CAN TURKEY FOSTER REGIONAL STABILITY UNDER UNCLOS?

The United Nations Convention for the Law of the Sea (UNCLOS) is nothing less than one of the most effectual peace instruments regulating the largest space on this planet. As Turkey did not accede to UNCLOS, an unclear legal environment exists wherein both Turkey and the international community feel uncomfortable. The developments of customary international law of the sea apply towards Turkey despite the rejection of UNCLOS. This paper describes particular advantages of UNCLOS and peculiarities of the Turkish position, arguing for a thorough analysis of actual legal positions on this matter. The article also underscores the importance of capacity building and the value of legal certainty under the rule of international law.

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Since the collapse of the Ottoman Empire, Turkey has had a mistrust of maritime powers, and maritime commerce in general.[1] This attitude is a consequence of numerous naval defeats against the more advanced European naval powers, losses that had deep-rooted effects in the collective mind of Turkey.[2] The defeats were a consequence of superior European technology in naval equipment and research skills, as well as advanced free-market societies able to finance these resources. However, the founder of the Turkish Republic, Mustafa Kemal Atatürk, was extremely aware of the manifold strategic dimensions of Turkey's adjacent sea and demanded to join that international competition.[3]

The aforementioned attitudes were noticeable during the negotiations of the United Nations Convention for the Law of the Sea – UNCLOS (and its preceding Geneva Convention) – and manifested themselves in certain academic and strategic schools of thought in Turkey. The aims and value system of UNCLOS were collectively perceived and understood in the context of several international conventions relating to sovereignty, military, or freedom of maritime navigation, negotiated in the decades of the declining Ottoman Empire and the emerging Turkish Republic.[4] While this interdependence is quite understandable, it creates confusion and harms the ability to analyze and to assess the underlying value system of the Law of the Sea and the structures, mechanisms, and instruments that further evolved in the meantime.

In 2015 the time is ripe for modern Turkey to step back and separate the two distinct spheres: on one hand, the genuine Law of the Sea and, on the other hand, Turkey's historical and, more importantly, present regional situation. This is especially important, as the latter has changed fundamentally in the past few years. It is highly probable that Turkey may face even more changes. This article will first briefly describe the regulations of UNCLOS with a focus on its dispute-resolution mechanisms and then move on to some of Turkey's past and ongoing maritime issues.

1 The main reason for the insolvency of the Ottoman Empire was the huge current account deficit, which had its origin in maritime-based trade and commerce activities with European naval powers. In particular, the granting of trading rights and privileges, called "capitulations," ultimately drained the financial resources of the state. Interestingly, there are striking similarities to modern Turkey's growth being based on a strong increase of the state's indebtedness and large current-account deficits.

2 Mahmud II, the 30th Sultan of the Ottoman Empire coined the phrase "*Denize düşen yılana sarılır*" [*The one who falls into the sea, clutches [even] to the snake*], referring to the Battle of Navarino in 1827 where ultimately the Turkish-Egyptian fleet lost against Russian Empire and its allies, leading to the independence of modern Greece.

3 Stated during a speech at the Turkish Parliament on 1 November 1933: "*Denizciliği, Türk'ün büyük ulusal ülküsü olarak düşünmeli ve onu az zamanda başarmalıyız*" [*We must regard seafaring as the Turkish national ideal and rapidly advance ourselves in that field*].

4 Among others, the Treaty of Lausanne (1923), the Treaty of Sèvres (1920), and the Montreux Convention Regarding the Regime of the Straits (1937).

The Regulatory Scope of UNCLOS

On a global dimension, the improved rule of law on the high seas – particularly the freedom of navigation – was the key element for the immense increase of global trade and the advancement of economies. This was mainly due to shared production systems and access to new markets. The high seas, the world's largest space, are subject to a regulation mechanism under UNCLOS (and other maritime conventions) to which nearly all states, including land-locked countries, contribute. Remarkably, Turkey, Syria, Israel, Azerbaijan, Tajikistan, and all four Turkic Central Asian states are abstaining.[5] However, the rules of the preceding treaty to UNCLOS, the Geneva Convention (1958), and, more importantly, customary international law apply to them as well. Some parts of UNCLOS are considered as international customary law, even if not the whole corpus. Therefore, the notion that a country is not bound to UNCLOS, due to non-signing or non-ratification, needs more careful analysis. UNCLOS' importance cannot be underestimated as the convention (and its underlying value system) is nothing less than one of the most effectual peace instruments regulating the largest space on this planet.

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UNCLOS contains important general definitions and specific definitions on functional sea space, as well as allocating rights and duties to states and stakeholders, particularly with regard to use of maritime recourses. Furthermore it contains peaceful dispute-resolution mechanisms (e.g. the International Tribunal for the Law of the Sea, based in Hamburg, and the International Seabed Authority, based in Kingston, Jamaica), which are entitled to represent and act on behalf of all mankind when regulating or licensing ocean seabed mining.

Focusing now on the International Tribunal for the Law of the Sea (ITLOS), the 24 cases that have been brought thus far by member states of UNCLOS, on behalf of their respective citizens against other member states, dealt mainly with the release of illegally seized vessels, environmental pollution activities, proprietorship of maritime resources, and security in the maritime space. These cases all had high commercial and/or political relevance to UNCLOS member states. Several of these conflicts were among neighboring states. The rules of ITLOS allow that

5 In total, only 16 member states of the United Nations did not sign UNCLOS, in contrast to the 167 UN member states that did.

parties may confer jurisdiction to the tribunal even though one or both parties of a dispute are not member states of UNCLOS (special submission). Highly remarkable, the proceedings and the final and provisional adjudications of this forum are free of charge.

Recent Developments and Facts

Turkey currently has manifold maritime disputes of various degrees with its neighbors and even non-neighboring states. Some of these disputes are solvable under existing, developed, and globally acknowledged dispute-resolution mechanisms and their underlying principles and value-systems. Furthermore, Turkey is not in a position to become an *Ordnungmacht*, or "rules-setter," in the Eastern Mediterranean, as it does not control sufficient financial or military resources. Hence, Turkey should consider making most effective and efficient use of the existing mechanisms in order to manage its foreign interests, which sometimes have strong domestic implications in a rapidly evolving security environment. In light of numerous maritime-related issues, in April 2015 the G7 foreign ministers issued a declaration on maritime security, stating: "We are committed to maintaining a maritime order based upon the principles of international law, in particular as reflected in the United Nations Convention on the Law of the Sea (UNCLOS)."[6]

Therefore, this article will focus on six maritime issues that illustrate the interrelation between Turkish interests and the Law of the Sea. While examining these issues, the following question should be kept in mind: "Which benefits would Turkey gain regarding the specific maritime issue if it joined UNCLOS?"

The East Mediterranean and Cyprus' Hydrocarbons

For a long time, hydrocarbons were assumed to exist in the exclusive economic zone (EEZ) of Cyprus, which is a member of UNCLOS.[7] While Cyprus accordingly declared an EEZ in the Mediterranean Sea, both Turkey and the self-declared Turkish Republic of Northern Cyprus did not declare any EEZ. As the latter is internationally considered to be a part of Cyprus, the international community is of the opinion that the government of Cyprus was entitled to agree with Egypt (2003), Lebanon (2007), and Israel (2010) on the boundaries of the relevant EEZ. Any exploration and upstream exploitation of hydrocarbons needs a secure legal framework to justify the multibillion-dollar investment of multinational corporations that seek to amortize their investments over time.

6 Press release titled "G7 Foreign Ministers' Declaration on Maritime Security," *German Foreign Ministry*, 15 April 2015, http://www.auswaertiges-amt.de

7 The EEZ provides that the respective coastal state exclusively controls all economic assets up to 200 nautical miles from the coast, according to Art. 57 UNCLOS.

Turkey did not welcome any exploration activities of Cyprus and Lebanon, issuing harsh demands to halt such activities and conducting exploration of its own.[8] Without going into the details, it can be stated that the external environment has changed rapidly and significantly with regard to this issue.[9] Turkey realized that it found itself locked in a legal position, whereby over time its own legal and factual position deteriorated while those of others have improved. Therefore, Turkey perceived it had no alternative other than to delay any further weakening of its position.[10]

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Turkey's international position contains deficiencies preventing the involvement of hydrocarbon business activities, as legal and financial certainty is insufficient. Consequently, Turkey cannot currently join Eastern Mediterranean efforts to capitalize on the huge wealth in the form of hydrocarbons. The newest prospects of a "unified" Cyprus fully controlling Cyprus' EEZ may have overstretched the consequences for Turkey's legal position on this issue. Therefore it is worth analyzing the advantages that any accession to UNCLOS would bring to Turkey.

The Antarctic Treaty System and Third Party Rights

One of the core elements of the Antarctic Treaty System, which must be seen largely separate from UNCLOS, is the call on those states having territorial claims in the Antarctic to put such claims on hold, specifically to refrain from any economic or military usage. Following World War II, the principles of friendly coexistence were implemented in the example of the Antarctic Treaty in 1959, in which *all* states were invited under the Antarctic Treaty System to conduct research and foster international cooperation. Accordingly, a claimed right is used not for the benefit of a third

8 In 2014, Turkey issued a navigational telex stating that a Turkish exploration vessel would be engaged in seismic activities from 20 October to 20 December 2014 and warning against any hindrance, despite the operation area's being in Cyprus' EEZ. Prior to that act, Turkey announced that the navy vessel TCG "*Gelibolu*" would monitor Cyprus' drill ship activities within Cyprus EEZ.

9 Due to financial crises and under the backing of the EU, Cyprus needed to capitalize quickly on the untapped wealth of hydrocarbons.

10 The Turkish Foreign Ministry has stated in Press Release no. 43 dated 15 February 2012: "These activities violate the Turkish Cypriots' equal and inherent rights [and] contradict the letter and spirit of the current comprehensive settlement negotiations," http://ww.mfa.gov.tr. Interestingly, Turkey was also stating that certain maritime spaces "are overlapping with Turkey's continental shelf areas in the Eastern Mediterranean," implying acceptance of the legal term "continental shelf," whose contents have to be viewed in the context of UNCLOS and customary international law.

party, but ultimately for the benefit of all. Turkey is a non-consultative member of the Treaty, and has become very active lately. The Turkish Parliament is currently drafting a law aiming to define Antarctic (and Arctic) research activities as strategic goals.[11] The issue of Antarctic is a wonderful example in which to strengthen Turkey's global research capacity and international recognition.

Deep Seabed Mining: The Next Gold Rush?

The deep seabed contain, some say, limitless amounts of valuable metals such as silver, gold, copper, manganese, cobalt, and zinc in the form of polymetallic nodules, sulphides, and ferromanganese crusts. The resources, being mined by hydraulic pumps or bucket systems, need to be transported to the surface for further processing. Consequently, deep-sea mining raises questions about the potential environmental impact on surrounding areas. The International Seabed Authority therefore regulates and licenses all seabed mining activities. According to commonly shared academic views, joining UNCLOS entitles member states (1) to apply for those licenses, (2) to access rare earth elements and (3) to profit from obligatory technology-sharing mechanisms vested in UNCLOS. It should be within the scope of Turkish national interests to be part of this emerging global seabed mining industry.

*The M/V "*KPS Kaya Bey*" and its Sister Vessels in Pakistan*

The Karadeniz Energy Group, based in Turkey, is the ultimate owner of several power-generating vessels, among those the M/V "*KPS Kaya Bey*" with a generation capacity of 216 MW. The "*KPS Kaya Bey*" and one sister vessels and two barges were employed for two years by Pakistan under a government-sponsored agreement, until Pakistan detained them in April 2012 for various reasons.[12] The commercial case was brought to the International Centre for Settlement of Investment Disputes (based in Washington D.C.). After more than one year, the corresponding tribunal ruled to release one vessel, while the other vessels remain there and the claims for reciprocal damages are still pending.

It is worth mentioning that the majority of ITLOS' cases refer to the "prompt release of vessel" categories. Notably the arrest of the ARA "*Libertad*" (Argentinian frigate) by Ghana in October 2012 also had a strong commercial background. Hearings were held in Hamburg on 29 November 2012, and the tribunal ruled on 15 December 2012 – less than a month later – to release the vessel immediately. Consequently, ITLOS would have been a much faster forum to adjudicate the case of the M/V

11 Furthermore, it applied to achieve Ad-Hoc Observer Status as a non-Arctic state at the Arctic Council (1996).

12 "One Turkish power-generating ship held in Pakistan released," *Hurriyet Daily News*, 5 August 2014.

"*KPS Kaya Bey*" and its sister vessels.[13] Therefore, one can say that Turkey as a state and its citizens would enjoy an important, expeditious dispute-resolution mechanism if Turkey were to become a member state of UNCLOS.

The "Gaza Freedom Flotilla" Incident

In May 2010 a flotilla of several vessels named "Gaza Freedom Flotilla" with strong support from the Turkish public intended to transport cargo and humanitarian aid to the Palestinian Authorities in the Gaza Strip. The intention was to break the sea blockade of the Gaza Strip, in force since 2009. After the Flotilla approached Israeli waters, it was instructed to anchor in the port of Ashdod for inspections of the cargo before releasing it to the Palestinian Authorities. The Flotilla rejected to comply and in the subsequent raid by Israel Defense Forces (IDF), nine members of the Flotilla, the majority of whom were Turkish citizens on the M/V "*Mavi Marmara*" (flying the flag of Comoros), were killed. The raid took place in the high seas. In July 2010 the UN Human Rights Council (UNHRC) conducted an independent Fact-Finding Mission, which resulted in a public report.[14] This incident has led – among others – to a highly stressed relationship between Turkey and Israel and, furthermore, to the problem of finding an adequate international judicial forum to handle the case.[15]

The International Criminal Court dismissed the case ultimately. Unfortunately, neither Turkey nor Israel agreed to submit the case to the ITLOS for unknown reasons. The Fact-Finding Mission concluded that the blockage of the Gaza Strip was illegal and the application of force by IDF-members was "disproportionate."[16] Lacking access to judicial review, the Secretary-General of the UN established a Panel of Inquiry, which published its conclusions in September 2011 (the Palmer Report).[17] The Palmer Report declared that the blockade was in principle legal.[18] There was – not only from Turkey – widespread disappointment regarding the lack of clarity within the Palmer Report. The ITLOS however, not only because of its 21 serving

13 This is assuming that ITLOS would have confirmed its jurisdiction and competence over this case and both governments involved would submit the case to the court.

14 "Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance" (The Mission Report), *United Nations Human Rights Council*, Document A/HRC/15/21, 27 September 2010.

15 In the Turkish national inquiry report (titled "*Interim Report on the Israeli Attach on the Humanitarian Aid Convoy to Gaza on 31 May 2010*," http://ww.mfa.gov.tr) Turkey referred therein (page 23, paragraph 37) to the adjudication of case no 2 of ITLOS being the M/V "*Saiga*" case (*Saint Vincent and the Grenadines v. Guinea*), ITLOS judgment dated 01 July 1999, page 155, https://www.itlos.org This case serves as an excellent example how the adjudications of the ITLOS form international customary law, applicable to and in the benefit of even non-member states of UNCLOS.

16 The Mission Report (2010), p. 53.

17 The panel consisted of four members with the former Prime Minster of New Zealand Geoffrey Palmer as its chair. The other members comprised of one representative from Turkey, Süleyman Özdem Sanberk, one from Israel, Joseph Ciechanover Itzhar, as well as the outgoing Columbian President Alvaro Uribe as vice-chair. The Palmer Report was published as: "Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident," *United Nations*, September 2011, http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf

18 The Palmer Report (2011), p. 44 and 102.

independent judges, but because of the manifold Law of the Sea topics (e.g. high seas, concept of innocent passage, rights under a blockade, right for self-defense of a coastal state, and others) could have been the ideal forum to clearly adjudicate the incident, probably in a more sustainable way.[19] This lack of judicial review had negative ramifications for regional stability in the following years.

The Delimitations in the Aegean Sea and Mediterranean Seas and its Effects on Turkey's EU Accession Process

The boundaries of modern Turkey were determined in the Peace Treaty of Lausanne (1923) as Turkey became the successor of the defunct Ottoman Empire. However, the exact maritime delimitations in the Aegean Sea and in the Mediterranean Sea were overlooked at the time. It is not very likely that any agreement on this topic between Greece, Cyprus, and Turkey (and, with regard to the EEZ, additionally with Syria, Israel, and Lebanon) can be achieved "outside" of UNCLOS. The reason is that UNCLOS provides, firstly, a finely crafted, well-balanced value system, acknowledged by nearly all states of this planet and, secondly, corresponding dispute resolution mechanism for the member states. Furthermore the European Union (EU) itself is a member of UNCLOS. The sum of all norms of the EU, the *acquis communautaire*, cannot be divided for EU-member states that are non-members of UNCLOS. Last but not least, the EU determines as a pre-condition to aspirant states that all onshore and offshore delimitation disputes with EU-member states be resolved before EU-accession, not only in order to reduce inner-EU conflicts but also to pursue a common foreign and security policy.

Conclusion and Appeal for Action

Firstly, it is inherent to a treaty system that certain sovereign rights are waived for the benefit of a greater common cause, which is most often the common goal of international legal certainty and avoidance of military conflicts. Therefore, the losses of any (presumably) existing degrees of freedom have to be weighted versus the advantages of becoming a member state of UNCLOS. The weighting has to be conducted in a rational and analytical manner by competent Turkish stakeholders of various fields. This imminent task should not be delayed anymore, and hopefully will lead to a renewed call for accession to UNCLOS.

Secondly, Turkey should endorse a capacity-building program in the field of the Law of the Sea along the aforementioned example of the Arctic and Antarctic law programs.

19 Among others, the following treaties were also relevant to the case: the London Declaration concerning the Laws of Naval War (1909), the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994), the UN International Maritime Organization Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988).

It seems that no single chair for the Law of the Sea exists at Turkish universities, and the number of publications from Turkish scholars in this field are limited. The most competent institution on this topic within Turkey is probably, somewhat surprisingly, the Turkish Foreign Ministry, and the country's legal analysis is – as mentioned before – predominantly overburdened with political considerations rooted in the experiences of the declining Ottoman Empire and emerging modern Turkey.

The aim of the capacity-building program should be to initially map and publish all unsettled maritime delimitations disputes in the Aegean, the Mediterranean and the Black Sea. This should be combined with an analysis of arguments compliant with the contemporary Law of the Sea. This procedure of bringing disputes from the fog of vague ideas into the technical language of law promises more success in the longer run for Turkey. The avoidance of clarity and the upholding of vaguely articulated rights, especially when the external environment suddenly evolves as it is currently doing, do not help Turkey.

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Finally, accession to UNCLOS should be considered in order to increase Turkey's international reputation and its solution-providing capacity.[20] Turkey would gain substantially more clout when speaking about issues relating to the Aegean Sea, East Mediterranean, and Cyprus if it were a signatory of UNCLOS. Legal certainty is an asset for Turkey and its neighboring states; hence Turkey should become a greater force in improving stability, as well as become a promoter of dispute-resolution mechanisms, not only on maritime matters. Accession to UNCLOS would show a landmark commitment to these goals.

20 The concept of "*sovereign reputation*" is elaborated in Andrew T. Guzman's masterpiece: *How International Law Works – A Rational Choice Theory* (Oxford University Press, 2008), p. 71. A state's "reputation" has also qualitative implications on the sovereign rating of state conducted by international rating agencies like Moody's or Standard and Poor's.