkey (in reference to Turkey's position). The orange-colored zones represent the EEZ areas of Turkey according to the Greek position.

Map no. 9

EEZ/continental shelf areas claimed by/agreed between states of the Eastern Mediterranean, except Turkey (2019)

Source: <https://www.keeptalkinggreece.com/2019/12/02/turkey-kastellorizo-greece-eez/>.



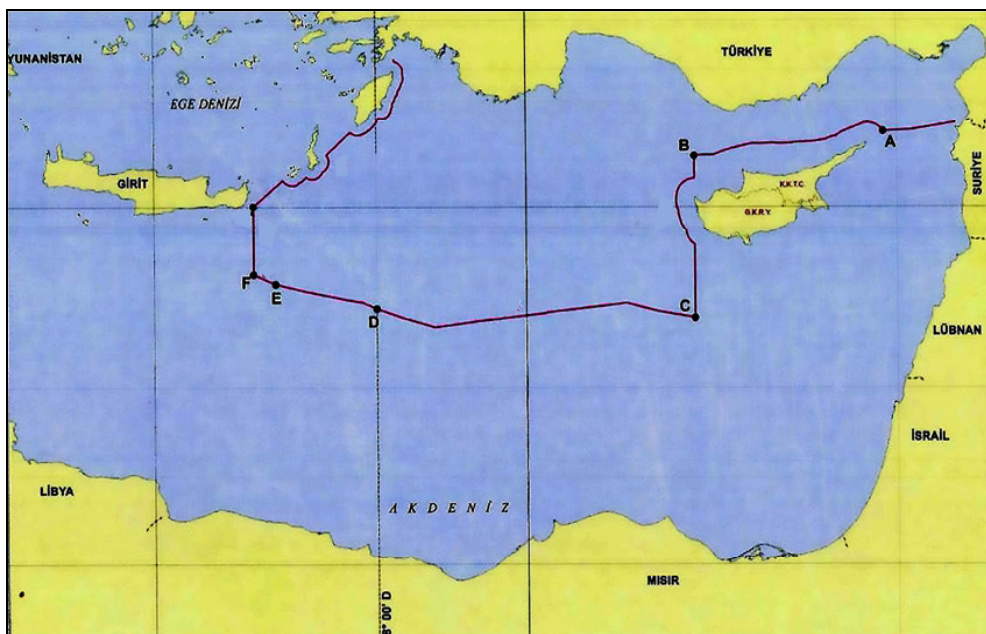
Upper right: Kastellorizo (marked with red circle)

Dotted lines mark maritime boundaries on which there exists no agreement. Lines marked in yellow represent boundaries for which there exist bilateral agreements (Cyprus-Egypt, Cyprus-Israel, Greece-Italy). This map exclusively depicts the claims of Greece, Cyprus, Egypt, and others, excluding the claims of Turkey. For Turkey's position, see map no. 10. For an illustration of the overlapping zones of Cyprus, Greece and Turkey, see map no. 11.

Map no. 10

Demarcation of EEZ/continental shelf area claimed by Turkey in the Eastern Mediterranean

Source: Turkish Foreign Ministry, Annex to letter dated 18 March 2020 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, 18 March 2020, UN/General Assembly Doc. A/74/757.



For an illustration of the overlapping zones of Cyprus, Greece and Turkey see map no. 11.

Map no. 11

Overlapping jurisdictional claims of Cyprus, Greece and Turkey

Source: The Economist, U.K.

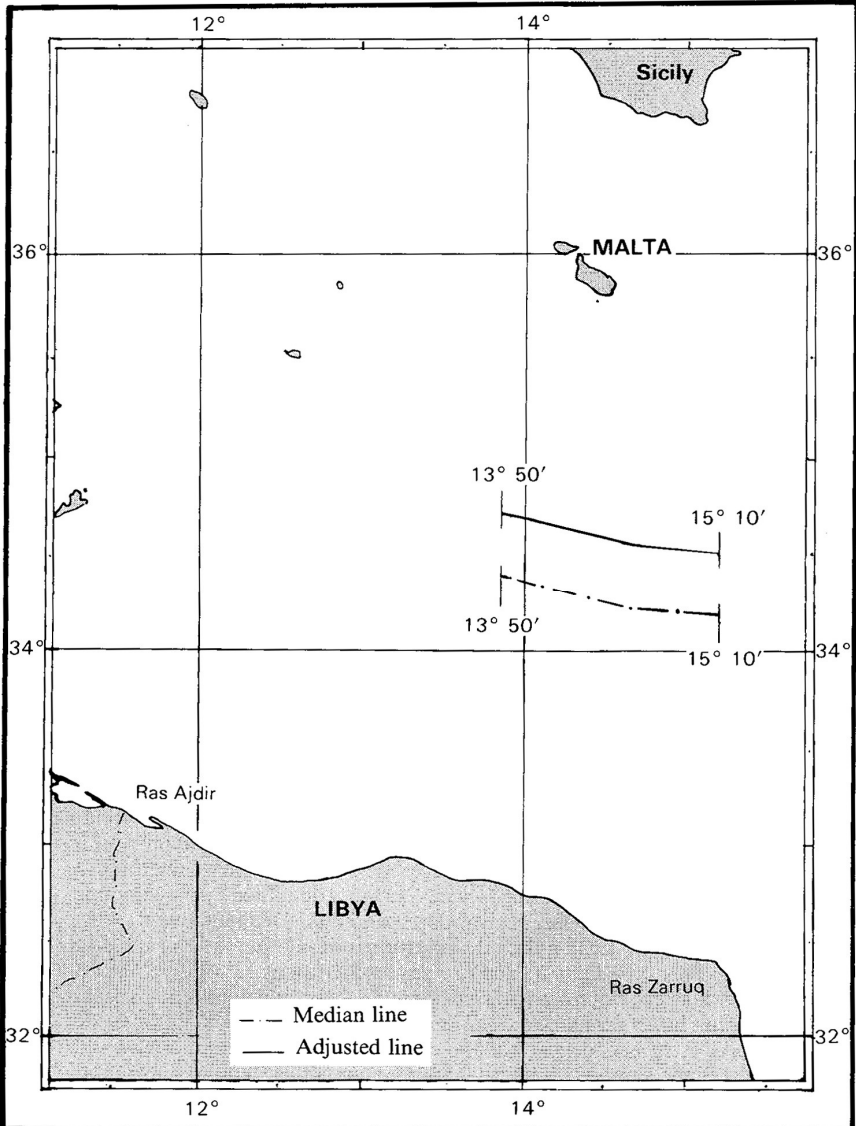


Black line: EEZ/continental shelf according to Turkey; upper blue line: limits of EEZ/continental shelf according to Greece and Cyprus, respectively.

Map no. 12

Demarcation of the continental shelf between Libya and Malta

Source: International Court of Justice, Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, Map No. 3.



Map no. 13

Overlapping continental shelf zones of Argentina and the British Overseas Territory of the Falkland Islands

Source: IBRU: Centre for Borders Research, University of Durham.



The areas colored in light red reflect the status according to the 2009 Submission of Argentina to the Commission on the Limits of the Continental Shelf. However, in the absence of a resolution of the dispute between Argentina and the United Kingdom over territorial sovereignty in the Falkland Archipelago, it is impossible to unambiguously define jurisdictional zones. Even if the question of territorial sovereignty were settled, there still would be the issue of overlapping EEZ/continental shelf areas between Argentina and the United Kingdom, in particular as regards Argentina's claim of an extended continental shelf.

List of Abbreviations

CEPMLP	Center for Energy, Petroleum and Mineral Law Policy (University of Dundee, UK)
CLCS	Commission on the Limits of the Continental Shelf
EEZ	exclusive economic zone
EU	European Union
FPI	Foreign Policy Institute (Turkey)
ibna	Independent Balkan News Agency
IBRU	International Boundaries Research Unit (University of Durham, UK)
FOS	foot of the continental slope
ICJ	International Court of Justice
ILC	International Law Commission (United Nations)
ILM	International Legal Materials
InforMEA	United Nations Information Portal on Multilateral Agreements
IUCN	International Union for the Conservation of Nature
km	kilometer
Navtex	navigational telex
NGDC	National Geophysical Data Center (USA)
nm	nautical mile (1.852 km)
OGEL	Oil, Gas & Energy Law (Journal)
OSA	Open Society Association (Maldives)
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS I	First United Nations Conference on the Law of the Sea

UNCLOS III	Third United Nations Conference on the Law of the Sea
US	United States
UW	United World International (Turkey)

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