

# Legal Status of Uninhabited Islets and Small Islands —Relationship Between Customary Law and Treaty Law—

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## Introduction

1. Legislative history of Article 121, paragraph 3
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## Introduction

When Japan submitted its application for the extension of the continental shelf beyond 200 nautical miles on 13 November 2008 to the United Nations Commission on the Limits of the Continental Shelf, China and South Korea submitted, one after another, their statements of position to the Commission, claiming that they could not approve the exclusive economic zone (EEZ) and the continental shelf measured from the base-point of Okinotori Island, criticizing the position of Japan<sup>1</sup>. Their arguments were based on the grounds that Okinotori Island is a “rock” under Article 121, paragraph 3, of the United Nations Convention on the Law of the Sea and cannot have its own EEZ or continental shelf.

In the past, China had commended Japan for its claim that Okinotori Island was an “island”, presumably because it might have thought it could likewise claim sovereignty over the uninhabited reefs in the South China Sea and jurisdiction over the surrounding waters. Be that as it may, China did the exact reverse this time. The truth of the matter seems to be that it wants to deny Okinotori Island’s EEZ which stands in the way of its People’s Liberation Army’s naval expansion into the western Pacific, as one senior government official has written in a straightforward way<sup>2</sup>. On the other hand, the behavior of South Korea seems more in line with the “Japan bashing” actions of China going ahead, much as in its criticism of Japanese cabinet members’ visit to Yasukuni Shrine. Aside from such a turnabout in policy, because their criticism on the issue of Okinotori Island was prepared using the wording of the United Nations Convention on the Law of the Sea and a legal basis was presented, a corresponding legal response may be necessary.

However, before proceeding to the main points of discussion, it is worth mentioning that neither State has a direct interest in the sovereignty over or delimitation of maritime boundaries of Okinotori Island, and their criticisms were only from a general point of view. In comparison, Japan’s protest against Russia’s application for an extended continental shelf in December, 2001 was based on the fact that the continental shelf measured from the Northern Territories, which are an inherent part of the territory of Japan, was involved in Russia’s claimed extended continental shelf. This was a legitimate protest against a serious infringement of sovereign rights and was an exercise of rights of a State whose interests were directly affected<sup>3</sup>.

The criticism from China and South Korea against Japan over Okinotori Island was made by the States that have no claims of legal interest. According to the statement of the Chairman of the Commission on the Limits of the Continental Shelf, there is no need of discussion of such criticism. However, since the regulatory wording of the United Nations Convention on the Law of the Sea is used in the criticism, it would not be useless to examine the criticism in general terms in the relevant legal wording.

What follows is a review of the legislative history of the provisions of Article 121, paragraph 3<sup>4</sup> and an attempt

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1 China, Note in Response to the submission made by Japan, dated 6 February 2009, CML/2/2009 (translation); Korea, Note in Response to the submission made by Japan, dated 27 February 2009, MUN/046/09.

2 Gao, Zhiguo, “Considerations and Recommendations on Suyang Reef and Okinotori Reef” (in Chinese), Gao, Zhiguo, Haiwen Zhang, and Jia Yu (eds.), “Studies on the Trends of Development in the International Law of the Sea”, Beijing: Ocean Press, 2007, pp. 6-8. Zhiguo Gao is the director of China Institute for Marine Development Strategy of State Oceanic Administration and a judge of the International Tribunal for the Law of the Sea.

3 In this regard, the following decision made by the Commission on the Limits of the Continental Shelf at its 14<sup>th</sup> session in 2004 should be noted:  
“Both annex II to the Convention and the rules of procedure of the Commission provided for only one role to be played by other States in regard to the consideration of the data and other material submitted by coastal States concerning the outer limits of the continental shelf beyond 200 nautical miles. Only in the case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes would the Commission be required to consider communications from States other than the submitting one.”  
Statement by the Chairman of the CLCS on the progress of work in the Commission, CLCS/42, pp. 3-4, para. 17 (14 September 2004).

4 In this paper, the direct objective of the work to follow this legislative history is not the confirmation of the Convention’s *travaux préparatoires* as supplementary means of interpretation provided in Article 32 of the Vienna Convention on the Law of Treaties.

for a comparison with customary international law and State practice concerning islands.

#### 1. Legislative history of Article 121, paragraph 3

The provision of the “Régime of Islands” of Article 121 of the United Nations Convention on the Law of the Sea is as follows:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.<sup>5</sup>

For the purpose of reviewing the legislative history of the “régime of islands”, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea*, New York: United Nations, 1988 (Sales No. E.87.V.2), a handy manual compiled by the Office of Ocean Affairs and the Law of the Sea of the Office of Legal Affairs, U.N. Secretariat, is available. Referring to this, the author would like to clarify the legislative history.

##### (1) Discussions at the meetings of the Sea-Bed Committee

Prior to the meetings of the Third United Nations Conference on the Law of the Sea (UNCLOS III), the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction—The Sea-Bed Committee—had produced a large number of documents on the “régime of islands” in preparation for the meetings. The declarations made by delegations and the proposals and variants as well as comparative texts subsequently submitted indicate that, although no formal agreement had yet been reached, a number of “main trends” had already emerged, in particular:

- (a) As to the definition of an island, it was suggested to retain the definition given in the 1958 Convention on the Territorial Sea and the Contiguous Zone, article 10, paragraph 1;
- (b) With regard to the delimitation of the maritime space of islands, it was proposed that as a “general rule”, the same criteria applicable for the delimitation of the territorial sea and the continental shelf of continental land masses should also apply to islands;
- (c) In the same manner as continental land masses, islands should also generate an exclusive economic zone or patrimonial sea of their own;
- (d) In order to determine the relevant maritime space of islands, a series of criteria such as “the population or absence thereof” and the geomorphological structure and configuration of (such islands) should be taken into account. It was even suggested that certain categories of “islets and small islands” which were “uninhabited and without economic life” should not possess “any of the shelf or other marine space of the same nature”. Nevertheless, under certain conditions, they might have “waters of their own”.<sup>6</sup>

##### (2) Work done during the first and the second sessions of the Third United Nations Conference on the Law of the Sea

According to the statement prepared by the Rapporteur-General of the 46<sup>th</sup> meeting of the Second Committee, the Committee decided to consolidate the 13 informal working papers into a single working document<sup>7</sup>. Part XIII of the document is referred to as the “régime of islands (Item 19)” and contains a number of draft provisions regarding islands. Its sole purpose was to reflect the main trends that had emerged from the proposals submitted to the Sea-Bed Committee or the UN Conference on the Law of the Sea in generally acceptable formulations<sup>8</sup>. The following part is related to the present Article 121, paragraph 3 (underlines added):

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<sup>5</sup> United Nations, *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the Sea, Introductory Material on the Convention and the Conference*, New York: United Nations, 1983 (Sales No. E.83.V.5), p. 39.

<sup>6</sup> United Nations Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea*, 1988, p. 21, para. 23. However, the “main trends” were far from being agreed upon. Some delegations pointed out that no distinction whatsoever should be made among islands, irrespective of, e.g., their size or population. *Ibid.*, p. 22, para. 25.

<sup>7</sup> *Ibid.*, p. 72, para. 37. *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. III, document A/CONF.62/L.8/Rev.1, annex II, para. 16 and appendix 1. At the 47<sup>th</sup> meeting in Geneva, on 18 March 1975, the Second Committee adopted a programme of work for the first part of the third session. It was decided that the basic text would be the working paper on the main trends in the document. *Ibid.*, para. 41.

<sup>8</sup> *Ibid.*, p. 80, para. 39.

*“2. Other related matters*

*“Provision 241*

*“Formula D*

“2. Islands without economic life and situated outside the territorial sea of a State shall have no marine space of their own.

“3. Rocks and low-tide elevations shall have no marine space of their own.”<sup>9</sup>

(3) Work done during the third session

No proposals or declarations were made in relation to the régime of islands. With regard to the informal single negotiating text for the Conference, the formula related to the régime of islands was prepared on the basis of the work in the second session as well as the work of the Sea-Bed Committee. The draft of the provision thus prepared is as follows:

*“Part VIII: Régime of Islands*

*“Article 132*

“3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”<sup>10</sup>

The wording above is the same as that of the present provision, as are paragraphs 1 and 2. Before the adoption of the informal single negotiating text, the informal consultative groups set up by the Second Committee in April, 1975 had repeated consultations from the results of which the Chairman created the relevant parts of the informal single negotiating text<sup>11</sup>. In this sense, it may be said that the Chairman was responsible for the wording. The Chairman pointed out in the preface that not all the main trends could be included<sup>12</sup>. In fact, the informal single negotiating text was of such a nature as expressed by the President of the Conference at the end of the 55<sup>th</sup> plenary meeting in these words: “The texts would not prejudice the position of any delegation and would not represent any negotiated text or accepted compromise.... It must not in any way be regarded as affecting either the status of proposals already made by delegations or the right of delegations to submit amendments or new proposals.”<sup>13</sup>

(4) Work done during the fourth session

It was decided by the Second Committee that work should be carried out informally and expeditiously without general debate on the basis of the informal single negotiating text, that there should be no submission of formal amendments or alternative texts, and that comments or corrections, if any, should be presented either orally or in writing. It was further decided that the work should be completed by about the middle of the session and the Chairman would prepare a revised single text reflecting the results of the work<sup>14</sup>. Upon completion of this process, the result of the work was incorporated into Part II of the Revised Single Negotiating Text<sup>15</sup>. The draft provision thus prepared was the same as the former draft of the provision, except that “Part VIII” was changed to “Chapter VIII” and “Article 132” was changed to “Article 128” with the subtitle, “Régime of Islands.”<sup>16</sup>

(5) Work done during the fifth session

“Régime of Islands” was not included among the key issues of the Second Committee. Neither did it appear on the “priority questions” list in the report of the Chairman<sup>17</sup>.

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<sup>9</sup> *Ibid.*, p. 75, para. 38.

<sup>10</sup> *Ibid.*, p. 83, para. 43.

<sup>11</sup> *Ibid.*, p. 82, paras. 42 and 43.

<sup>12</sup> *Ibid.*, p. 82, para. 42.

<sup>13</sup> *Ibid.*, p. 83, para. 44.

<sup>14</sup> *Ibid.*, p. 84, para. 48.

<sup>15</sup> *Ibid.*, p. 85, para. 49.

<sup>16</sup> *Ibid.*, p. 85, para. 50.

<sup>17</sup> *Ibid.*, p. 86, para. 52.

(6) Work done during the sixth session

At the plenary meeting held on 28 June 1977, it was decided that the President, the Chairmen of the Main Committees, the Chairman of the Drafting Committee, and the Rapporteur-General would work as a team named “Collegium” under the leadership of the President and that an informal composite negotiating text that covers the main subjects and problems of Parts I-IV of the revised informal single negotiating text would be prepared. In the document thus prepared (Informal Composite Negotiating Text, document A/CONF.62/WP.10 of 15 July 1977)<sup>18</sup>, although the wording of the revised informal single negotiating text remained unchanged regarding the régime of islands, “Chapter” was changed back to “Part” and the article number was changed from “Article 128” to “article 121.”<sup>19</sup>

(7) Work done during the seventh session

At the beginning of the first half of the session, a series of decisions were made relating to the organization of work (document A/CONF.62/62), and the identification and resolution of the outstanding core issues were made the priority issues. Deliberation of other issues was also allowed, including the issue of the régime of islands<sup>20</sup>. Thus in the proposal submitted by nine States including Algeria, it was defined as follows<sup>21</sup>:

*“Article 121*

“4. Rocks and islets which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

The representative of Japan pointed out that it was not right to make distinctions between islands according to their size or according to whether or not they were habitable. He also pointed out that neither the Convention on the Continental Shelf of 1958 nor many States which had an exclusive zone of 200 nautical miles make any distinction between “habitable” and “inhabitable” islands<sup>22</sup>.

(8) Work done during the eighth session

In summary, the informal composite negotiating text was revised into the informal composite negotiating text-revision 1. However, there was no substantial development relating to the existing Article 121, paragraph 3.

(9) Work done during the ninth session

Although the relationship between islands and boundary delimitation<sup>23</sup> was discussed, there was no particular development other than the French delegation’s statement that it regretted that paragraph 3 of Article 121 had not been deleted. The relevant wording of the informal composite negotiating text-revision 2 was the same as in revision 1<sup>24</sup>.

Regarding the text of this revision 2, Venezuela said that, with regard to “human habitation”, “if the provision was to be maintained, his delegation would interpret it as meaning that the capacity of an island to sustain human habitation referred not only to the abstract possibility of habitation, but also to the practical situation.” Further, Venezuela pointed out that “economic life of their own should be interpreted as covering not complete self-sufficiency but the existence of national (*sic*) resources which could be exploited economically or the possibility of other uses.”<sup>25</sup>

The Dominican Republic supported the draft text and pointed out that giving “rocks” a competence to establish an EEZ would create a disturbing precedent that could be based only on political factors<sup>26</sup>.

With the objective of reflecting various discussions held in the resumed ninth session, the informal composite

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18 *Ibid.*, p. 87, para. 55.

19 *Ibid.*, p. 87, para. 55.

20 *Ibid.*, pp. 87-88, para. 57.

21 Document C.2/Informal Meeting/21, *ibid.*, p. 89, para. 58.

22 *Ibid.*, p. 90, para. 60.

23 *Ibid.*, p. 95, para. 71.

24 *Ibid.*, p. 96, para. 73.

25 *Ibid.*, p. 97, para. 76(a).

26 *Ibid.*, p. 99, para. 76(i).

negotiating text-revision 3 was prepared as the Draft Convention on the Law of the Sea (Informal Text), document A/CONF.62/WP/10.Rev. 3 of 22 September 1980. The régime of islands was dealt with in Part VIII, where the wording remained the same as that in the revision text of the previous session<sup>27</sup>.

(10) Work done during the tenth session

The (informal) draft of the Convention was incorporated in the official Draft Convention on the Law of the Sea, document A/CONF.62/L.78 of 28 August 1981, in which Part VIII, régime of islands, stayed unchanged<sup>28</sup>. While the draft convention was made official, delegations were given the opportunity to submit formal amendments to the draft convention as part of the meeting's work schedule<sup>29</sup>.

(11) Work done during the eleventh session

At the plenary meeting of the first part of the session, the delegations were given an opportunity to express their opinions. The representative of Venezuela, questioning the subtle line between islands of paragraph 1 of Article 121 and rocks of paragraph 3, requested the deletion of paragraph 3. The representative of Iran expressed that they could not support the definition of islands in the draft convention. The representative of Turkey said that they could not accept the draft article and therefore would maintain the right to reserve their position. The representative of Greece pointed out that the article on the régime of islands was of crucial importance and should not be touched. The representative of Cyprus also pointed that the compromise achieved by the Second Committee should not be overturned, as it offered the best prospect of consensus<sup>30</sup>.

Despite the above statements of opinion, the memorandum issued by the Collegium of the Second Committee did not include any amendment to Part VIII<sup>31</sup>.

Towards the end of the first part of the eleventh session, delegations were given an additional opportunity to submit formal amendments. The representative of Romania submitted an addition of paragraph 4 to Article 121, which read "Uninhabited islets should not have any effects on the maritime spaces belonging to the main coasts of the States concerned."<sup>32</sup> The representative of the United Kingdom, as in the past, requested the deletion of paragraph 3<sup>33</sup>. The purport of Romania's proposed amendment was to prevent any State from encroaching on the maritime zone of another State by invoking the existence of uninhabited islets in the delimitation area. It pointed out that such a provision was in accordance with the practice of many States and with existing international judicial practice<sup>34</sup>. The grounds of the amendment of the United Kingdom were that there was no basis for such discrimination between different forms of territory in international law and that it would conflict with the rights of States in respect of their territories<sup>35</sup>.

Romania's amendment was supported by Peru, Algeria, and Mozambique<sup>36</sup>, while it was opposed by many States including Greece, the United Kingdom, Japan, East Germany, the USSR, Malta, Trinidad and Tobago, Portugal, Uruguay, Ecuador, Ukraine, and Belarus<sup>37</sup>. The amendment of the United Kingdom was supported by Greece, Japan, Brazil, Portugal, Iran, Ecuador, and Zambia<sup>38</sup> but was opposed by Singapore, East Germany, the USSR, Algeria, South Korea, Denmark, Trinidad and Tobago, Colombia, Uruguay, Mongolia, Belarus, and Pakistan<sup>39</sup>. Thus, more States voted against it rather than for it. On the other hand, Tunisia indicated that Article 121 was properly balanced

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<sup>27</sup> *Ibid.*, p. 99, para. 77.

<sup>28</sup> *Ibid.*, pp. 100-101, paras. 80-81.

<sup>29</sup> *Ibid.*, p. 102, para. 81(d).

<sup>30</sup> *Ibid.*, pp. 103-104, paras. 84(a), (b), (c), (f), (h).

<sup>31</sup> *Ibid.*, p. 104, para. 85.

<sup>32</sup> Document A/CONF.62/L.118, *ibid.*, p. 104, para. 86(a).

<sup>33</sup> Document A/CONF.62/L.126, *ibid.*, p. 105, para. 86(b).

<sup>34</sup> *Ibid.*, p. 106, para. 87(f).

<sup>35</sup> *Ibid.*, p. 105, para. 87(d).

<sup>36</sup> *Ibid.*, pp. 105, 107, paras. 87(c), (k), (l).

<sup>37</sup> *Ibid.*, pp. 105-108, paras. 87(a), (d), (e), (g), (h), (j), (o), (q), (t), (u), (v), (x).

<sup>38</sup> *Ibid.*, pp. 105, 107-108, paras. 87(a), (e), (i), (q), (s), (u), (z).

<sup>39</sup> *Ibid.*, pp. 105-108, paras. 87(b), (g), (h), (k), (m), (n), (o), (r), (t), (w), (x), (y).

and should not be changed<sup>40</sup>. Among the States that opposed the amendments submitted by Romania and the United Kingdom, some States like the USSR, Uruguay, and Ecuador did so because they thought the amendments would destroy the attained compromise<sup>41</sup>.

(12) Written statements of opinion by a few delegations

A letter dated 22 April 1982 from the representative of Australia expressed its objection to the amendment of Romania and support for the amendment of the United Kingdom<sup>42</sup>. Colombia, in its statement dated 1 April 1982 expressed that in eight years there had never once been a suggestion by the Chairman of the Second Committee that change might improve the prospects for a consensus<sup>43</sup>. A statement from Turkey dated 17 April 1982 and a statement from Colombia dated 16 April 1982 expressed strong objection to the amendment of the United Kingdom that requested the deletion of paragraph 3 of Article 121<sup>44</sup>.

(13) Consultations regarding various amendments

With the objective of measuring the degree of support for those amendments, the Chairman of the Second Committee held consultations at the request of the President. As a result, almost all the amendments, including those to Article 121, were withdrawn or were not pressed to a vote<sup>45</sup>. Even after the adoption of the Convention at the 182<sup>nd</sup> plenary meeting on 30 April 1982, Venezuela indicated that it could not accept Articles 15, 74, 83, and Article 121, paragraph 3, in so far as those provisions applied to maritime delimitation<sup>46</sup>. The report introduced to the plenary meeting by the Chairman of the Drafting Committee on 24 September 1982 at the resumed eleventh session contained no recommendation regarding Article 121. After the closing of the resumed eleventh session the UN Convention on the Law of the Sea (document A/CONF.62/122 of 7 October 1982) was published. The régime of islands was dealt with in Part VIII, which follows exactly the language of the previous draft<sup>47</sup>.

(14) Work done during the final part of the eleventh session

In the final part of the eleventh session held in Montego Bay from 6 to 10 December 1982, delegations were given a last opportunity to express their views in plenary before the signing of the Convention<sup>48</sup>. However, several opinions expressed were focused on discussions regarding the role of islands in maritime boundary delimitation<sup>49</sup>. This presumably reflected the fact that, at UNCLOS III, the discussions on the régime of islands were mostly dominated by the island States and those states with islands off the coast to which the effect of islands on boundary delimitation was a major concern<sup>50</sup>.

It may be seen from the preceding review of the legislative history that the provision that “uninhabited islets and small islands without economic life” should not possess “any continental shelf or other marine space of the same nature” had already been made as one of the main trends during the discussions of the Sea-Bed Committee in the preparatory stage of the Conference on the Law of the Sea. It is also recorded that criticism had been raised against such a provision<sup>51</sup>. It is worth noting, however, that a draft article corresponding to the existing Article 121, paragraph 3, had already been presented by the Chairman as early as in the third session of the Conference<sup>52</sup>. The

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40 *Ibid.*, p. 107, para. 87(p).

41 *Ibid.*, pp. 106, 108, paras. 87(h), (t), (u).

42 *Ibid.*, p. 108, para. 88(a).

43 *Ibid.*, p. 109, para. 88(b).

44 *Ibid.*, p. 109, para. 88(c), (d).

45 *Ibid.*, p. 109, para. 89.

46 *Ibid.*, p. 109-110, paras. 90, 91.

47 *Ibid.*, p. 110, paras. 93, 94.

48 *Ibid.*, p. 110, para. 95.

49 Cyprus, Romania, Turkey, Colombia, Iran, the Netherlands Antilles, Greece, etc. *Ibid.*, pp. 110-112, paras. 95(a)-(h).

50 Arguments to connect the régime of islands directly to maritime boundary delimitation were considerably developed, and proposals to include a paragraph for that purpose in the draft text were made at an early stage of the Conference.

51 See note 5 and the accompanying text.

52 See note 10 and the accompanying text.

record shows that there was a substantial amount of discussion concerning the draft article at the Conference, where the United Kingdom, France, Japan, Greece, Brazil, Portugal, Iran, Ecuador, Zambia and others expressed their position that the said paragraph of the article should be deleted from the draft articles. However, this position could not garner a majority vote<sup>53</sup>.

The text of the paragraph seems to have been adopted while any criteria for measuring whether “rocks” could “sustain” “human habitation” and “economic life of their own” were not identified in a strict sense. Although this is a matter for regret, ambiguities generally and unavoidably tend to accompany international conventions as a result of compromises in negotiations. As the United Nations Convention on the Law of the Sea in particular was negotiated as a package deal, its detailed provisions can only be interpreted on a case-by-case basis in their application.

## 2. Relationship between treaty law and customary international law

How will paragraph 3 of Article 121, which was drafted as above, bind the parties to the UN Convention on the Law of the Sea?

Japan signed and ratified this Convention and, therefore, is naturally bound by it. However, when interpreting and applying it in accordance with the wording of its provisions, the meanings of the terms of “rocks”, “human habitation”, “economic life”, and “sustain” are not so definitive as to leave no doubt about them. Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties stipulates that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, which is a rational provision. Is it possible to get any clear meanings of the mentioned four terms in accordance with this provision then? This is a rather difficult question in itself, and as it is not within the scope of this paper, the author would like to refrain from further discussing this matter.

The immediate concern of this paper is whether or not the interpretation as indicated in the criticisms from China and South Korea concerning the issue of Okinotori Island from which Japan claims an extended continental shelf can bind it as a State party to the UN Convention on the Law of the Sea. Japan has heretofore classified Okinotori Island as an “island”, not a “rock”. Its position is that this claim is in accord with customary international law and not in conflict with the provision of the régime of islands in the 1958 Convention on the Territorial Sea and the Contiguous Zone. Therefore, what matters here is whether or not this claim is invalidated by the relevant provision of the new Convention. From this writer’s personal point of view, it will not necessarily be so invalidated. There seems to be a suggestive hint in the fact that a few influential international lawyers have presented an interpretation that the requirement for the exercise of the right of self-defense under Article 51 of the UN Charter does not deny the customary international law requirement for its exercise.

Article 51 recognizes the right of self-defense only in the case of an “armed attack”, saying that “if an armed attack occurs against a Member of the United Nations”, the member State under attack may exercise the right of individual or collective self-defense. The wording “if an armed attack occurs” in the official English text is deemed to be synonymous with “if an armed attack *has occurred*” in the present perfect tense in the English grammar. This interpretation is also adopted in a book on the UN Charter by Hans Kelsen<sup>54</sup>, which has been regarded as an authoritative interpretation. However, if, on the basis of this interpretation, the right of self-defense can be invoked only after a missile with a nuclear warhead has reached a targeted State and has caused a catastrophic effect<sup>55</sup>, it is difficult to regard such an interpretation as appropriate. In the traditional international law, it was understood that the State had the right to take action in self-defense against an “imminent attack.” D. W. Bowett says it is erroneous to assume that UN member States own only the rights given by the Charter. They also have those rights which general international law accords to them except and in so far as they themselves have surrendered them under the Charter<sup>56</sup>. C. H. M. Waldock also takes this view and says, “it is enough if there is a strong probability of an armed attack — an imminent threat of armed attack...”<sup>57</sup> Regarding the *Corfu Channel* Case in 1949, he also says, “at any rate, it is clear that the Court did not take a narrow view of the inherent right of self-defence reserved by Article

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53 See note 36 and the accompanying text.

54 Hans Kelsen states, “... the right of self-defence exists only *if*, and that implies *after* an armed attack occurs.” (Emphasis original) Kelsen, Hans, *Recent Trends in the Law of the United Nations*, London: Stevens & Sons, 1951, p. 914. He also states, “The exercise of the right of self-defence consists in actions, especially enforcement actions (meaning actions involving the use of force) directed against the aggressor *after an armed attack has occurred*.” (Emphasis added) *Ibid.*, p. 915.

55 Cf. Bowett, D. W., *Self-Defence in International Law*, Manchester: Manchester University Press, 1958, pp. 191-192, where he says, “no state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state’s capacity for further resistance and so jeopardize its very existence.”

56 *Ibid.*, p. 185.

57 Waldock, C. H. M., “The Regulation of the Use of Force by Individual States in International Law”, *Recueil des Cours de l’Académie de Droit International de La Haye*, tome 81 (1952-II), p. 500.

51.”<sup>58</sup>

More importantly, State practice endorses the nonrestrictive interpretation of Article 51 of the Charter. In the deliberation of the definition of aggression at the UN General Assembly Sixth Committee in 1952, the representatives of Belgium, Greece, the United Kingdom, and the United States all considered that a State threatened with an impending attack might be justified in attacking first in self-defense<sup>59</sup>.

Such an interpretation under general international law is considered to hold good in the official French text of the Charter because it reads “dans le cas où un Membre des Nations Unies est l’objet d’une agression armée” (emphasis added), which can be interpreted to include not only the case where an armed attack has occurred but also the case where an armed attack has not yet occurred. While the existence of such a difference between the official texts of the Charter in different languages is a problem, which might be put aside for the moment, the fact is that the official French text has the same authenticity as the official English text (Article 111 of the Charter)<sup>60</sup>. In short, while the requirement for the exercise of the right of self-defense under Article 51 is interpreted in a narrow and restrictive manner in the official English text, it is interpreted in a broad and nonrestrictive sense in the official French text. On the basis of the latter, the conclusion could not be avoided that the requirement for the exercise of the right of self-defense under general international law is not dead in the Charter.

As regards the relationship between customary international law and the UN Charter regarding Article 51, the International Court of Justice showed a judgment in the *Nicaragua* Case (merits) in 1986:

“Even if the customary norm and the treaty norm were to have exactly the same content (in relation to this dispute), this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm.

It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content.”<sup>61</sup>

Although this judgment only concerns Article 51 of the Charter, its general implication could not be totally denied.

What can further be said from the legal point of view is that interested States play an important role in the formation of not only international relations in general but also customary international law. In its judgment in the *North Sea Continental Shelf* Cases of 1969, the International Court of Justice held that “State practice, including that of States whose interests were specially affected” needs to show a “general recognition that legal rules or legal obligations are involved.”<sup>62</sup> When we have a look at the practice of interested States with islets and small islands from this viewpoint, the United States and France, the world’s two largest EEZ holders, have established their EEZ using all islands and insular formations that are above water at high tide as the baseline<sup>63</sup>. Australia established the EEZ in the Elizabeth Reef and the Middleton Reef areas that “are almost submerged at high tide.” In November 2004, when Australia submitted an application for an extended continental shelf, the United States made an objection, which targeted the extended continental shelf from the South Pole and did not refer to the extended continental shelf from these two reefs. The United States would not have made an issue of the extended continental shelf from the reefs probably in consideration of its own position.

## Conclusion

Article 121, paragraph 3, of the United Nations Convention on the Law of the Sea has now been established through the legislative history as shown above. The existing wording of the text of Article 121 had already been formed at a fairly early stage, although various amendments were subsequently submitted and much discussed. Eventually, however, the wording from the early stage was adopted in the official text of the Convention. Throughout the process, consideration was given to the idea that the Convention, as a whole, was a package deal and, therefore, that the sessions should be conducted with the position of each delegation on hold for the sake of a

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58 *Ibid.*, p. 501.

59 278<sup>th</sup>-295<sup>th</sup> meetings (5-22 January 1952), as quoted by Bowett, *op. cit.*, *supra* note 55, p. 189.

60 The official Spanish text also uses the expression “en caso de ataque armado (in the case of an armed attack)”, meaning that the occurrence of an armed attack is not necessarily assumed as the prerequisite, the wording being similar to the French text. By contrast, the official Chinese and Russian texts would seem to be close to the official English text.

61 *ICJ Reports 1986*, p. 94, para. 175; p. 96, para. 179. *See also* p. 94, para. 176; pp. 94-95, para.177; p. 95, para. 178.

62 *ICJ Reports 1969*, p. 43, para. 74.

63 For example, although French atoll Bassa da India off the west coast of Madagascar is completely submerged at high tide for three hours, it has the EEZ. Madagascar claims sovereignty over this atoll. Kagami, Yasuhiko, “Management Policy of Remote Islands—Based on Recent U.S. and French Cases” (in Japanese), “FY2007 Research and Study Report on Maintenance and Regeneration of Okinotori Island”, Tokyo: Ocean Policy Research Institute, 2008, p. 38.

compromise for all<sup>64</sup>. Consequently, although the official stance was that negotiations were possible for the “negotiating text”, the impression is that it was a Chairman-directed text. As a treaty is drawn up through the political process of negotiations, it naturally takes on a political hue. Unlike treaties which are prepared over a long time by a group of experts of international law such as the International Law Commission, there may be a high possibility that the Convention on the Law of the Sea reflects a stronger political compromise.

As matter of fact, specific meanings of the terms of “rocks”, “human habitation”, “economic life of their own”, and “sustain” under Article 121, paragraph 3, do not seem to have been discussed in detail during the sessions, although it would have been clear that this question of definition could immediately arise when the paragraph must be applied.

The interpretation that an uninhabited islet or small island whose position as an island has long been established<sup>65</sup> should be deemed as a “rock” under Article 121, paragraph 3, because it is “not human habitable” or “cannot sustain” “economic life of its own” and, therefore, that neither an EEZ nor a continental shelf can be established around it is much too superficial. It ignores the history of such an island and the sovereignty of the State that owns the island. The State owning such an uninhabited islet or small island may possibly abandon the traditional status of the island so as to meet the wording of Article 121, paragraph 3, as a signatory to the Convention. However, such a change in its status might be a political judgment that cannot necessarily be regarded as a judgment formed on a legal basis.

When islets and small islands are at the risk of being submerged at high tide due to abrasive action of the sea, some preventative reinforcing works have in fact been done<sup>66</sup>. However, no questioning of the legality of such works seems to have been made<sup>67</sup>. This fact may further strengthen the certainty of the position of an island in customary international law.

On the other hand, in regard to an uninhabited islet or small island in the middle of the ocean having an encircling EEZ of a radius of 200 nautical miles, there is criticism that it is an infringement on the deep sea-bed, a “common heritage of mankind.”<sup>68</sup> However, such criticism could be called an inversion of logic. The United Nations Convention on the Law of the Sea defines the ocean floor outside the legitimate limits of the EEZ or the continental shelf of the coastal State as the deep sea-bed, the landside limit of which can only be specified after the outer limits of the continental shelf as the limit of national jurisdiction is identified<sup>69</sup>.

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64 For example, at the end of the first half of the ninth session, the President of the Conference mentioned in the informal composite negotiating text (2<sup>nd</sup> revised explanatory memorandum): “The very nature of the concept of a package deal required that no delegation’s position on a particular issue should be treated as irrevocable until at least all the elements of the package had formed the subject of agreement and that, therefore, every delegation had the right to reserve its position on any particular issue until it had received satisfaction on other issues which it considered to be of vital importance to it.” United Nations Office for Ocean Affairs and the Law of the Sea, *op. cit.*, *supra* note 5, p. 96, para. 74.

65 Okinotori Island was incorporated into Ogasawara Village in Tokyo in July, 1931. Ogasawara Islands were discovered by a Japanese in 1593, and after a fight over ownership of the Islands with the United States, the Islands came under the control of Japan. They came under U.S. control in the post-WWII period, but were returned to Japan in 1968 under an agreement with the United States. Before the establishment of the EEZ in June, 1996, the 200-nautical-mile provisional fishery zone was set in May, 1977, and a part of the provisional fishery zone included the surrounding waters of Okinotori Island. But no State protested against the inclusion until the provisional fishery zone was switched to the EEZ. Even after the establishment of the EEZ, no protest had been made until China recently raised its voice against this island’s EEZ and continental shelf. Miyoshi, Masahiro, “Japan’s Claim to Extended Limits of the Continental Shelf”, Van Dyke, Jon M., Sherry P. Broder, Seokwoo Lee, Jin-Hyun Paik (eds.), *Governing Ocean Resources: New Challenges and Emerging Regimes: A Tribute to Judge Choon-Ho Park*, Leiden/Boston: Martinus Nijhoff Publishers, 2013, p. 236, note 13.

66 When it was discovered, Iceland’s Isle of Kolbeinsey had an area covering 700 meters north and south and 100 meters east and west, but by 2001, it had become an isle of 90 square meters with two hills (3.5 meters and 2 meters high respectively) due to erosion. In 1989, although it was reinforced with concrete and a heliport, the heliport was destroyed by further erosion, and the isle eventually became two islets in 2006. Denmark (the Faroe Islands) and Norway claimed that these islets were rocks, but did not protest against the reinforcement work. “FY2007 Research and Study Report on Maintenance and Regeneration of Okinotori Island”, Tokyo: Ocean Policy Research Institute, 2008, pp. 44-45.

67 At least two law of the sea specialists say that reinforcement work is allowed as additional work for “naturally formed land” to be above water at high tide. Hayashi, Moritaka, “International Law on Islands/Rocks” (in Japanese), “FY2006 Research and Study Report on Maintenance and Regeneration of Okinotori Island”, Tokyo: Ocean Policy Research Institute, 2007, pp. 16-17; Symmons, Clive Ralph, *The Maritime Zones of Islands in International Law*, The Hague: Martinus Nijhoff Publishers, 1979, p. 33; *Id.*, “Some Problems Relating to the Definition of ‘Insular Formations’ in International Law: Islands and Low-Tide Elevations”, *Maritime Briefing*, Vol. 1 (1995), pp. 2-3.

68 In August, 2009, the Law of the Sea Institute and Inha University jointly held an international conference on the law of the sea in Honolulu, and the author made a presentation on Japan’s application for the extended continental shelf submitted to the UN Commission on the Limits of the Continental Shelf in November, 2008. When there was a question from the floor asking if Okinotori Island’s continental shelf might not violate the common heritage of mankind, the author made an explanation as described in the text.

69 The United Nations Convention on the Law of the Sea provides for the deep sea-bed in Article 134, paragraph 1, and then states: “Nothing in this article affects the establishment of the outer limits of the continental shelf...” in paragraph 4.

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