THE ARCHIPELAGO CONCEPT IN THE LAW OF THE SEA: PROBLEMS AND PERSPECTIVES

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HISTORICAL PERSPECTIVES: THE LAW ON THE TERRITORIAL SEA

There is a crisis today in the law of the sea, brought on by the obsolescence of erstwhile comforting concepts which have to give way to the more intricate visions of a framework for the management of ocean space — and yet the new framework does not possess immediate practical value for the solution of pressing problems at hand.[1] This state of flux has underlined all the more the issues posited by Prof. Schewebel in the present debate over the content of the law of the sea: Who shall control the seas, and for what purposes?[2]

These issues, of course, are not new. They are as old as the *jus gentium* itself, a protean conundrum reducible to the bare mechanics of striking the happy balance between the general interest (advocating freedom of the sea) and the particular interest of coastal states (advocating the extension of their authority to at least a certain belt of the adjacent sea.)[3] They have confronted the family of nations ever since man launched the epic voyages of discovery[4] and learned to build up the naval power of the State.[5]

Efforts at caliberation of both interests have been marked by a fluctuation between two concepts: the *mare clausum*, or the sea held to be appropriated by particular nations, to the *mare liberum*, or the sea held to be free and open to all for all purposes. While the modern trend is towards the *mare liberum*, another movement has made clearer under international law certain exclusive rights of maritime states over waters immediately adjacent to their coasts. "To this extent all maritime coun-

[1]Kunsumaatmadja, *The Legal Regime of Archipelagos: Problems and Issuse*, in LAW OF THE SEA INSTITUTE, SEVENTH ANNUAL CONFERENCE, 1972 PROCEEDINGS 166.

[2]Schewebel, "Who Shall Control the Sea and For What Purposes?" Washington Post, November 8, 1972, p. A-26, as cited in Ridao, *The Philippine Claims to Internal Waters and Territorial Sea: An Appraisal*, 3 PHIL. Y. INT'L. L. 57 (1974).

[3]Francois, *Some Aspects of the Extension of National Sovereignty to the Adjacent Sea*, 1 INT'L. RELATIONS 79 (1955).

[4]In 1493, the Royal Bulls sought to demarcate, by an imaginary line 100 leagues west of the Azores, Portuguese and Spanish rights of sovereignty. England was then provoked to declare the doctrine of common use for sea and air. See, for example, 1 OPPENHEIM & LAUTERPACHT, INTERNATIONAL LAW 583-4 (8th ed., 1955) and COLOMBOS, INTERNATIONAL LAW OF THE SEA 45-46 (6th rev. ed., 1961).

[5]COLOMBOS, *supra*, note 4.

tries now possess a sovereignty of the sea."[6]

Limited sovereignty over the so-called territorial sea or territorial waters[7] descends from the sovereignty asserted of old by particular nations over whole seas or large parts of seas. The successive stages of contraction are evident in the histories of Denmark (the Norwegian Sea and the North Atlantic), Sweden (the Baltic), Spain, and Portugal. But during all this time, "there was a general recognition that every maritime state was entitled to exercise jurisdiction over some extent of the neighboring sea."[8] Problems arose over the lack of agreement as to the extent of the adjacent sea that could be appropriated, and there has never been any lack of proposals for limits on boundaries.

Jurists applied themselves with zeal to the challenge of defining the territorial belt. In the twelfth and thirteenth centuries, the early English lawyers — Glanville, Bracton, Britton, and "Fleta" — merely echoed the Roman law by holding that the sea is, by its nature, common, and they refrained from drawing a specific limitation within which exclusive dominion could be exercised by the prince of the adjoining state. But in the Middle Ages, the early Italian jurists were already attacking the problem squarely. Bartolus of Saxo-Ferrato set out the limit to be a distance of one hundred miles from the coast, or less than two days' journey; his pupil Baldus Ubaldus posited a shorter distance of sixty miles, or one day's journey from the coast. Bartolus conceded to the prince rights of jurisdiction and the appropriation of islands;[9] Baldus conferred not only jurisdiction but also sovereignty.

In the sixteenth century, Bodin in France wrote that within sixty miles from shore, the prince of the adjoining country could impose law on those approaching the coast. In the next century, Gentilis concurred in the view that both jurisdiction and dominion pertained to the neighboring state, stretching the applicable distance to one hundred miles from the coast — and even farther, as long as there was no interference from the proximity of another state.

The doctrine of sovereignty or dominion over a specified maritime zone was already current by the seventeenth century, although there was no evidence that it was confirmed by general usage. It appears to have

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[6]FULTON, THE SOVEREIGNTY OF THE SEA 537 (1911).

[7]Also called neighboring, proximal, adjacent, or littoral sea — *Mare proximum, mare vicinum, mer territoriale, nachstang renzender Meer.*

[8]FULTON, *op. cit., supra,* note 6 at 538.

[9]Navigation was almost entirely restricted within his prescribed distance, prompting Fulton to observe the probability of the primary idea as the maintenance of order and the suppression of piracy.

been followed in certain parts of the Mediterranean, until the eighteenth century.[10]

The demarcation of seas went further with the adoption of the principle of the mid-channel, or *thalweg*, from the law apportioning the waters pertaining to either bank of a river. This doctrine traced its source to Roman law; since the *thalweg* was often a boundary between contiguous states, it was easily adapted from rivers to intervening seas. As the boundary of maritime jurisdiction or sovereignty between two states, it produced the effect of leaving little of the sea unappropriated.

We find the doctrine of the *thalweg* as early as 1023 in King Cnute's charter, in *Mirror of Justice* (a law-book written in the reign of Edward II), and in the pronouncements of Die, Plowden, and Lord Chief-Justice Hale. But, "(t)here is no evidence that the principle of the mid-channel as applied to the sea was ever homologated by an English sovereign or Government."[11]

So far, we have met with the method of delimitation consisting of drawing imaginary lines in the sea, at some distance from the coast. But there was another method: using the range of vision on a fair day, seawards from the shore, or vice-versa. This principle was employed in Scotland, England, Spain, and Denmark. But it was fair game to the critics: Bynkershoek, for example, pointed out that the distance "would vary according to the position of the observer, the keenness of his vision, the climate, and many other circumstances, and it was inapplicable to narrow seas, such as the Channel, where the opposite coasts belonged to different states."[12]

Even more vulnerable was a third proposal for allotting the space of sea where the adjacent state should have exclusive rights of fishing: the adjacent nation should have a primary right to the fisheries, as against foreigners. Thus, for example, the territorial sea should not be fixed absolutely but should be proportional to the needs of the adjacent state, without violation of the just rights of other peoples.[13]

As for bays, straits, and arms of the sea, early general usage placed them under the jurisdiction of the neighboring state, in contra-distinction to the sea on an open coast. The controversy centered on the size of the area considered as territorial. Under the old common law of

[10]But the abortive Russian Ukase of 1821 prohibited foreigners from navigating in the Behring Sea within one hundred Italian miles off the coast. In 1891, the claim was revived by the United States.

[11]FULTON, *op. cit., supra*, note 6 at 543.

[12]*Ibid.*, p. 546.

[13]Sarpi, writing in Italy in the seventeenth century and defending Venetian claims.

England, they were regarded as within the body of the adjacent county, if they could be "reasonably discerned" from the other shore. As they were *inter fauces terrae,* offenses committed within their areas were triable at common law. On the other hand, on the open sea along the coast, the jurisdiction of the common law was coextensive only with the low-water mark, and beyond that, the Admiral had jurisdiction over the high sea, or *altum mare.* Bays, as part of the territory, were clearly distinguished from the open coast.

Up to this point, the territorial waters of a state were determined by arbitrary methods, unrelated to a natural basis which could be universally applied. Such a natural basis appeared in the seventeenth and eighteenth centuries, via the principle "that the maritime dominion of a state ended where its power of asserting continuous possession ended."[14] The contiguous state could lay claim only over that territorial sea which it could command and control by artillery on shore. The sea was common when it lay beyond the range of guns on shore.

This principle appears to have received definite expression at the beginning of the eighteenth century, but was first put in writing by Grotius in his work, *Law of War and Peace.* Conceding that a state might acquire sovereignty over parts of the sea, he laid down two aspects of this sovereignty: firstly, in regard to persons by an armed fleet; and secondly, "in regard to territory, as when those who sail on the coasts of a country may be compelled from the land, just as if they were on land."[15] Perhaps because the principle was obscurely and incidentally put, and perhaps because its time had not yet come, the doctrine espoused by Grotius had little effect on the jurists of the seventeenth century. It was eclipsed by the proposals of two other writers, Loccenius and Puffendorf. Loccenius wrote that a nation could not acquire universal dominion over the sea, but it could acquire sovereignty over a particular sea, as far as that was under its power, subject to the rights of innocent passage and navigation by others. Puffendorf argued that a nation could justifiably claim dominion in the neighboring sea, because it had the right of exclusive fishing, as well as the right to secure and defend itself.

In the century that followed the seventeenth, claims and practice were modified. The changes were wrought in part by the juridical controversies between writers of various nationalities, and by decisions of the High Court of Admiralty of England. But there is a twofold reason of greater impact: "One was the moral and material victory

[14]FULTON, *op. cit., supra,* note 6 at 549.
[15]The most obvious reference appears to be compulsion by artillery.

of the Dutch Republic in its long and persistent struggle against the exorbitant claims to maritime dominion, first, of Spain and Portugal, and then of England and Denmark. The other was the great extension of commerce and navigation, in which England secured an ever-increasing share, so that in the next century we find her taking the part of Holland in opposing the Danish claims to *mare clausum*."[16]

It was at the beginning of the eighteenth century that the principle of delimiting the territorial sea, generally accepted today, was first expounded. In 1703, Cornelius van Bynkershoek[17] wrote that the open ocean could not be totally controlled, but large parts of the sea could be appropriated, when the surrounding territory belonged to the claimant ruler. Following Grotius, he posited "that principle that the dominion of a state extended over the neighboring sea as far, and only as far, as it was able to command and control it from the land."[18] And this control was effectuated by throwing projectiles from the shore by artillery — hence the famous appellation of "the cannon-shot rule."

Bynkershoek's famous doctrine had the merit of transferring in theory to all parts of a coast the function of compulsion and dominion which before had only existed in the presence of forts and batteries. But the doctrine was also open to criticisms of fictitiousness; for in many coasts and districts it is impractical to control the territorial sea by using artillery on shore; and in factual terms, such control is actually wielded by other means, such as coast guards and naval vessels. Nevertheless, the intrinsic merits of the doctrine and its happy phraseology[19] combined to earn it a place in international law as the rule for fixing the boundary of the territorial waters.

After Bynkershoek, there was a tendency to narrow the extent of the territorial sea. Hubner[20] advanced two reasons for reiterating the doctrine: firstly, it is in the power of the master of the country to take possession and to maintain parts of the adjacent sea by means of forts and batteries erected on shore; and secondly, the waters serve as a rampart to the land. Valin[21] tacked on a new principle to the doctrine by proposing consideration, not only of the reach of guns from the coast, but also of the depth of the water; the area up to the point at which the bottom could no longer be reached by a sounding-line pertained to the

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[16]FULTON, *op. cit., supra*, note 6 at 554.

[17]Like Grotius, he was a Dutchman. He was Judge in the Supreme Court of Appeal of Holland, Zealand, and West Friesland.

[18]FULTON, *op. cit.*, 556.

[19]*Terrae dominium finitur ubi finitur armorum vis* — "The dominium of the land ends where the power of arms terminates."

[20]An assessor in the Consistorial Court at Copenhagen.

[21]An authoritative French writer.

adjoining coast. Fulton[22] properly characterized his ideas as "vague and impracticable." It was Moser[23] who declared that the territorial sea extended as far as a cannon-ball could reach, and G.F. von Martens[24] who gave the equivalent distance as three leagues.[25]

Before the century closed, publicists had put forward the three-mile limit as an alternative to the range of guns. Following Galiani,[26] Azuni[27] declared that the equivalent distance should be fixed at three miles, as the farthest trajectory possible for a cannon-shot.

Along lines parallel to the opinions of international jurists, the practice and usage of nations in the eighteenth century was characterized by three features: "(1) the continued decadence of claims to sovereignty over extensive areas; (2) the growing custom of fixing definite boundaries for special purposes by international treaties or by municipal laws; (3) legal decisions by which the limit of cannon range was recognized in certain cases."[28] The decadence of wide claims to maritime sovereignty was evident in the cases of Venice, England, Denmark, Norway, and Spain. Towards the end of the eighteenth century, the horizon was dotted by various maritime boundaries assigned in particular places for particular purposes. Many states fixed the extent of their neutral waters upon the limit of gunshot from an open coast. And in 1793 — when war broke out between Great Britain and France — the United States, finding it necessary to define the extent of territorial protection on the coast in order to effectuate its status as a neutral, tentatively adopted one marine league, or three geographical miles, as the equivalent of gunshot from the shore.[29]

In the nineteenth century, the views of Grotius on *imperium* and of Bynkershoek on *dominium* helped to produce a conception of sovereignty of the coastal state over the territorial sea, of the same nature as sovereignty over the territorial land. *Vis-a-vis* these ideas on sovereignty, certain authors wanted to confine the coastal states only to specific and strictly defined rights: de la Pradelle would only acknowledge coastal servitudes (*servitudes cotieres*) of a coastal state on the adjacent sea, while Fauchille would only admit a right of self-defense (*droit de con-*

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[22]In 562.

[23]A councilor of state in Denmark.

[24]In works considered classics in the field.

[25]He further admitted that a nation could acquire maritime dominion beyond this limit.

[26]Sicilian Sev. of Legation at Paris.

[27]An Italian author who was a judge in the commercial court at Nice.

[28]FULTON, *op. cit.*, 556.

[29]For a painstaking study, see FULTON, *op. cit.*, in the chapter on "The Historical Evolution of the Territorial Sea," at 537-575.

servation) over a belt of sea which would then remain essentially as *mare liberum*.

Today, the coastal state is required to submit to some restrictions on its command of the territorial sea — *e.g.*, the right of passage — which delimit more its authority than those on land. But, "(t)he question has now been decided to the advantage of the sovereignty theory; the sovereignty of the coastal state over its territorial sea is generally recognized."[30] The prevailing rule is that a state has sovereignty over a certain belt of sea — *une certaine zone de mer* — adjacent to its coasts.

One great problem remains and challenges the modern-day technocrats of ocean space. How far does the territorial belt extend? We have seen that at the end of the eighteenth century — because the range of a gun amounted to about three sea-miles — the three-mile breadth was gradually adopted. But the criterion for fixing this breadth was the actual power capable of being exercised by the coastal state; hence, it does not appear that the three-mile limit was meant to be accepted permanently in international law as the boundary of the territorial sea. "It is obvious that, when it became possible as the result of technological developments to exercise this power over a much greater distance, the tendency would be also to extend the limits of the territorial sea."[31] At the same time, there was a dawning recognition "that the disposition to equate the width of the territorial sea with the principle of command of that sea from the coast was a very dangerous one."[32] It is dangerous because the stupendous increase in the range of guns brought on by modern technology would gravely imperil the principle of freedom of the sea.

More contemporaneously, the U.S. Delegation's Report on the Third U.N. Conference on the Law of the Sea held at Caracas, Venezuela, in 1974, states: "Agreement on a 12-mile territorial sea is so widespread that there were virtually no references to any other limit in the public debate." If so, the more compelling area for study would be the mechanics of drawing the territorial sea limits — and here we come to the complex and fascinating question of the archipelago concept.

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[30]Francois, *loc. cit. supra*, note 3.
[31]*Ibid.*, 80.
[32]*Ibid.*

THE CONCEPT OF ARCHIPELAGOS

A. *Definition*

The archipelago concept in the law of territorial waters does not put forward a latter-day construct but merely vivifies a concept of long standing. The *Encyclopedia Britannica* defines archipelago as "any island-studded sea." *Webster's International Dictionary* notes that the term "archipelago" derives from the Grecian Archipelago, or Aegean Sea,[33] and applies the term to "any sea or broad sheet of water interspersed with many islands or with a group of islands; also, such a group of islands." It thus appears that while the original meaning was of a *sea* studded with many islands, the generic term by transposition has attained the universal meaning of the studding *islands* within the sea. It is also apparent that the concept of archipelago has traditionally referred, not only to a group of islands, but also to an intimate and inseparable combination of land and sea.[34]

Accordingly, Evensen's[35] widely-accepted definition states: "an archipelago is a formation of two or more islands (islets or rocks) which geographically may be considered as a whole." He distinguishes two basic types of archipelagos, namely: (1) coastal archipelagos, and (2) outlying (or mid-ocean) archipelagos, and explains: *"Coastal archipelagos* are those situated so close to a mainland that they may reasonably be considered part and parcel thereof, forming more or less an outer coastline from which it is natural to measure the marginal seas. The most typical example of such coastal archipelagos is the Norwegian *skjaergaard* stretching out almost all along the coast of Norway forming a fence — a marked outer coastline — toward the sea. Other typical examples of such coastal archipelagos are offered by the coasts of Finland, Greenland, Iceland, Sweden, Yugoslavia, and certain stretches on the coasts of Alaska and Canada, just to mention a few of many examples. *Outlying (mid-ocean) archipelagos* are groups of islands situated out in the ocean at such a distance from the coasts of firm land as to be considered as an independent whole rather than forming part of an outer coastline of the mainland. A few examples suffice in this connexion: the Faeroes, Fiji Islands, Galapagos, Hawaiian Islands, Indonesian, Japan, Philippines, Solomon Islands, the Svalbard archipelago."

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[33]"It is studded with small islands."

[34]Ingles, *The Archipelagic Theory*, 3 PHIL. Y. INT'L. L. 23 (1974).

[35]EVENSEN, CERTAIN LEGAL ASPECTS CONCERNING THE DELIMITATION OF THE TERRITORIAL WATERS, OF ARCHIPELAGOS, Preparatory Document No. 15, A/CONF. 13/18, 29 November 1957, p. 290.

Another set of definitions limits the concept to a number of major island groups that are relatively concentrated and interrelated, constituting a state (independent or dependent) in themselves and excluded from the mainland. An archipelago should contain the following characteristics:[86]

"1. There must be a substantial number of relatively large islands scattered throughout a sea in an areal and not a linear pattern.

"2. The islands should be situated so as to relate geographically (adjacency) to each other and to others in the group.

"3. They should be perceived as a unitary whole because of political administration."

The same geographer identifies the most important characteristics of an archipelago as the following:

"1. A real dispersion of many islands over two or more axes (longitudinal and lateral).

"2. Adjacency of islands among themselves with special reference to the length of the line about the perimeter.

"3. A land/water or territorial sea/insular sea ratio contained with in the ultimate archipelagic baselines system."

Unlike Evensen, Hodgson identifies not two but three different manners in which the archipelago "principle" has been extended to island types:

"1. The first archipelago system has been applied to coastal islands, which conventionally have been integrated with the mainland territory of the same state. The Norwegian straight baselines system is the classic example of the type; the language of the International Court of Justice's *Anglo-Norwegian Fisheries Case* has, to a large measure, been incorporated into the Geneva Convention on the Territorial Sea and the Contiguous Zone. The provisions, although very general and subject to abuse, have generally provided a basic system to integrate coastal archipelagos into the maritime regimes of the continental territory of states.

"2. A second method of dealing with the problem has been adopted by states which are entirely insular in geography. This system accepts in principle that one (or several) large islands constitute mainland in a manner similar to that permitted by the Convention on the Territorial Sea and the Contiguous Zone. Smaller, fringing islands are 'tied' to the mainland by a system of straight baselines. The United Kingdom, France (Corsica), Iceland, Denmark, (Sjaelland), Greenland, Iceland,

[86]Hodgson, *Islands: Normal and Special Circumstances*, in LAW OF THE SEA INSTITUTE EIGHTH ANNUAL CONFERENCE, 1973 PROCEEDINGS 157.

Cuba, Dominican Republic, Canada (Newfoundland), Haiti, and many other states have utilized this concept without undue protest from the international community. (The Icelandic system, of course, drew many protests, including one from the United States; however, these protests were not publicly based on the use of the archipelago principle but were tied to the extent of the lines and their effects on the local cod fishing of distant water fleets.)

"3. The third type of archipelago principle involves the consolidation of oceanic archipelagos into a single unit by a system of straight baselines. Normally, this insular type varies from the second system in the scale of the archipelago — it invariably covers a larger area than the second category — and in that no single island dominates, in its dimensions, the total land area of the archipelago. Here the islands are nearly all of an equal size — *e.g.*, Galapagos Islands and Svalbard — or several are equally large but dispersed."[37]

While Evensen distinguishes between two basic types of archipelagos — the coastal and the outlying — Hodgson identifies three island types — coastal, insular, and oceanic. Hodgson's additional category — the insular states — appears to be subsumed under Evensen's category of the coastal state. It is well to give distinctive attention to insular states, since they suffer the peculiar onus of consolidating administrative control over outer islands separated by inferior infrastructure and a faulty communications network. Regionalism poses a threat to national unity, and patent restrictions on the mainland option further place the insular states at a disadvantage not suffered by continental states. The obvious geographic inequities that work against the insular states, coupled with the strategic positions of some, *e.g.*, the Philippines and Indonesia, inevitably spotlight remedial doctrines such as the archipelago straight baseline system.

B. *Studies of International Bodies*

i. Institut de droit international. In the 1888 Lausanne session, the question of the extent and delimitation of territorial waters was included in the agenda, and in the 1889 Hamburg session, the question of the delimitation of the territorial waters of coastal archipelagos was also brought up.[38] But no consideration was given to these special questions.[39] In the 1894 Paris conference, proposals were made for the

[37] *Ibid.*, 156.

[38] By the Norwegian jurist Mr. Aubert.

[39] There is no mention of the questions in the reports of 1892 and 1894 made by the Rapporteur, Sir Thomas Barclay, nor in the resolutions passed at the 1894 Paris session. See ANNUAIRE DE L' INSTITUT, vol. 11, 136, 139, *et seq.*; vol. 12, 104 *et seq.*; and vol. 13, 328 *et seq.*

extent of marginal seas, with provisions for bays and straits,[40] but it was only in 1927 that the 5th Committee of the Institut[41] proposed Article 5 on the regime of the territorial waters of archipelagos, as follows in Evensen's unofficial translation:

> "Where a group of islands belongs to one coastal state and where the islands of the periphery of the group are not farther apart from each other than the double breadth of the marginal sea, this group shall be considered a whole and the extent of the marginal sea shall be measured from a line drawn between the outermost part of the islands."

In the 1928 Stockholm conference, coastal archipelagos received special attention with the proposed amendment to Article 5:[42]

> "In case an archipelago is situated along the coast of a country the extent of the marginal seas shall be measured from the outermost islands and rocks, provided that the distance of the islands and islets situated nearest to the coast does not exceed the double breadth of the marginal seas."[43]

By final resolution of the Institut, Article 5 was cast as follows:

> "Where archipelagos are concerned, the extent of the marginal sea shall be measured from the outermost island or islets provided that the archipelago is composed of islands and islets not further apart from each other than twice the breadth of the marginal sea and also provided that the islands and islets nearest to the coast of the mainland are not situated further out than twice the breadth of the marginal sea."[44]

The 5th Committee originally proposed six nautical miles as the extent of marginal sea. Under its original proposal of Article 5, it then followed that baselines drawn between the outermost points of an archipelago were subject to a twelve-mile maximum. The proposed amendment of Article 5 contained no provision for a maximum distance between the islands and islets of an archipelago, merely proposing a distance of twice the breadth of the marginal sea between the nearest island or islets of the archipelago, and the mainland. In its final form, Article 5 contained two proposals: one, that the maximum distance between islands and islets should be twice the breadth of the marginal sea; and the other, that the maximum distance between the nearest islands and islets on the one hand, and the coast of the mainland on the other hand, should likewise be twice the breadth of the marginal sea.

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[40]Article 2 provided that the marginal seas should be fixed at six nautical miles from low-water marks all along the coast. Article 3 provided that in bays, the marginal sea should follow the sinuosities of the coast, except that straight base lines could be drawn across the mouth of a bay where the width thereof did not exceed twelve nautical miles; but historic title might justify wider baselines. Articles 10 and 11 dealt with straits. See 13 ANNUAIRE DE L' INSTITUT 329 *et seq.*

[41]With Sir Thomas Barclay and Prof. Alvarez as Rapporteurs.

[42]Advanced by the Swedish jurist Reuterskiold.

[43]Unofficial translation by Evensen.

[44]Unofficial translation by Evensen at the 34 ANNUAIRE DE L' INSTITUT 673.

The Stockholm conference later changed[45] its proposal for the extent of the marginal sea from six to three nautical miles.

ii. International Law Association. The studies of the *Institut de droit international* were discussed by the International Law Association, first at the 1892 Geneva conference[46] and later at the 1895 Brussels conference.[47] In 1924, the Association turned substantial attention to territorial waters by assigning consideration of this question to a "Neutrality Committee" headed by Prof. Alvarez as Chairman. The result was the Committee report and draft convention on "The Laws of Maritime Jurisdiction in Time of Peace." Prof. Alvarez, differing in some respects from the Committee's proposals, submitted a special draft convention of his own,[48] thus advancing the first proposal to treat an archipelago of islands as one unit with a territorial belt drawn around the islands as a group rather than around each individual island.[49]

The Committee's draft did not contain specific provisions concerning the territorial waters of archipelagos,[50] merely providing in Article 2 that states shall exercise jurisdiction over their territorial waters to the extent of three marine miles from low water mark at spring tide along their coasts. Article 3 provided that, in case of islands situated outside the territorial limit of a State, a zone of territorial waters shall be measured around each of the said islands. Article 4 proposed a twelve-mile maximum for baselines across the mouths of bays. Articles 13 to 16 dealt with straits.

For his part, Prof. Alvarez turned in a draft characterized by a remarkable measure of legal clairvoyance. In 1924, he already envisaged the peculiar question that might arise concerning islands and archipelagos, thus presaging the contemporary debate on this controversy by fully half a century. In Article 4 of his draft, he proposed a zone of marginal seas of six nautical miles from low-water marks. In Article 5, he proposed a twelve-mile maximum for baselines across the mouths of bays, without suggesting a maximum for the distance between the islands of an archipelago. Article 5 went on to propose:

> As to islands situated outside or at the center limit of a State's territorial waters, a special zone of territorial waters shall be drawn around such islands according to the rules contained in Article 4.

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[45]By a 23-21 majority.

[46]Specifically, the Association discussed Sir Thomas Barclay's report. See REPORT OF THE 15TH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION, 1892, 182 *et seq.*

[47]See REPORT OF THE 17TH CONFERENCE, 1895 p. 102 *et. seq.*, and REPORT OF THE 27TH CONFERENCE, PARIS 1912.

[48]See REPORT OF THE 33RD CONFERENCE, STOCKHOLM, 1924, 259 *et. seq.*

[49]Kunsumaatmadja, *op. cit. supra*, note 1 at 167.

[50]REPORT OF THE 33RD CONFERENCE, 262 *et. seq.*

> Where there are archipelagos the islands thereof shall be considered a whole, and the extent of the territorial waters laid down in Article 4 shall be measured from the islands situated most distant from the centre of the archipelago.[51]

The report of the Neutrality Committee made no mention of Prof. Alvarez' proposal.[52] And although the Vienna Conference in 1926 discussed the question of the territorial waters of archipelagos, the amended draft convention that it produced did not mention archipelagos.[53]

iii. American Instiute of International Law. The Alvarez proposal found hospitable reception with the American Institute of International Law. The Institute failed to propose any maximum distance between the islands of an archipelago, but it did propose that:

> In case of an archipelago, the islands and keys composing it shall be considered as forming a unit and the extent of territorial sea referred to in Article 5 shall be measured from the islands farthest from the center of the Archipelago.[54]

iv. Harvard Research in International Law. There were no provisions concerning archipelagos in the draft convention on territorial waters produced in 1929 by the Harvard Research in International Law. It provided[55] that the marginal sea around an island or around land exposed only at some stage of the tide is measured outward three miles therefrom in the same manner as from the mainland. It was commented that in any situation where islands are within six miles of each other the marginal sea will form one extended zone, and no different rule should be established for groups of islands or archipelagos except if the outer fringe of islands is sufficiently close to form one complete belt of marginal seas.[56]

v. The Hague Codification Conference of 1930. The Codification Conference, failing to reach an agreement, abandoned the idea of drafting a definite text on the territorial waters of archipelagos,[57] but did state the following observation:

> With regard to a group of islands (archipelagos) and islands situated along the coast, the majority of the Sub-Committee was of the opinion that a distance of ten miles should be adopted as a basis for measuring the

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[51]Unofficial translation by Evensen, after the REPORT OF THE 33RD CONFERENCE, 1924, 266 *et seq.*

[52]Kunsumaatmadja, *loc. cit., supra,* note 1.

[53]REPORT OF THE 34TH CONFERENCE, VIENNA 1924, 40 *et seq.*

[54]Article 7 of its project No. 10 (National Domain) in 20 AM. J. INT'L. L. (Spec. Suppl.) 318-319 (1926).

[55]In Article 7.

[56]23 AM. J. INT'L. L. (Spec. Suppl.) 241, 276 (1929).

[57]The subject was referred to the Second Sub-Committee of the Second Committee of the Conference.

> territorial sea outward in the direction of the high sea... The Sub-Commitee did not express any opinion with regard to the nature of the waters included within the group.[58]

The starting-point for the ten-mile belt of territorial sea was proposed to be "the islands most distant from the center of the archipelago,"[59] and additionally in the case of coastal archipelagos, "(i)f there are natural islands . . . situated off the coast, the inner zone of the sea shall be measured from these islands, except in the event of their being so far distant from the mainland that they would not come within the zone of territorial sea if such zone were measured from the mainland . . ."[60]

The reactions to these proposals fell into three categories: Negative, refusing to consider archipelagos as a single unit; affirmative, but with the qualification that the islands and islets of the archipelago were not farther apart than a certain maximum; and affirmative on a geographical, case-to-case basis.

On the question of whether the waters enclosed within the archipelago should be regarded as internal waters or as marginal seas, the Preparatory Committee proposed a compromise under which archipelagos would be considered as a unit, but the maximum distance between its islands and islets of the group should be twice the breadth of marginal seas, and the enclosed waters should be considered marginal seas, and not internal waters. The language was embodied in Basis of Discussion No. 13:

> In the case of a group of islands which belong to a single State and at the circumference of the group are not separated from one another by more than twice the breadth of territorial waters, the belt of territorial waters shall be measured from the outermost islands of the group. Waters included within the group shall also be territorial waters.
>
> The same rule shall apply as regards islands which lie at a distance from the mainland not greater than twice the breadth of territorial waters.[61]

It was commented that the Preparatory Committee's suggested rule contained a limit of width between the islands of an archipelago and gave the waters the status of *territorial, not inland waters.* The explanation for this prescribed status was found in the need to presume the right of innocent passage through channels between islands which not infrequently are important to international navigation. There appears

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[58]Report of the Second Commission, 16 Ser. L. o. N. P., 216 (1930).

[59]Art. 5, par. 2 of the amended draft convention prepared for the Committee of Experts, League of Nations document C-196, M-70, 1926. See 20 AM. J. INTL'L. L., (Spec. Suppl.) 142 (1926).

[60]Art. 5, par. 1, *supra*, note 59.

[61]2 Ser. L. o. N. P., 51 (1929). See 24 AM. J. INT'L. L. (Spec. Suppl.) 34 (1930).

to have been a marked tendency in 1930 to favor the introduction of a special rule for archipelagos, whether coastal or ocean, but subject to a limit of width between the islands and with a strong reservation by some states against the waters being treated as *inland waters*.[62]

The Hague Conference failed to produce a practical definition of a group of islands, in terms of their numbers, size, and relative position. As a response to this impasse, it has been pointed out that the real reason for making a special case of islands is that the three-mile envelope leaves undesirable pockets. The Geographer of the Department of State of the United States has accordingly made the following suggestion:

> It is the American viewpoint that the only practical way to eliminate these pockets is to consider the pockets as pockets, rather than to consider the islands as islands. It is believed that the general proposition for the assimilation of anomalous pockets of high sea by a geometrical means avoids the definition of a "group of islands," just as the geometrical solution of the proposal relating to bays avoids the definition of "bays," and that in both cases the desired results are obtained in an entirely satisfactory manner.[63]

The Hague Conference also considered the case of artificial islands, advancing the observation that —

> The definition of the term "island" does not exclude artificial islands, provided these are true portions of the territory and not merely floating works, anchored buoys, etc. The case of an artificial island erected near the line of demarcation between the territorial waters of two countries is reserved.[64]

The principle, as approved in the Report of the Second Sub-Committee, reflected the position of the United States that each offshore island was to be surrounded by its own belt of territorial waters. The American position was reiterated in the report of the Special Master appointed[65] following the decision in *United States v. California*:[66]

> The rule that the baseline of the marginal belt follows the sinuosities of the coast, except where interrupted by straight-line segments not more than ten miles wide across the mouths of bays, in itself excludes the idea of drawing the coastline from headland to headland around offshore islands. That each offshore island should have its own three-mile belt goes naturally

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[62]Waldock, *The Anglo-Norwegian Fisheries Case*, 28 BRIT. Y. INT'L. L. 114, 144-145 (1951).

[63]Boggs, *Delimitation of the Territorial Sea*, 24 AM. J. INT'L. L. 341, 554 (1930).

[64]REPORT OF THE SUB-COMMITTEE II OF THE SECOND COMMISSION (TERRITORIAL WATERS), League of Nations Doc. C. 230. M. 117, 13 (1930).

[65]REPORT OF SECOND COMMISSION, C. 230. M. 117, V, 13 (1930).

[66]332 U.S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889 (1947).

with the fact that these islands are part of the territory of the nation to which the mainland belongs.[67]

vi. International Law Commission. The Special Rapporteur, Prof. J.P.A. Francois, submitted all three reports on "The Regime of the Territorial Sea." In his first report,[68] he proposed that —

> With regard to a group of islands (archipelago) and islands situated along the coast, the ten-mile line shall be adopted as the baseline for measuring the territorial sea outward in the direction of the high sea. The waters included within the group shall constitute island waters.[69]

For the baselines of archipelagos, his proposal was:

> Nevertheless, where a coast is deeply indented or cut into, or where it is bordered by an archipelago, the baseline becomes independent of the low-water mark and the method of baselines joining appropriate points on the coasts must be employed.[70]

In his second report[71] he amended the provision on baselines to read:

> As an exception where circumstances necessitate a special regime because the coast is deeply indented or cut into, or because there are islands in its immediate vicinity, the baselines may be independent of the low water mark.

Departing from the governing principles of international law as expressed by the International Court of Justice in the Judgment of 18 December 1951 in the *Anglo-Norwegian Fisheries* case,[72] he advocated a ten-mile maximum both for baselines drawn across the mouths of bays and for baselines drawn between islands and islets of an archipelago, amending his Article 10 to read:

> With regard to a group of islands (archipelago) and islands situated along the coast the ten-mile line shall be adopted as to baselines.

stressing he had "inserted Article 10 not as expressing the law at present in force, but as a basis of discussion should the Commission wish to study a text envisaging the progressive development of international law on this subject." He proposed[73] for isolated islands that:

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[67]Report, October 14, 1952, printed in SUBMERGED LANDS: HEARINGS BEFORE THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, UNITED STATES SENATE, 83rd CONG., 1st sess., in S. J. Res. 13, etc., 1211, 1221. The report was filed November 10, 1952, 344 U.S. 872 (1952).

[68]A/CN. 4/53.

[69]Art. 10.

[70]Art. 5, par. 2.

[71]A/CN. 4/61.

[72]I.C.J. REPORTS, 133 (1951).

[73]Art. 9.

> Every island has its own territorial sea. An island is an area of land surrounded by water, which is permanently above high-water mark.[74]

His third report,[75] while maintaining his previous views as to straight baselines for deeply indented coastlines including coastal archipelagos, advanced an entirely new set of rules with regard to the more specific principles concerning archipelagos, "thus illustrating in an interesting way the complexity and uncertainty involved in regard to rules governing archipelagos."[76]

Article 12 of his new draft, applying to coastal as well as to outlying archipelagos, proposed rather strict rules without indicating the bases for the proposed maximum length of five miles for the straight baselines, and for the proposed maximum number (one) for a straight baseline ten miles in length:

> 1. The term "groups of islands," in the juridical sense, shall be determined to mean three or more islands enclosing a portion of the sea when joined by straight lines not exceeding five miles in length, except that one such line may extend to a maximum of ten miles.
>
> 2. The straight lines specified in the preceding paragraph shall be the baselines for measuring the territorial sea. Waters lying within the area bounded by such lines and the islands themselves shall be considered as inland waters.
>
> 3. A group of islands may likewise be formed by a string of islands taken together with a portion of the mainland coastline. The rules set forth in paragraphs 1 and 2 of this article shall apply *pari passu*.

When the International Law Commission adopted in 1954 its first draft of "Provisional Articles Concerning the Regime of the Territorial Sea,"[77] it adopted the suggestions of the Rapporteur for straight baselines where a coast was deeply indented or cut into, or where islands were situated in its immediate vicinity, maintaining the ten-mile distance as the maximum permissible length for straight baselines. Isolated islands were treated in the manner proposed by the Rapporteur, but groups of islands were not touched upon.

In 1955, the Commission amended[78] its draft to admit the use of straight baselines "where circumstances necessitate a special regime because the coast is deeply indented or cut into, or because there are islands in its immediate vicinity,"[79] without providing for any fixed maximum as to the length of the baselines. In providing thus for coastal archi-

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[74]A/CN. 4/61.
[75]A/CN. 4/77.
[76]EVENSEN, *op. cit., supra,* note 35 at 293.
[77]Official Records of the General Assembly, Ninth Session, Suppl. No. (A/2693).
[78]*Ibid.*, Tenth Session, Supplement No. 9 (A/2934).
[79]Art. 5.

pelagos, the Commission rested on the implicit assumption that the waters inside the baselines should be considered internal waters. It made no special provisions on groups of islands, and drew a maximum length of twenty-five nautical miles for straight baselines across the mouths of bays, except in the case of historic bays.

In 1956, the Commission adopted its final draft[80] of "articles concerning the law of the sea," with provisions[81] for isolated islands:

> Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark.

Without similarly touching the question of outlying (mid-ocean) archipelagos, it embodied for coastal archipelagos the principles laid down by the International Court of Justice in its 1951 Judgment in the *Anglo-Norwegian Fisheries* case, and provided[82] for the drawing of straight baselines "where circumstances necessitate a special regime because the coast is deeply indented or cut into, or because there are islands in its immediate vicinity." The Commission also proposed a maximum of fifteen miles for straight baselines drawn across the mouths of bays, except historic bays.

But the International Law Commission did not present any specific provisions concerning archipelagos, explaining with what amounted to a plea for more scientific information: "Like The Hague Conference for the Codification of International Law of 1930, the Commission was unable to overcome the difficulties involved. The problem is similarly complicated by the different forms it takes in different archipelagos. The Commission was also prevented from stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject." It was an explanation that was to echo for many more years, as the family of nations grappled with the variety of rules and of state practice concerning the extent and delimitation of the territorial waters of archipelagos.

vii. U.N. Conference on the Law of the Sea: 1958 1960, and 1974.

a. The First Conference, 1958. On 21 February 1957, the General Assembly of the United Nations called[83] for a conference of its members to "examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic, and political aspects of the

[80]Official Records of the General Assembly, Eleventh Session, Supplement No. 9, (A/3159).
[81]Art. 10.
[82]Art. 5.
[83]By Resolution 1105.

program, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate". On 24 February 1958, the First Conference on the Law of the Sea was convened. After producing four conventions,[84] it adjourned on 28 April 1958.

The First Conference used as working papers the final report[85] of the International Law Commission, consisting of draft articles with commentary. The Commission faced the complex and controversial problem of straight baselines by seeking to embody in its draft the opinion of the International Court of Justice in the well-known *Fisheries* case.[86] The Conference finally adopted the draft as Article 4 of the Convention on the Territorial Sea:

> Article 4
>
> 1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
>
> 2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.
>
> 3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.
>
> 4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.
>
> 5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.
>
> 6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

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[84]Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/CONF. 13/L. 52); Convention on the High Seas (U.N. Doc. A/CONF. 13/L. 53); Convention on the Fishing and Conservation of the Living Resources of the High Seas (U.N. Doc. A/CONF. 13/L. 54); and Convention on the Continental Shelf (U.N. Doc. A/CONF. 13/L. 55).

[85]INTERNATIONAL LAW COMMISSION, REPORT, U.N. General Assembly 11th Sess., Official Records, Suppl. No. 9 (A/3159); 51 AM. J. INT'L. L. 154 (1957).

[86]Fisheries Case (1951) ICJ REPORT 116; 46 AM. J. INT'L. L. 348 (1952), opined: "Where a coast is deeply indented and cut into, as is that of Eastern Finnmark (Norway's northern coast), or where it is bordered by an archipelago such as the "skjaergaard" along the western sector of the coast here in question, the baseline becomes independent of the low-water mark... In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities;..."

The draft made no mention of a maximum length for a single baseline, *i.e.*, a maximum length of a line between any two particular points, although several states had made corresponding proposals, and the Commission in its sixth session had originally adopted a maximum length of ten miles.[87]

As an exception to the general rule of drawing baselines, the straight baseline method provoked major controversies rooted in the appreciation that this exceptional method would make waters, which would otherwise be part of the high seas, into territorial sea. The sentiment was that the straight baseline method should be allowed only in the presence of conditions making it extremely impracticable to draw a baseline along the coast itself. In the *Fisheries* case, the Court had suggested that only exceptional circumstances would permit straight baselines, after reciting the peculiarities of the Norwegian coast.[88]

The Conference adopted the Court's suggestion by adopting *in toto* the phrase "where the coast line is deeply indented and cut into or if there is a fringe of islands along the coast in its immediate vicinity" from the Court's opinion. Since the Court's opinion as a whole limited sharply the circumstances under which straight baselines might be used, it has been observed that "since there is ample evidence that the Conference intended to adopt the spirit of the opinion, it is to be assumed that the language of Article 4 will be interpreted restrictively."[89]

In the *Fisheries* case, the Court first justified the Norwegian practice of drawing straight baselines because of the Norwegian geography, and then it went on to uphold Norway's right to draw particular baselines in certain areas on economic grounds. Norway, for instance, could include a particular area especially important to Norwegian fishermen within the territorial sea.[90] On the basis of this holding, the Soviet delegation argued that whether or not straight baselines could be used, was an initial choice that might be made on economic as well as on geographical considerations. The Soviet argument led to the conclusion that a nation with a regular coastline could advance the claim that fishing stocks vital to her interest would not be embraced unless it ran its baseline over water, further pushing the territorial sea out into the high seas. The Convention disregarded the Soviet argument, and in adopting the article, made clear that the method of straight baselines

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[87]In the commentary to Article 5, INTERNATIONAL LAW REPORT, *supra*, note 85 at 14-15.

[88]The Norwegian Government intimated that there were 120,000 islands within a 600-mile stretch.

[89]Dean, *The Geneva Conference on the Law of the Sea: What was Accomplished*, 52 AM. J. INT'L. L. 618 (1958).

[90]Fisheries Case, *supra*, note 86 at 133, 142.

is allowed only on geographic considerations; only thereafter can the determination of particular baselines rest on economic interest evidenced by long usage.

The Conference also followed the Court in the *Fisheries* case by considering as internal waters, areas of water enclosed between the coast and the baseline. But the Conference additionally provided in Article 5 of the Convention on the Territorial Sea that a right of innocent passage identical to that through the territorial sea exists through such newly-created internal waters.[91] In this manner, the Conference underlined respect for the integrity of the high seas and its freedoms by refusing to allow states with only slightly irregular coastlines to extend their territorial seas by drawing baselines over water rather than along the coast.

b. The Second Conference, 1960. Although the 1958 Conference was successful in reaching agreements embodied in multilateral conventions on the law of the sea, it had not solved several problems: "the breadth of the territorial and fishery limits."[92] The U.N. General Assembly accordingly called[93] the Second Conference on the Law of the Sea, held on 17 March to 27 April 1960 at Geneva, Switzerland. The Second Conference was primarily concerned with two problems: "(a) the breadth of the territorial sea bordering each coastal state, and (b) the establishment of fishing zones by coastal states in the high seas contiguous to, but beyond, the outer limit of the territorial seas of coastal states."[94]

On 31 March 1960 — while the Second Conference was in progress — the American nuclear-powered submarine *Triton* passed submerged through the Surigao Strait, south of Luzon in the Philippines, across the Mindanao Sea, proceeding through the Macassar Strait and south of Java into the Indian Ocean. It thus passed submerged through waters within the Philippine and Indonesian archipelagos, which are claimed as internal waters by each of these nations. It does not appear that the Conference discussed in this light the international law principle[95] that foreign vessels may not pass through internal waters as of right, even if their passage is innocent. The Conference, in fact, was concerned with securing agreement among nations with different security, economic, or fishing interests, and hence the issue of straight baselines or of the archipelago doctrine was set aside. But the Chairman of the U.S.

[91] In commentary to Article 5, *supra*, note 87.

[92] U.N. Doc. No. A/RES/1307 (XIII) (1958); U.N. Yearbook 381-383 (1958).

[93] By resolution of 10 December 1958.

[94] Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L. L. 752 (1960).

[95] 1 OPPENHEIM & LAUTERPACHT, *supra*, note 4 at 461.

delegation, in an article assessing the performance of the second Geneva Conference, managed to reiterate American opposition to the doctrine, saying that "we do not recognize the validity of this extensive and unilateral archipelago theory."[96]

While the second, like the first, Conference failed to arrive at a uniform rule on the breadth of the territorial sea, an archipelagic state like the Philippines preferred to view this failure as a particular victory. The six-mile joint U.S.-Canadian proposal[97] had failed by only one vote to get the necessary two-thirds majority in the plenary session, thus dissolving the heavy threat of dismemberment posed to the Philippines, consisting as it does of thousands of islands separated by distances longer than twelve miles.

c. The Third Conference, 1974, and the U.N.[98] *Seabed Committee.* The U.N. General Assembly established in 1968 the Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction. The Committee was requested to prepare a study which would include a survey of past and present activities of the United Nations and other intergovernmental bodies with regard to the seabed and the ocean floor, and of existing international agreements concerning those areas, giving an account of the scientific, technical, economic, legal, and other aspects of the item; and an indication as to practical means of promoting international cooperation in the exploration, conservation and use of the seabed and the ocean floor, and the subsoil thereof, as contemplated in the title of the item, and of their resources.

Subsequently, the General Assembly established[99] on 21 December 1968 the Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction. The General Assembly reaffirmed[100] the mandate of the Committee and enlarged its membership. At its first session held in March 1971, the Committee formed three Sub-Committees. Sub-Committee II referred to the special position of archipelagic states in international law and to the criteria which should determine whether or not groups of islands constitute an archipelago. Not only were there statements regarding passage through archipelagic waters and straits and the nature of such passage; but there was also a statement that the preservation of the political and economic unity of an archipelagic state, the protection of its security, and

[96]Dean, *op. cit., supra,* note 94 at 753.
[97]U.N. Doc. No. A/Conf. 19/C. 1/L. 10 (1960).
[98]By Resolution 2430 (XXII).
[99]By Resolution 2467 A, B, C, and D (XXII).
[100]By Resolution 2467 (XXIII), supplemented by Resolution 2750 (XXV).

the preservation of its marine resources justified the inclusion of the waters inside an archipelago under the sovereignty of the archipelagic state or the granting of a special status to such waters. There was a further statement that the special status of archipelagic waters was an emerging concept and might be settled as part of an over-all solution of problems relating to the law of the sea.[101]

The Seabed Committee acted as a preparatory body for the Third Law of the Sea Conference held at Caracas, Venezuela, on 20 June to 29 August 1974. The General Assembly intended the 1974 Conference to "deal with the establishment of an equitable international regime — including an international machinery — for the area and the resources of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the regime of the high seas, the continental shelf, the territorial sea (including the question of its breadth) and the question of international straits and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal states), the preservation of the marine environment (including, *inter alia*, the prevention of pollution) and scientific research."

The 91-member Committee drafted treaty articles dealing with this broad range of subjects. Among the issues that it listed for consideration by the 1974 Conference were archipelagos and historic waters. In listing the subject of archipelagos for consideration by the Conference, the Committee had before it several endorsements of the archipelagic concept. One was the Declaration on the Issues of the Law of the Sea presented[102] to the Seabed Committee in 1973 by the Organization of African Unity. The Declaration, among others, said:

> That the African States endorse the principle that the baselines of any archipelagic State may be drawn by connecting the outermost points of the outermost islands of the archipelago for the purpose of determining the territorial sea of the archipelagic state.

Uruguay issued[103] on 3 July 1973 a document recognizing the archipelago concept:

> The territorial sea of an archipelagic state where constituent islands and other natural characteristics form an intrinsic geographical, economic, and political entity that has been or may have been historically regarded

[101] *Report of the Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction*, 1 U.N. GENERAL ASSEMBLY, RECORDS 55; Twenty-Eighth Session, Suppl. No. 21 (A/9021).

[102] *Report of the Sea-Bed Committee*, 2 U.N. GENERAL ASSEMBLY, OFFICIAL RECORDS, p. 5.

[103] *Ibid.*, vol. III, p. 26.

as such may be measured from the straight baselines joining the furthest points of the islands and the outer low tide reefs of the archipelago.

Ecuador, Panama, and Peru co-sponsored[104] draft articles on the archipelago concept for inclusion in the Convention on the Law of the Sea:

Article 3

1. The area of sovereignty and jurisdiction of an archipelagic State may be measured from straight baselines joining the outermost points of the outermost islands and reefs of the archipelago.

In such cases, the waters enclosed by the baseline shall be considered internal waters though vessels of any flag may sail in them, in accordance with the provisions laid down by the archipelagic State.

The People's Republic of China proposed[105] on 16 July 1973:

An archipelago as an island chain consisting of islands close to each other may be taken as an integral whole in defining the limits of the territorial sea around it.

At the plenary session of the 1974 Conference, the Co-Chairman of the Philippine delegation[106] delivered a statement noting these favorable endorsements, and adding that "there has been no delegation so far that has formally expressed opposition to the archipelagic concept."

The Third Law of the Sea Conference did not achieve a comprehensive Law of the Sea Treaty, although it laid the foundations and building blocks in usable form of a settlement. The Conference recommended to the U.N. General Assembly that the next session be held in Geneva from 17 March to 3 or 10 May 1975.

According to the final summing-up[107] of the Chairman of Committee I on 28 August 1974, "The idea of a territorial sea of 12 miles and an exclusive economic zone beyond the territorial sea up to a total maximum of 200 miles is, at least at this time, the keystone of the compromise solution favored by the majority of the states participating in the Conference," but the proviso was added that "there are, in addition, other problems to be studied and solved in connection with this idea, for example, those relating to archipelagos and the regime of islands in general."

The U.S. Delegation's Report[108] on the work of Committee II on archipelagos stated: "The Bahamas, Fiji, Indonesia, Mauritius, and the

[104] *Ibid.*, p. 30.
[105] *Ibid.*, p. 72.
[106] Vicente Abad Santos, Secretary of Justice.
[107] Doc. A/Conf. 62/L. 86.
[108] A/Conf. 621.

Philippines strongly advocated adoption of the archipelago concept. The issue has been complicated by the addition of arguments for archipelagic treatment of island groups belonging to continental states, with substantial differences of view indicated in conference statements on this issue. It is widely recognized that the key issues of definition and transit of archipelagic waters must be resolved for a satisfactory accommodation on the issue."

The draft articles[109] on territorial sea submitted by Fiji, Indonesia, Mauritius, and the Philippines, and distributed by the Second Committee on 18 July 1974, described the sovereignty of archipelagic states as extending beyond their archipelagic waters, over the territorial sea. On 26 July, the Philippines submitted draft articles[110] providing that historic waters shall include territorial waters pertaining to a State by reason of an historic right or title, and that the maximum limit for the breadth of the territorial sea shall not apply to historic waters held by any State as its territorial sea.

On 9 August, Fiji, Indonesia, Mauritius and the Philippines submitted draft articles[111] relating to archipelagic states which were largely based on proposals contained in documents[112] submitted to the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction. The draft defined an archipelago as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other features form an intrinsic geographical, economic, and political entity or which historically have been regarded as such."[113] The crux of the draft is Article 2 paragraph 1: "An archipelagic State may employ the method of straight baselines joining outermost points of the outermost islands and drying reefs of the archipelago in drawing the baselines from which the extent of the territorial sea, economic zone and other special jurisdictions are to be measured."

But the sovereignty of the archipelagic State over the archipelagic waters which pertain to it, is not absolute. The archipelagic State guarantees the continued right of an immediately adjacent neighboring State to use, pursuant to tradition, a part of the sea within the baselines, for direct communication, including the laying of submarine cables

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[109]A/Conf. 62/C. 2/L. 13.

[110]A/Conf. 62/C. 2/L. 24.

[111]A/Conf. 62/C. 2/L. 49.

[112]A/AC. 138/SC. II/L. 15 and A/AC. 138/SC. II/L. 48 in the GENERAL ASSEMBLY, OFFICIAL RECORDS, Twenty-Eighth Session, Suppl. No. 21 (A/9021, vol. V, item 16, p. 1) and (A/9021, vol. III, pp. 102-105), respectively.

[113]Art. 1, par. 3.

and pipelines.[114] Subject to the designation of sea lanes, ships of all States shall enjoy the right of innocent passage through archipelagic waters.[115] An archipelagic State may not suspend the innocent passage of foreign ships (except when a foreign warship does not comply with the laws and regulations of the archipelagic State concerning its passage)[116] through sea lanes designated by it, except when essential for the protection of its security, after giving due publicity thereto and substituting other sea lanes for those through which innocent passage has been suspended.[117]

The draft specified that its provisions were "without prejudice to the regime concerning coastlines deeply indented and cut into and to the waters enclosed by a fringe of islands along the coast."

On 12 August, Ecuador proposed[118] that "the method applied to archipelagic States for the drawing of baselines shall also apply to archipelagos that form part of a State, without entailing any change in the natural regime of the waters of such archipelagos or of their territorial sea."

On the same day, amendments to the draft articles proposed by the quadruple group of archipelagic States, were set out[119] by the People's Republic of Bulgaria, German Democratic Republic, and Polish People's Republic. The proposed amendments expectedly dealt with a specification of the limits to the sovereignty of the archipelagic State. While the quadruple group had provided for the right of innocent passage, the amendments proposed to be more liberal: "All ships shall enjoy equally[120] freedom of passage in archipelagic straits, the approaches thereto, and those areas in the archipelagic waters of the archipelagic State along which normally lie the shortest sea lanes used for international navigation between one part and another part of the high seas."[121] While foreign ships exercising the right of free passage should "comply with the relevant rules and regulations made by the archipelagic State,"[122] the archipelagic State was forbidden from interrupting or suspending "the transit of ships through its straits or archipelagic waters, or take any action which may impede their passage."[123] Correspondingly, "All ships passing through the straits and waters of archi-

[114]Art. 2, par. 5.
[115]Art. 4.
[116]Art. 5, par. 9.
[117]Art. 5, par. 10.
[118]A/Conf. 62/C. 2/L. 51.
[119]A/Conf. 62/C. 2/L. 52.
[120]A/Conf. 62/C. 2/L. 52/Con. 1.
[121]Art. 4.
[122]Art. 5, par. 8.
[123]Art. 5, par. 10.

pelagic States shall not in any way endanger the security of such States, their territorial integrity or political independence. Warships passing through such straits and waters may not engage in any exercises on gunfire, use any form of weapon, launch or take on aircraft, carry out hydrographic surveys or engage in any similar activity unrelated to their passage. All ships shall inform the archipelagic State of any damage, unforeseen stoppage, or of any action rendered necessary by *force majeure.*"[124]

On 15 August, Thailand submitted[125] draft articles insuring that where archipelagic waters include areas which previously had been considered as high seas, the archipelagic State "shall give special consideration to the interests and needs of its neighboring States with regard to the exploitation of living resources in these Areas." The right of innocent passage, for the sole benefit of neighboring States enclosed by the archipelagic waters, includes passage to gain "access to and from any part of the high seas by the shortest and most convenient routes." In both cases, "an archipelagic State shall enter into arrangements with any such neighboring States at the request of the latter."

On 16 August, Malaysia proposed[126] amendments to the draft of the quadruple group so that not only direct communication would be a test for the continued right of traditional use by an immediately adjacent neighboring State, but also "direct access and all forms of communications." Malaysia further proposed that this kind of use should not fall under the provision that subject to the designation of sea lanes where passage could be restricted, ships of all States shall enjoy the right of innocent passage through archipelagic waters.

On 19 August, the Philippines changed its mind about its draft articles on historic waters, and instead proposed[127] that "The territorial sea may include waters pertaining to a State by reason of an historic right or title *and actually held by it as its territorial sea.* (Italics supplied.) On the same day, it joined the rest of the quadruple group in proposing[128] that "The term 'high seas' means, *inter alia,* all parts of the sea that are not included in the archipelagic waters of an archipelagic States."

On 20 August, Bahamas submitted draft articles[129] departing from the draft of the quadruple group only by including "as a baseline any

[124]Art. 5, par. 9.
[125]A/Conf. 62/C. 2/L. 63.
[126]A/Conf. 62/C. 2/L. 64
[127]A/Conf. 62/C. 2/L. 24/Rev. 1.
[128]A/Conf. 62/C. 2/L. 69.
[129]A/Conf. 62/C. 2/L. 70.

non-navigable continuous reefs or shoals lying between the outermost points of the outermost islands and drying reefs." It also specified that baselines could be drawn from low-tide elevations, whereas the draft of the quadruple group allows this method only in the presence of certain conditions.[130]

In turn, the Bahamas proposal came under scrutiny by Cuba, which suggested[131] on 22 August that "an archipelagic State may employ the method of straight baseline joining the outermost points of the outermost islands of the archipelago, provided that these lines follow the general configuration of the main island or islands and are not drawn to or from isolated islets or reefs. The areas of sea situated on the landward side of the lines must be linked to the land territory and the navigation therein must be connected with the governments of the archipelagic State." The proposed Cuban amendment continued with the same restrictive attitude: "The drawing of such baselines shall not enclose as archipelagic waters any waterways or straits used for international navigation or areas of sea traditionally used by a neighboring and adjacent State for direct communication from one part of its territory to another part or between its territory and the high seas."

Finally, on 24 August, the Second Committee issued an informal working paper[132] which, like others before it, was intended "to reflect in generally acceptable formulations the main trends which have emerged from the proposals submitted either to the U.N. Sea-Bed Committee or to the Conference itself." The paper dealt with nineteen provisions and considered alternative formulas for each provision. In tabulated form, the provisions and their formulas are as follows:

I. Scope:

   a. Articles apply only to archipelagic States.
   b. Articles apply to a coastal State with one or more off-lying archipelagos which form an integral part of its territory, upon a making of a declaration to this effect.
   c. Articles apply to archipelagos that form part of a State, without entailing any change in the natural regime of the waters of such archipelagos or of their territorial sea.

II. Definition:

   a. An archipelagic State is a State constituted wholly by one or more archipelagos and may include other islands. An archipe-

[130]Art. 2.
[131]A/Conf. 62/C. 2/L. 73.
[132]Informal Working Paper No. 8/Rev. 2.

lago is a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic, and political entity, or which historically have been regarded as such.

b. A State may declare itself to be an archipelagic State where the land territory of the State is entirely composed of three or more islands; and it is possible to draw a perimeter, made up of a series of lines or straight baselines, around the outermost points of the outermost islands in such a way that: no territory belonging to another State lies within the perimeter, no baseline is longer than a certain number of nautical miles, and the ratio of the area of the sea to the area of the land territory inside the perimeter does not exceed a certain figure, provided that any straight baseline between two points on the same island shall be drawn in conformity with the article of the Convention on straight baselines.

III. Straight baselines:

a. Straight baselines join the outermost points of the outermost islands and drying reefs of the archipelago in drawing the baselines from which the extent of the territorial sea, economic zone and other special jurisdictions are to be measured.

b. Same as formula (a), but additionally, a baseline could be any non-navigable continuous reefs or shoals lying between such points.

c. The baselines may be drawn not only in the case of an archipelagic State but also of an archipelago that forms part of a State.

IV. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

V. Baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

VI. The system of straight baselines shall not be applied by an archipelagic State in such a manner as to cut off the territorial sea of another State as determined by the Convention.

VII. An archipelagic State shall clearly indicate its straight baselines on charts to which due publicity shall be given.

VIII. An archipelagic State may draw baselines in conformity with the articles on bays and on river mouths of the Convention for the purpose of delimiting internal waters.

IX. Archipelagic waters:

a. Waters enclosed by the baselines, regardless of their depth or distance from the coast, belong to, and are subject to the sovereignty of, the archipelagic State to which they appertain.

b. Same as formula (a), but the last clause provides that sovereignty is exercised subject to the provisions of these articles and other rules of international law.

c. Same essentially as formula (a), but adding that vessels of any flag may sail them in accordance with the provisions laid down by the archipelagic State.

X. The sovereignty and rights of an archipelagic State extend to the air space over its archipelagic waters as well as to the water column and the sea-bed and subsoil thereof, and to all of the resources contained therein.

XI. Continued right to a part of the sea which has traditionally been used by an immediately adjacent neighboring State:

a. If the drawing of such baselines encloses a part of the sea which has traditionally been used by an immediately adjacent neighboring State for direct communication, including the laying of submarine cables and pipelines, between one part of its national territory and another part of such territory, the continued right of such communication shall be recognized and guaranteed by the archipelagic State.

b. Same as formula (a), but uses the phrase "direct access and all forms of communications" instead of "direct communication" alone.

c. An archipelagic State shall recognize, for the sole benefit of such of its neighboring States as are enclosed or partly enclosed by its archipelagic waters, a right of innocent passage through these waters for the purpose of gaining access to and from any part of the high seas by the shortest and most convenient routes.

XII. Where the archipelagic waters, or territorial waters measured therefrom, of an archipelagic State include areas which previously had been considered as high seas:

a. The archipelagic State shall enter into consultation, at the request of any other State, with a view to safeguarding the rights

and interests of such other State regarding any existing uses of the sea in such areas, except the navigational uses provided for in a certain article, but including *inter alia,* fisheries, submarine cables, and pipelines.

b. The archipelagic State, in the exercise of its sovereignty over such areas, shall give special consideration to the interests and needs of its neighboring States with regard to the exploitation of living resources in these areas, and, to this effect, shall enter into an agreement with any neighboring State, at the request of the latter, either by regional or bilateral arrangements, with a view to prescribing modalities entitling the nationals of such neighboring State to engage and take part on an equal footing with its nationals and, where geographical circumstances so permit, on the basis of reciprocity, in the exploitation of living resources therein.

XIII. Passage through archipelagic waters:

a. Subject to the provisions of Articles XIV to XVIII, ships of all States shall enjoy the right of innocent passage through archipelagic waters.

b. The innocent passage provision applies, but where parts of archipelagic waters have before the date of ratification of the Convention been used as routes for international navigation between one part of the high seas and another part of the high seas as the territorial sea of another State, the Convention applies to those routes (as well as to those parts of the territorial sea of the archipelagic State adjacent thereto) as if they were straits.

c. All ships shall enjoy equally freedom of passage in archipelagic straits, the approaches thereto, and those areas in the archipelagic waters of the archipelagic State along which normally lie the shortest sea lanes used for international navigation between one part and another part of the high seas.

XIV. Sea lanes and traffic separation schemes: An archipelagic State may designate sea lanes suitable for the safe and expeditious passage of foreign ships through its achipelagic waters, and may restrict the passage of such ships to such sea lanes. It may, after due publicity, substitute other sea lanes. It may also prescribe traffic separation schemes, taking into account: the recommendations or technical advice of competent international organizations; any channels customarily used for international navigation; the special

characteristics of particular channels; and the special characteristics of particular ships.

XV. An archipelagic State may make laws and regulations, not inconsistent with the provisions of these articles and having regard to other applicable rules of international law, relating to passage through its archipelagic waters, on the sea lanes. It shall give due publicity to all such laws and regulations.

XVI. The duties of foreign ships, passing through the archipelagic waters or the sea lanes, to comply with all laws and regulations made by the archipelagic State under the provisions of this article:

a. The duty applies when the foreign ship is exercising the right of innocent passage.
b. The duty applies when the foreign ship is exercising the right of free passage.

XVII. Foreign warships:

a. If any foreign warship does not comply with the laws and regulations of the archipelagic State concerning its passage through the archipelagic waters on the sea lanes and disregards any request for compliance which is made to it, the archipelagic State may suspend the passage of such warship and require it to leave the archipelagic waters by such safe and expeditious route as may be designated by the archipelagic State.
b. All ships passing through the straits and waters of archipelagic States shall not in any way endanger the security of such States, their territorial integrity or political independence. Warships passing through such straits and waters may not engage in any exercises or gunfire, use any form of weapons, launch or take on aircraft, carry out hydrographic survey or engage in any similar activity unrelated to their passage. All ships shall inform the archipelagic State of any damage, unforeseen stoppage, or of any action rendered necessary by *force majeure*.

XVIII. Suspension of transit:

a. Subject to the provisions of the proper paragraph, an archipelagic State may not suspend the innocent passage of foreign ships through designated sea lanes, except when essential for the protection of its security, after giving due publicity and substituting other sea lanes for those through when innocent passage has been suspended.

b. An archipelagic State may not interrupt or suspend the transit of ships through its straits or archipelagic waters, or take any action which may impede their passage.

XIX. Saving clause: The foregoing provisions shall not affect the established regime concerning coastlines deeply indented and cut into and the waters enclosed by a fringe of islands along the coast, as expressed in the proper article.

As this condensed version of the informal working paper shows, the controversy on the archipelago concept centers around the definition of an archipelagic State, the method of drawing straight baselines, and the rights and duties of foreign ships passing through archipelagic waters. There seems to be basic agreement about the right of innocent passage on archipelagic waters, as well as on the right of the archipelagic State to designate sea lanes and prescribe traffic regulation schemes. At this point, it would appear that the question of the archipelago concept has progressed from an inquiry as to its validity, to an inquiry as to its proper scope and application. In this light, the Third Conference on the Law of the Sea could be considered as a success for the advocates of the archipelago concept, if we recall that when Prof. Alvarez first cast light on this concept by bringing it to the attention of the International Law Association in 1924, the proposal was met with a resounding silence.

C. *Views of International Law Publicists*

While international law publicists have paid scant attention to the territorial waters of archipelagos and that only when they discuss the extent and delimitation of territorial waters,[183] they have at least followed the tendency to view archipelagos as units, and have accordingly pursued the applicable legal implications concerning the delimitation of waters.

1. *Henry W. Halleck* (1908)[184] specifies that the term "coasts" "does not properly comprehend all the shoals which form sunken continuations of the land perpetually covered with water, but it includes all the natural appendages of the territory which rise out of the water, although they may not be of sufficient firmness for habitation or use. No matter whether such appendages are composed of mud or of solid rock, they are considered as a part of the territory of the main land, the right of dominion not depending upon the texture of the soil." In support of this proposi-

[183]Evensen, for example, cites HALL'S A TREATISE ON INTERNATIONAL LAW, par. 38; H. WHEATON'S ELEMENTS OF INTERNATIONAL LAW, par. 178 (1866); 1 HALLECK'S INTERNATIONAL LAW, 147 (4th ed., 1908); and MUNCH'S DIE TECHNISCHEN FRAGES DES KUSTENMEERS (THE TECHNICAL QUESTIONS REGARDING TERRITORIAL WATERS), 108.

[184]INTERNATIONAL LAW, 174 (Baker & Drucquer ed., 1908).

tion, he cites the case of *The Anna*,[135] which had reference to a little mud island at the mouth of the Mississippi River, composed of earth and trees drifted down by the river, and not of sufficient consistency to support the purposes of life.

He also considered "islands in the sea, which do not derive their elements, on the principle of alluvion and increment, immediately from the main shore, but are separated from it by deep channels of a greater or less width." Unless someone else had acquired title to them, Halleck notes that "Such islands, if in the vicinity of the main land, are regarded as its dependencies."

2. *William Edward Hall* (1924)[136] takes notice of "certain physical peculiarities of coasts in various parts of the world, where land impinges on the sea in an unusual manner," and therefore "require to be noticed as affecting the territorial boundary." He cites as examples the coast of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific, and in particular on the south coast of Cuba, the Archipelago de los Canarios, which he decides to be a mere salt-water lake.

3. *Philip C. Jessup* (1927)[137] adopts with slight modifications the statement issued by the American Institute and the League Committee:

> In the case of archipelagos, the constituent islands are considered as forming a unit and the extent of territorial waters is measured from the islands farthest from the center of the archipelago.

4. *Henry Wheaton* (1929)[138] defines the extent of the term "coasts" to include "the natural appendages of the territory which rise out of the water, although these islands are not of sufficient firmness to be inhabited or fortified; but it does not properly comprehend all the shoals which form sunken continuations of the land perpetually covered with water." Like Halleck, he cites the case of *The Anna* and the judge's determination there that where a number of little mud islands formed a kind of portico to the main land, "the protection of the territory was to be reckoned from these islands, and that they are the natural appendages of the coast on which they border, and from which indeed they were formed." The judge in that case took into consideration the principle of alluvium and increment.

Wheaton further notes: "Where there is an archipelago it is usually claimed, as for Norway and in the draft (Article 7) of the American

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[135] 5 ROB. R. 385.
[136] A TREATISE ON INTERNATIONAL LAW, (A. Pearce Higgins ed.) 149 (1924).
[137] THE LAW OF TERRITORRIAL WATERS AND MARITIME JURISDICTION, 457 (1927).
[138] *Elements of International Law*, 364 (A. Berriedale Keith ed., 1929).

Institute of International Law, that the measurement of territorial waters shall run from the islands at the greatest distance from the centre of the archipelago."

5. *Green Haywood Hackworth* (1940)[139] cites the opinion of the British prize court, written by Lord Sterndale, in *The Dusseldorf*[140] where the question was from what place were the three miles of the coast to be reckoned. The claimant contended "that wherever you get a piece of rock, however small, however uninhabited, and however uninhabitable, within the three-mile radius from the mainland, that must also be taken as being part of the territory of the country, and the three miles of territorial waters must be taken from that rock." The judge gave no opinion about the question, saying that he did not consider it necessary, but he did say: "I do not wish to be taken as accepting it as accurate." He then moved to the consideration of "a smaller contention:" that an island about 300 meters long was large enough to be part of the mainland. Again leaving this question "for decision when it becomes necessary to decide it," he stated: "I cannot see my way to say that two pieces of land which are not disconnected from the mainland at low water, and not separated in any way, are not part of the mainland."

6. *Charles Cheney Hyde* (1945)[141] seems to lean towards the archipelago concept in the following passage:

> An Island in the high sea, such as Porto Rico or Crete, has its own territorial waters on marginal sea, measured three marine miles outward therefrom in the same manner as from the mainland. Where, however, a group of islands forms a fringe or cluster along the ocean front of a maritime State it may be doubted whether there is evidence of any rule of international law that obliges such State invariably to limit or measure its claim to the waters around them by the exact distances which separate the several units. Moreover, if in a particular case, the geographical relationship of the entire series to the neighboring mainland coast causes the island to be a natural frontier or barrier between itself and the ocean, it is believed that the circumstance may not unreasonably be made the basis of a broad territorial claim to waters that connect them with each other.[142]

Noting the lack of accord among interested powers, he underscores "the fact that if geographical considerations have long been decisive of the nature and development of State practices, rules designed to mirror

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[139]1 DIGEST OF INTERNATIONAL LAW, 642 (1940).
[140]9 LLOYD'S REPORTS OF PRICE CASES, 6 (1923).
[141]1 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, 484 (1945).
[142]S. Whittemore Boggs, *Delimitation of the Territorial Sea*, 24 AM. J. INT'L. 541, 552, 554, cited in HYDE, *supra*, note 141.

what they ordain and to merit general approval must rest upon the same foundation."

He takes note of the American proposal for the elimination of objectionable pockets of the high seas "occasioned by the presence of one or more islands near the mainland, or by any number of islands at any distance from the mainland," the reason being —

> that the three-mile envelope leaves undesirable pockets. It is the American viewpoint that the only practicable way to eliminate these pockets is to consider the pockets as pockets rather than to consider the islands as islands. It is believed that the general proposal for the assimilation of anomalous pockets of high sea by a geometrical means avoids a definition of "a group of islands," just as the geometrical solution of the proposal relating to bays avoids the definition of "bays" and that in both cases the desired results are obtained in an entirely satisfactory manner.

Hyde believes "that general acceptance of this proposal may be expected upon an understanding that it should not be so applied as to deprive particular maritime States of island-surrounding waters which they have long regarded as territorial, and which have been generally acknowledged to belong to the powers that claim them as their own." In a footnote, he bewails the influence of geographical and economic factors in the shaping of practice and rules produced by it in the codification of the law of territorial waters. He seems to suggest that geometrical factors, as fresh and different tests of national pretensions, do not deserve their present difficulties whenever they "deprive a State of a water area which by virtue of a different theory it has claimed as its own and over which it has without opposition exercised control." The modern consensus does not seem to share Hyde's enthusiasm about geometrical factors, which are not mentioned in the alternative formulas for the definition of archipelagos contained in the informal working-paper of the Third U.N. Conference on the Law of the Sea.

7. *L. Oppenheim* (1947)[148] strangely enough, fails to discuss the territorial waters of archipelagos. In arguing that there should be no maritime belt around lighthouses in the sea, he incidentally states: "It is tempting to compare such lighthouses with islands, and argue in favour of a maritime belt around them." But in an oblique way, he seems to take a position in favor of the archipelago concept by stating: "If an island rises within the territorial maritime belt, it accrues to the land of the littoral State, and the extent of the maritime belt is now to be measured from the shore of the new-born island." And conversely: "Thus, if an island near the shore disappears through volcanic action, the extent of

[148] 1 INTERNATIONAL LAW, A TREATISE, (H. Lauterpacht ed.) 454, 517, 530 (1947).

the maritime territorial belt of the respective littoral State is thereafter to be measured from the low-water mark of the shore of the continent, instead of from the shore of the former island."

8. *Georg Schwarzenberger* (1957)[144] considers questions of whether groups of islands must be taken as a unit, or whether each island must have its own territorial sea — and decides it against the archipelago concept. He argues that the judgment in the *Fisheries case* must be understood in its context. In the case of a *skjaergaard,* the length of straight baselines between islands forming part of the rock rampart may exceed ten miles; and the Court observed that the "practice of States does not justify the formulation of any general rule of law."[145] Even then, Schwarzenberger believes that the Court's observation "can hardly have been meant to affect the position of other than coastal archipelagos. This exception apart, waters between islands at a distance exceeding twice the breadth of the territorial sea remain part of the high seas."

9. *Myres S. McDougal and William T. Burke* (1962)[146] consider claims relating to five aspects of coasts with special configurations, of which two are relevant: (1) rugged and complex coastal configurations, and (2) non-adjacent archipelagos.

Rugged and complex coastal configurations are "composed of frequent indentations, deeply penetrating a coastal region, or of large numbers of islands and rocks adjacent to a coast, or of both these sets of formation," such as those found in northern Norway, Maine, and Alaska in the United States, parts of the Canadian coast of Scotland, and perhaps the Yugoslav coast in the Adriatic.

Notice is taken of the claim "to use a system of straight lines which cross expanses of water to join various features of the configurations." To afford the mariner a substantial degree of certainty in locating himself with respect to the limits of coastal authority over adjacent highsea areas, "delimitation of the territorial sea from a large group of islands as a unit would appear desirable policy."[147] Another reason advanced in favor of this policy is the actual dependence of the coastal population upon the adjacent oceans.

However, if the chief goal is acquisition of resources, then little reason is left for the added claim of very comprehensive authority over access for purposes of transportation. "Unless, therefore, other factors are shown, the most desirable goal here would seem to be that of permitting the use

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[144] 1 INTERNATIONAL LAW, 337 (1957).
[145] I.C.J. REPORTS 131 (1951).
[146] THE PUBLIC ORDER OF THE OCEANS, 398 (1962).
[147] *Ibid.*, 399.

of straight baselines for delimiting the outer limit of the territorial sea when complex geographical conditions so require, but at the same time providing that all the waters within this line are a part of the territorial sea."[148]

Attention is next focused on two important but subsidiary issues: (1) the length of the straight line linking the offshore features, and (2) the desirability of using partially submerged features as base points. From the standpoint of practicability, the implication is drawn "that base points should always be visible to the navigator and that use of low-tide elevations (drying rocks and shoals) ought to be impermissible."[149] Apart from this consideration, the length of the straight lines should meet the test of legitimate local needs.

With the background comment that "the 1958 Conference provision on groups of islands adjacent to a coast seems weighted far too heavily in favor of exclusive coastal interests,"[150] McDougal and Burke make this recommendation: "Where the coastline is a complicated pattern of physical features, including islands, delimitation of the territorial sea from them would seem to be eminently reasonable as a method of simplifying the zones of coastal authority. But for simpler situations, which are no doubt the most numerous, there would seem to be no justification for connecting islands with straight lines apart from reasons which go beyond the accidental fact thta there are islands adjacent to a coast. The islands ought merely to serve here as convenient places for those concerned to delimit the areas of differential access to fisheries, an access allocated by reference to those economic, social, political, biological, and other facts which ought to determine it."[151]

On the second clasification, claims relating to non-adjacent archipelagos, the authors specify the chief claim and counterclaim, and a possible alternative: "The island groups involved here are those unconnected with a continental coast, such as the Philippine Islands, Indonesia, the Galapagos Islands of Ecuador, and the state of Hawaii in the United States. The major claim sometimes made is to delimit the territorial sea from a line connecting the outermost islands and to include all waters within the line as part of internal waters. The primary counterclaim asserts that an island in an archipelago does not differ from any other island and that each should have only its own belt of territorial sea; in this view, there would be no question of straight baselines or of internal waters. A possible alternative to either outcome would be to permit the use of a single ter-

[148] *Ibid.*, 400.
[149] *Ibid.*, 401.
[150] *Ibid.*, 408.
[151] *Ibid.*, 409-410.

ritorial sea for the islands as a unit but to regard the waters within the baseline as part of the territorial sea."[152]

There follows a sympathetic enumeration of the reasons underlying the espousal of the archipelago concept: (1) local value processes in which exchange and travel play a role, such as immigration, entry of aliens, import and export, and the military aspect of security, including espionage and surveillance; and the pursuit of fisheries as a source of food and perhaps wealth. But the final appraisal is less than an endorsement of the archipelago concept, and is in fact a prophecy that archipelagic states will get less than the concept presently demands. We are cautioned to pay close attention to certain categories of information:

> the use of the waters concerned for international transport, both ocean and air, the dependence of the populace upon the food resources of the adjacent ocean, use of the same areas by other states, the importance of inter-island transport and the difficulties peculiar thereto which might call for exercise of local authority affecting community use, and the special problems of archipelago states with respect to both security and the exit and entry of goods and persons.[153]

Having placed these items on the balance, McDougal and Burke assume that inclusive interests will receive priority over exclusive interests.

10. *C. John Colombos* (1967)[154] makes a categorical statement favoring the archipelago concept: "The generally recognized rule appears to be that a group of islands forming part of an archipelago should be considered as a unit and the extent of territorial waters measured from the centre of the archipelago. In the case of isolated or widely scattered groups of islands, not constituting an archipelago, the better view seems to be that each island will have its own territorial waters, thus excluding a single belt for the whole group. Whether a group of islands forms or not an archipelago is determined by geographical conditions, but it also depends, in some cases, on historical or prescriptive grounds."

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[152] *Ibid.*, 411.
[153] *Ibid.*, 419.
[154] THE INTERNATIONAL LAW OF THE SEA 120 (1967).

THE PRACTICE OF ARCHIPELAGOS[155]

A. *Coastal Archipelagos*

1. *Australia.* Legislative authority over the sea does not extend beyond the distance of three marine miles from low water mark of the mainland and the islands respectively; waters outside the three-mile limit form part of the high seas.[156]

2. *Cuba.* "The waters situated between the islands, islets or cays and the mainland of Cuba are internal waters."[157]

3. *Denmark.* Waters between and inside the Danish coastal archipelagos are internal waters, delimited by straight baselines with a ten-mile maximum.[158]

4. *Egypt.* Internal waters are delimited by straight baselines with a maximum length of twelve nautical miles drawn between the mainland and islands and from island to island.[159]

5. *Finland.* The maximum length of baselines is twice the breadth of the marginal seas. Since this breadth is four nautical miles, the maximum length is eight nautical miles. Where archipelagos are situated too far out at sea to be included in the outer coastline, they have their own territorial waters, are considered as a whole, and are enclosed by baselines in length twice the breadth of the marginal seas. Since this breadth is three nautical miles, the maximum length is six miles. Waters between and inside the islands or islets are internal waters.[160]

6. *Iceland.* Internal waters are delimited by straight baselines enclosing the waters of coastal archipelagos, islands, and rocks, without a stipulated maximum length, the baselines varying according to the particular geographic features.[161]

7. *Norway.* As upheld by the International Court of Justice in its celebrated judgment in the *Fisheries* case, the Norwegian straight base-

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[155] See EVENSEN, *op. cit. supra*, note 35 at 295-299.

[156] The position of Australia is implicit in its consent given to this assertion by the United Kingdom during the *Fisheries* case as to the Barrier Reef, a coastal archipelago situated off Queensland.

[157] Art. 6, par. 2, of the Decree of 8 January 1934.

[158] Neutrality Decrees of 27 January 1927 and 11 September 1938, and enactments on Fishing and Hunting in Greenland Waters dated 1 April 1925, 27 May 1950, 7 June 1951, and 11 November 1953.

[159] Art. 4, Royal Decree of 18 January 1951.

[160] Act of 18 August 1958 and Presidential Decree of the same date.

[161] Fisheries Regulations of 19 March 1952.

line system, laid down in the Royal Decree of 12 July 1935, includes the following main features:

> (a) A continuous line of straight baselines is drawn all along the coast. The outermost points of the coastal archipelago, including drying rocks, are used as basepoints.
>
> (b) There are no maximum lengths for such baselines. Each of them is dependent upon the geographical configuration of the coastline.
>
> (c) The baselines follow the general direction of the coast.
>
> (d) There is no connection between the length of the baselines and the breadth of the marginal sea.
>
> (e) The waters inside the baseline are considered internal waters. Thus, the waters of *fjords* and bays and the waters between and inside the islands, islets and rocks of the *skjaergaard* are internal waters.
>
> (f) The outer limits of the marginal sea are drawn outside and parallel to such baselines at the distance of four nautical miles.[162]

8. *Saudi Arabia.* Internal waters are defined by straight baselines with a maximum length of twelve nautical miles, enclosing waters lying between islands, islets and the mainland.[163]

9. *Sweden.* Internal waters are defined by straight baselines which enclose the waters between the islands of a coastal archipelago and between the islands and the mainland, without a maximum length for baselines.[164]

10. *United Kingdom.* In the *Fisheries* case, the United Kingdom set up, as against the straight baseline system, the arcs of circles system whereby territorial waters would be measured from low water marks by a consecutive line of intersecting arcs of circles. But it was willing to concede that if, contrary to its belief, customary international law recognized straight baselines for archipelagos, presumably such baselines would be acceptable provided they were absolutely limited to ten miles in length.[165] But at the seventh session of the International Law Commission, it issued comments on 15 March 1966 which included this statement: "(The U.K. Government) do not consider that there is any need to make special provisions for groups of islands as such . . ."[166]

11. *United States of America.* The United States has adamantly taken the stand that archipelagos should be treated in the same manner as isolated islands, *i.e.*, each island should have its own marginal sea. It

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[162]EVENSEN, *supra*, note 35 at 295.

[163]Arts. 4 and 6, Royal Decree of 28 May 1949.

[164]See customs regulations of 7 October 1927 and the Royal Letter of 4 May 1934.

[165]2 I.C.J. PLEADINGS, ORAL ARGUMENTS, DOCUMENTS, FISHERIES CASE, JUDGMENT of 18 December 1951, 361.

[166]2 YEARBOOK OF THE INT'L. L. COMMISSION, 85 (1916).

does not even apply straight baselines where the marginal seas of islands might intersect.[167]

12. *Yugoslavia.* Internal waters are defined by straight baselines drawn along the outer fringes of the coastal archipelagos, without a maximum length for baselines, except across the mouths of bays and estuaries where the maximum is twelve nautical miles.[168]

B. *Outlying Archipelagos*

1. *Bermudas.* In the *Fisheries* case, the United Kingdom asserted its authority over the coastal waters within the Bermudas "up to a distance of three nautical miles from the outer ledges."[169]

2. *Cook Islands.* In the *Fisheries* case, the United Kingdom stated that the government of the New Zealand has not drawn a continuous belt of territorial waters around each separate island.[170]

3. *Faeroes.* Its eighteen inhabited islands and many islets, skerries, and rocks, are treated as a unit, the territorial waters of which are drawn by a mixed system of arcs and straight lines: straight lines delimit the outer limits of the fishery zones, while arcs of circles round off the limits where two straight lines meet.[171]

4. *Fiji Islands.* In the *Fisheries* case, the United Kingdom stated that the Fiji Islands were not treated as a whole for the delimitation of territorial waters and that each island has a separate belt of such waters.[172]

5. *Galapagos.* Ecuador treats the Galapagos as a unit by drawing straight baselines between "the most salient points of the outermost islands forming the contour of the archipelago of Galapagos."[173]

6. *Hawaii.* Although the Hawaiian Islands seem to have been considered as a whole in the past,[174] at present the government of the United States does not recognize the archipelago concept in favor of this state, and each Hawaiian island has its own belt of territorial waters.

7. *Iceland.* A consecutive line of straight baselines is drawn along the

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[167]See EVENSEN, *supra*, note 35 at 297.
[168]Enactment of 1 December (28 November) 1948.
[169]I.C.J., PLEADINGS, ORAL ARGUMENTS, DOCUMENTS, FISHERIES CASE, *supra*, note 165 at 532.
[170]*Ibid.* at 523, 524.
[171]Argument of 22 April 1958 between Denmark and the U.K. drawing up the exclusive fishing zones of the Faeroes.
[172]I.C.J., PLEADINGS, ORAL ARGUMENTS, DOCUMENTS, FISHERIES CASE, *supra*, note 165 at 532.
[173]Presidential Decrees on fisheries of 2 February 1938 and 22 February 1951.
[174]See the Neutrality Proclamation of 16 May 1854 and 27 May 1877.

coast from its outermost points, but excluding islands far out at sea, which are each given their individual waters.

8. *Svalbard.* Since Norway enjoys full and absolute sovereignty over the archipelago,[175] presumably it looks on it as a unit, the internal waters of which are delimited by the application of the straight baseline system.

C. *Special Outlying Archipelagos*

1. PHILIPPINES

The Philippines is a special outlying archipelago in the real sense: it is *sui generis.* It is the only outlying or mid-ocean archipelago in the world where territoiral area is delimited by metes and bounds, very much as in a Torrens title, indicating the parallels of latitudes and the meridians of longitudes of the perimetric boundary lines of its territory. Such metes and bounds were not only drawn in international maps and charts dating back to over three hundred years ago, but were also embodied in international treaties which thus define and delimit the national frontiers of the archipelago.

Within the metes and bounds of such international treaty limits, the Philippines as successor state exercises legal title and dominion over all the maritime territory. Accordingly, the new 1973 Constitution of the Philippines defines the national territory under Article I, Section 1 as follows:

> The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all the other territories belonging to the Philippines by historic right or legal title, including the territorial sea, the air space, the subsoil, the sea-bed, the insular shelves, and the other submarine areas over which the Philippines has sovereignty or jurisdiction. The waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines.

As an archipelagic state, the Philippines is an island-studded sea rather than a group of islands with necessary appurtenances of adjacent waters. The legal distinction between these two geographical concepts is important. As an island-studded sea, the Philippine archipelago comprises sea which must have a territorial basis, and the delimitation of its metes and bounds must be determined according to the modes of acquisition of state territory recognized by international law. But were it merely a group of islands with necessary appurtenances of adjacent waters, the delimitation of their breadth seaward would have an international aspect

[175]See Spitzbergen Treaty of 9 February 1920.

in that the international validity of such delimitation would be necessarily governed by the principles of international law. In brief, the Philippines is an outlying archipelago surrounded by seas on all sides.[176] As an archipelago[177] of some 7,100 islands, with a total land area of about 116,000 square miles,[178] the Philippines is delimited by water oubndaries defined in the Treaty of Paris on 10 December 1898,[179] and the treaty concluded at Washington on 7 November 1900[180] both between the United States and Spain, and in the convention concluded between the United States and Great Britain on 2 January 1930, with Supplemental Exchange of Notes of the same date and of 6 July 1932.[181] It has been noted[182] that to these water boundaries the only exceptions are the arbitral award to the Netherlands of Palmas Islands in 1928[183] and the Philippine territorial claim to Sabah in North Borneo.[184]

Within the boundaries set by international treaty limits, the total area extent is about 1,788,000 square kilometers (520,170 square nautical miles). The approximate ratio of water to land is about 5:1. The heavily indented coastline of 34,600 km. (21,500 statute miles) is fringed with numerous coral reefs, gulfs, and lagoons, prompting the Philippine government by national legislation to adopt the method of straight baselines as the basis for defining the inner boundary of its territorial sea. The shortest of the baselines is about 178 meters and the longest is 259.4 km. (140 nautical miles) off the Moro Gulf area. The average length of baseline is 64 km. (35 nautical miles). The baselines comprehend a total area of about 884,400 sq. nautical miles). Within the baselines, the ratio of water to land is aoubt 1.9:1. Measured from the baselines, the breadth of the territorial sea in several instances amounts to only about 5.6 km. (3 miles) or less. But off the western coast of Luzon, the territorial sea measures about 135-145 nautical miles and extends even longer on the eastern coast.[185]

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[176]See Arreglado, *The National Territory of the Philippines*, 3 PHIL. Y. INT'L. L. 96-97 (1974).

[177]See Chaffee & Others, AREA HANDBOOK OF THE PHILIPPINES (1969) and BACKGROUND NOTES: REPUBLIC OF THE PHILIPPINES (Department of State 1970), in INSULAR SOUTHEAST ASIA: A BIBLIOGRAPHY SURVEY (DA Pam, 550-12).

[178]WORLD DATA HANDBOOK (Department of State, August 1972), General Foreign Policy Series No. 264 (GPO).

[179]U.S.T.S. No. 343, 30 Stat. 1754 (1898).

[180]U.S.T.S. No. 345, 31 Stat. 1942 (1900).

[181]Convention Delimiting the Boundary Between the Philippine Archipelago and the State of North Borneo. U.S.T.S. No. 846, 47 Stat. 2198 (1933); British T.S. No. 2 (1930); 137 L.N.T.S. 299 (1933).

[182]Ridao, *op. cit. supra*, note 2 at 59.

[183]See *infra.*, Island of Palmas case (*U.S. v. Netherlands*) 2 U.N. REV. OF INT'L. ARB. AWARDS 830 (1928).

[184]Rep. Act No. 5446 (1968), sec. 2, which amended Rep. Act No. 3046 (1961).

[185]See Manansala, *The Philippines and the Third Law of the Sea Conference: Scientific and Technical Impact*, 3 PHIL. Y. INT'L. L. 135-137 (1974).

As an outlying archipelago, the principal component of the Philippines is the marine area or the sea. The constituent islands, islets, and other land formations are spread out in the form of a triangle within the territorial limits of its maritime territory. It has been alleged that the so-called "international treaty limits" were designed merely to identify the islands embraced within the Philippine archipelago. The Philippine position is that such limits were established primarily to define the boundary lines, as well as to delimit the metes and bounds of the territorial sea embraced within the Philippine archipelago.

The internal waters of the Philippines are officially defined thus: "all waters around, between and connecting the different islands of the Philippine archipelago, irrespective of their widths or dimensions, are necessary appurtenances of the land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines." This position was first taken in diplomatic notes of notification to various states and in a note of 12 December 1955 to the Secretary General of the United Nations.[186] It was affirmed by the Philippines in the First (1958), Second (1960), and Third (1974) U.N. Conferences on the Law of the Sea.[187] It is embodied in Republic Act No. 3046, as amended by Republic Act No. 5446, and in the letter of 5 July 1956 from the Secretary of Foreign Affairs to the Navy on the extent of the Philippine territorial sea for purposes of enforcement of municipal laws. This position was most recently reiterated in the new Constitution.[188]

The territorial seas of the Philippines are defined in the declaration embodied in the government's note of 5 July 1955 to the Secretary General of the U.N., and in the diplomatic notes of notification to various states. The official statement declared that all other water areas embraced in the imaginary lines described in the Treaty of Paris of 10 December 1898, the treaty between the United States and Spain concluded at Washington on 7 November 1900, and the convention between the United States and Great Britain of 2 January 1930, constitute the territorial sea of the Philippines, subject to the exercise by foreign friendly vessels of the right of innocent passage over these waters. This position is also affirmed in guidelines issued to the Philippine Navy and in Republic Act No. 3046.

The Chief of the Philippine delegation to the Second U.N. Conference on the Law of the Sea posited three reasons for the extension of the sovereignty of a state over the territorial sea:

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[186]LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA (UN Leg. Series, 1957), St/Leg/Ser. B/6, 39-40, quoted in 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 282-83 (1963).

[187]See 4 WHITEMAN, *id.* at 310.

[188]Art. 1, sec. 1.

1. The security of the state demands that it should have exclusive possession of its shores and that it should be able to protect its approaches.

2. For the purpose of furthering its commercial, fiscal and political interests, a state must be able to supervise all ships entering, leaving, or anchoring in the sea near its coast.

3. The exclusive enjoyment of the products of the sea close to the shores of a state is necessary for the existence and welfare of the people and its land territory.[189]

With these reasons as premises, the conclusion was offered that as to each coastal state, the question of the breadth of the territorial sea, being inseparably connected with the question of self-preservation, must needs be answered in varying ways, according to the circumstances and conditions of each state.

The Philippine claim to its territorial sea has two broad bases: the legal and the social.

The legal basis of the Philippine claim rests on three grounds: recognition by treaty, devolution of treaty rights, and historic rights.[190]

Recognition by treaty is evidenced chiefly by the Treaty of Paris concluded at Paris on 10 December 1898[191] under Article III of which Spain ceded to the United States "the archipelago known as the Philippine Islands, and comprehending the islands lying within the following described lines: . . . ," the system of lines being defined by parallels of latitude and meridians of longitude. The treaty signed at Washington on 7 November 1900[192] also noted that under Article III of the Treaty of Paris, "Spain cedes to the United States the archipelago known as the Philippine Islands and comprehending the islands lying within certain described lines," and clarified that Spain ceded the United States title to "any and all islands belonging to the Philippine archipelago, lying outside the lines described in Article III of that Treaty and particularly to the islands of Cagayan, Sulu, and Sibutu and their dependencies." Further the convention between the United States and Great Britain concluded on 2 January 1930[193] set forth the geographic lines separating the Philippine archipelago and North Borneo, a British protectorate.

All these treaties draw geographical lines; the crucial question therefore arises as to the purport of these geographical lines: are they boundary lines or not?

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[189]Tolentino, *The Philippine Territorial Sea, statement delivered on 25 March 1960 at the Second U.N. Conference on the Law of the Sea at Geneva*, 3 PHIL. Y. INT'L. L. 48.

[190]Ridao, *supra*, note 2 at 62-74.

[191]*Supra*, note 179.

[192]*Supra*, note 180.

[193]*Supra*, note 181.

That they are not boundary lines is the position taken by the United States, which prefers to view them as delimitations of the geographical area within which land areas belonged to the Philippines.[194]

That they are boundary lines, but that the treaties refer to the islands or the land territory, and to the sea area within the specified geographical lines, is the position advanced by Sorensen, who proceeds from the belief that this manner of defining the boundaries by latitudes and longitudes may have been the only practical method, in view of the immense number of islands, and that it cannot be interpreted as revealing any intention to include the sea between the islands as territorial waters.[195]

That they are indeed boundary lines is borne out by the language of the convention of 2 January 1930 between the United States and Great Britain. Article I describe the geographical line as beginning and ending "on the *boundary* defined by the Treaty between the United States of America and Spain signed at Paris, December 10, 1898." Article II moreover provides "if more accurate surveying and mapping of North Borneo, the Philippine Islands and intervening islands shall in the future show that the line described above does not pass between Little Bakkungaan and Great Bakkungaan Islands, substantially as indicated on Chart No. 4720, the *boundary line* shall be understood to be defined in that area as a line passing between Little Bakkungaan and Great Bakkungaan Islands as indicated on the chart." Along the same vein, it provides further that "if more accurate surveying and mapping shall show that the line described above does not pass between Mangsee Islands and Mangsee Great Reef as indicated on Chart No. 4720, the *boundary line* shall be understood to be defined in that area as a straight line... passing through Mangsee Channel as indicated on attached Chart No. 4720." Accordingly, the Attorney Adviser of the Department of State observed in 1957: "While the *boundary line* is described only in geographic terms in the convention, the attached map shows that the mid-line was apparently adopted at two points separating islands of the Mangsee Channel and the channel between Great and Little Bakkungaan Islands."[196]

In the *Island of Palmas* case[197] the United States submitted as Exhibit No. 11, maps published in 1902 by the U.S. Bureau of Insular Affairs. The maps reproduced the lines described in Article III of the

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[194]Telegram, Department of State to American Embassy, Manila, 4 January 1958, MS. Dept. of State, file 756 D. 022/1-458, in 4 WHITEMAN, *supra*, note 186 at 283.

[195]Sorensen, *The Territorial Sea of Archipelagos*, published in JURIS GENTIUM, LIBER AMICORUM, J.P.A. FRANCOIS (1959) in 4 WHITEMAN, *supra*, note 186 at 286-87.

[196]Read, *Delimitation of the Territorial Sea in Straits and Off Other Opposite Coasts; memorandum*, July 1957, US/CLS/LEG/12, 56-60, in 4 WHITEMAN, *supra*, note 186 at 310.

[197]2 U.N. REP. OF INT'L. ARB. AWARDS 830 (1928).

Treaty of Peace. Particular note should be taken of the arbitrator's statement that Article III "is so worded that it seem as though the Philippine Archipelago, within the *limits* fixed by that Article, was at the moment of cession under Spanish sovereignty . . ."[198]

In view of the foregoing, the conclusion is ineluctable that the lines drawn in the Treaty of Paris of 1898 and the convention of 1930, draw nothing less than the territorial limits of the Philippine Archipelago, at the very least, insofar as Spain and Great Britain are concerned.

Devolution of treaty rights is first evident from the Act of the U.S. Congress (the Philippine Independence Act of 1934)[199] authorizing the Philippine legislature to call a constitutional convention, which spoke of a government with "jurisdiction over *all the territory* ceded to the United States. By the Treaty of peace concluded between the United States and Spain on the 10th day of December 1898, the *boundaries* of which are set forth in Article III of said treaty . . ."[200] The resulting Constitution of the Philippines provided in Article I: "The Philippines comprises *all the territory* ceded to the United States by the Treaty of Paris concluded x x x on the tenth day of December 1898, the limits of which are set forth in Article III of said treaty, together with all the islands embraced in the Treaty x x x concluded between the United States and Great Britain on the second day of January 1930, and all territory over which the present Government of the Philippine Islands exercises jurisdiction." As required by the Act of Congress, this constitution was approved by President Franklin D. Roosevelt. Thus, the treaty rights acquired by the United States under the Treaty of Paris of 10 December 1898 (as construed by the Philippine Independence Act), insofar as Spain and Great Britain were concerned, were transferred to the Commonwealth of the Philippines when the Philippines achieved independence.

The devolution of rights is unassailable. The Philippine Constitution signed by the U.S. President contained a description and delimitation of Philippine territory. It was to this territory that the Republic of the Philippines succeeded in the exercise of sovereignty and jurisdiction when the United States withdrew on 4 July 1946. The same description and delimitation of territory was taken notice of by the Filipino people when they ratified their constitution in a plebiscite.

Historic rights to Philippine boundaries arise from several sources. For one, there has been no protest, since the ratification of the Treaty of Paris against the exercise of sovereignty by the United States over all the

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[198]*Ibid.*, 842-43.
[199]Public Law No. 127, 48 State. 456 (1934).
[200]*Ibid.*, sec. 1.

Philippine land and sea territory embraced in that treaty. Neither was there any protest when the Philippines became independent and exercised sovereignty and jurisdiction over the same territory. Philippine title to a certain extent of territorial sea, therefore, has a historic basis and it cannot, it should not, be affected adversely by a definite rule on the breadth of the territorial sea. "A historic title is generally recognized basis of acquired or established rights."[201]

For another, no protest has been raised, except by the United States, to the diplomatic notes addressed by the Philippine government to various states regarding the extent of the internal waters and territorial sea of the Philippines. Again, the implication can be drawn that all these silent states recognize the asserted claim of the Philippines.

Even the U.S. Bureau of Insular Affairs published, as far back as 1902, maps of the Philippine Islands reproducing the lines described in Article III of the Treaty of Peace of 10 December 1898.[202] The U.S. Coast and Geodetic Survey also published charts, corrected on 24 July 1929, indicating the line delimiting the boundary separating the Philippine Archipelago and North Borneo, a British protectorate; they were attached to and made a part of the Convention of 2 January 1930 between the United States and Great Britain. Following the holding in the *Island of Palmas* case that maps would be of special importance in cases where they do not assert the sovereignty of the country the government of which has caused them to be issued,[203] and that when annexed to a legal instrument, they have the value of such an instrument, involving more than recognition or abandonment of a right,[204] then the maps and charts aforementioned show that the United States and Great Britain expressly recognize the territorial boundaries of the Philippine archipelago drawn by the Treaty of Peace of 10 December 1898 and by the Boundary Convention of 1930.

As for the social basis of the Philippine claim to territorial waters, the roots of this basis go back to time immemorial — since it is from this time that the Philippine archipelago has been considered as a single unit, a compact group of 7,000 small but closely-knit islands connected by one submarine platform. It was always a single entity, even while sovereignty passed from Spain to the United States to the Philippines. Hence, it was not entirely unpredictable that social imperatives would anchor the Philippine claim to considerations of customs and fiscal measures, immigration, sanitation, fishing, and last but not least, security and defense.

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[201]Tolentino, *op. cit. supra*, note 189 at 52.
[202]*Island of Palmas case, supra*, note 183 at 853.
[203]*Ibid.*, 852.
[204]*Ibid.*, 853.

The archipelago concept is essentially a child of the basic unity that permeates the land, the water, and the people. Geography, economics, politics, and, in some cases, history, interweave to form a seamless and distinct whole. The concept is a function of the identity of the archipelago itself; for without this sense of identity, the archipelago will fail of statehood. The Philippine position, then, is "that there should be international recognition of the right of archipelagic states to draw straight baselines connecting the outermost points of the outermost islands and drying reefs of the archipelago from which the extent of the territorial sea of the archipelagic state is or may be determined, and within which baselines, the waters, which are archipelagic waters, regardless of their depth or distance from the coast, the seabed and the subsoil thereof, and the superjacent airspace as well as their resources, belong to and are subject to the sovereignty and exclusive jurisdiction of the archipelagic state."[205]

Parenthetically, it may be emphasized that the archipelago concept and the treaty limits positions, although related, are not interdependent. The archipelago concept proceeds from the archipelagic nature of the state, while the treaty limits position proceeds from the instruments of cession. Hence, while "the archipelago concept implies full dominion and sovereign rights over waters within the baseline, primarily, the waters between the islands which comprise the archipelago x x x the treaty limits position merely identifies the outer limits of our territorial sea which commences from the baselines proceeding seaward or away from the archipelago."[206]

The straight baselines drawn around the coastlines of the Philippine island territory were designed primarily to establish the outer limits of all the waters (designated "inland waters" by the new Constitution) around, between, and connecting the land formations of the archipelago; such baselines were not intended to delimit the territorial seas outwards. It is error, therefore, to designate as "territorial seas" the water lying beyond the coastlines of the island territory and extending seawards up to the delimitation lines of the international treaty limits. Such sea areas possess the juridicial status of national waters, and form an integral part of the national territory. To call such sea areas as "territorial seas" would run counter to the implicit enunciation of the territorial limits of the 1973 Constitutions. The erroneous application of the term "territorial seas"

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[205]Tolentino, *Principles Relating to Archipelagic States, statement made at New York City on 15 March before Sub-Committee II, U.N. Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction*, 3 PHIL. Y. INT'L. L. 28-29 (1974).

[206]Mendoza, *Current Developments in the Law of the Sea Relevant to the Philippines*, 3 PHIL. Y. INT'L. L. 10 (1974).

would bring it the concomitant international rights of innocennt passage and free navigation.

Hence:

> The straight baselines may have also the function of serving as demarcation lines between our "inland waters" and all the waters beyond up to the international treaty limits, which may be called as "territorial waters" in the sense that the Philippines accords to international shipping the right of innocent passage and free navigation over their surface, and to distinguish them from the "inland waters," over which no such international right is accorded. But in all other respects, "territorial waters" are equivalent to "national waters", forming an integral part of the maritime territory of the Philippines.[207]

Philippine delimitation of the extent of its maritime domain readily assumes validity upon a close look at the geographical configuration of the archipelago. It is a compact of islands in the form of a triangle, each of the three sides of which is an island chain forming an almost continuous coastline, thus facilitating the drawing of straight baselines.

The original unity of all the land formations within the triangle is borne out by the presence of a submarine platform under the waters around the perimeter of the whole archipelago. Within this submarine platform, the enclosed seas appear to be only depressions or basin seas. In fact, the bottom water of the central seas of the archipelago is not in free communication with that of the Pacific Ocean, the South China Sea, or the Indonesian Sea. Thus, the maritime spaces between the constituent islands and islets of the archipelago are not open sea but on the contrary are appurtenances of the island territory. Such maritime spaces are land-locked and penetrate into the very heart of the archipelago, their waters do not touch the shore of any other state; and they are isolated from the high seas and international waterways by the islands surrounding them.

Great Britain at one time and now Canada each claimed the waters of Hudson Bay as part of its territorial waters. But compared to the seas within the Philippine archipelago, Hudson Bay is of considerably wider dimensions: 600 miles in breadth, 1,000 miles in length, 600,000 square miles in water area (seven times bigger than the Sulu Sea, the largest sea inside the Philippine archipelago), 50 miles in width on the entrance to the Atlantic Ocean, and of different widths at various passages leading to the Arctic Ocean. The Sulu Sea, the largest of the central seas of the Philippines, in comparison has a total surface area of about 85,000 square miles only. In addition, the Sulu Sea is enclosed by the land domain of the Philippines, both above and below the waters.

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[207]Arreglado, *op. cit. supra*, note 176 at 103-104.

Under the Treaty of Paris, "Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands within" certain lines drawn along specified degrees. It has been contended that under this stipulation, only the islands and not the intervening waters were transferred. The Philippine position is that the terms "archipelago" means not only the groups of islands but also the waters lying in, between, surrounding, and connecting all the constituent islands. The Philippine position follows the Convention on the Territorial Sea and the Contiguous Zone which in Article 10 describes an island as "a naturally-formed area of land, surrounded by water, which is above water at high tide." Significantly, the Dictionary of the French Academy defines "archipelago" as *etendue de mer parsemee, entrecoupee d'iles: ex: l'archipel des Philippines.*

At the 1973 summer session of the U.N. Sea-Bed Committee held in Geneva, Switzerland, the Philippines, Fiji, Indonesia and Mauritius co-sponsored Document No. 48, the draft articles on archipelago (which formed the basis of the draft articles submitted by the same quadruple group to the Third U.N. Conference on the Law of the Sea. Document No. 48 had the following key provisions:

> ART. II, Par. 1: "An archipelagic state may employ the method of straight baselines joining the outermost points of the outermost islands and driving reefs of the archipelago in drawing the baselines from which the extent of the territorial sea is to be measured.
>
> ART. III, Par. 1: "The waters inclosed by the baselines, which waters are referred to in these articles as archipelagic waters, regardless of their depth or distance from the coast, belong to and are subject to the sovereignty of the archipelagic state to which they appertain.
>
> ART. IV: "Subject to the provisions of Article V, innocent passage of foreign ships shall exist through archipelagic waters."

The draft article co-sponsored by the Philippines for the next convention on the law of the sea, intends to achieve equal rights as between continental and archipelagic states on the right to draw baselines.[208] But this intention will not be fully achieved if the next Convention retains the provisions of the 1958 Geneva Convention constituting waters on the landward side of the baselines of the territorial sea as part of the internal waters of the state. Under these provisions, there is generally no right of innocent passage of foreign ships,[209] while under the draft art-

[208]The 1958 Geneva Convention provides: "In localities where the coastline is deeply indented and cut into, or there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baselines from which the breadth of the territorial sea is measured."

[209]An exception is made where the establishment of a straight baseline has the effect of inclosing as internal waters, areas which previously had been considered as part of the territorial sea or of the high seas.

icles, the waters inclosed in the baselines are made subject to innocent passage by foreign ships. The draft articles thus make "a greater concession to international navigation"[210] and because of this concession, the waters inclosed by archipelagic baselines are called "archipelagic waters" and not "internal waters" as they are if enclosed by baselines of continental states, and as "they really are"[211] in the words of the chairman of the Philippine delegation to the 1973 summer session of the U.N. Seabed Committee.

While the draft articles offer this concession, at the same time they limit its effects by allowing the archipelagic state, by national legislation, to restrict the passage of foreign ships to sea lanes designated by it, and, generally, to regulate the form and manner of such passage with due regard to the applicable rules of international law. This system of designated sea lanes would make the regime of internal waters still applicable to archipelagic waters outside the sea lanes, and the concession would therefore be operative only in the sea lanes designated by the archipelagic state. This system has been defended on the ground that the territorial sea of a state lies outside its land area; but, the archipelagic waters are between the islands and may be in the very heart or interior of the archipelagic state; they form a unity with the surrounding islands to which they are necessary appurtenances connecting the parts of the land of the State."[212]

Cognizant that the proposed system of designated sea lanes might militate against international recognition of their territorial integrity, the archipelagic states are offering the price of the draft article providing that "an archipelagic state may not suspend the innocent passage of foreign vessels through sea lanes designated by it . . . except when essential for the protection of its security, after giving due publicity thereto, and substituting other sea lanes for those through which innocent passage has been suspended." There is no gainsaying that this major concession is a wise and major step towards international recognition of the unity of the land and sea domain of archipelagos.

Even then, the right of innocent passage through designated sea lanes as described by the draft articles, has met with skepticism. Some states have demanded a right of free passage through these lanes, and some a right of innocent passage through all the waters of the archipelago. It does not appear that the Philippines would be willing to go that far. Stressing that these waters within the baselines are integral parts of the

[210]Tolentino, *On Historic Waters and Archipelagos; statement delivered at the 1973 Summer Session of the U.N. Seabed Committee held in Geneva, Switzerland*, 9 PHIL. Y. INT'L. L. 36 (1974).

[211]*Ibid.*

[212]*Ibid.*, 37.

archipelago, a Filipino spokesman asked: "Why then *free passage* which is not even recognized through territorial seas which are *outside* a nation's baselines? Or why innocent passage through *all* the waters (not merely designated sea lanes) when these waters are not territorial seas and lie *within* the baselines?"[213] Indeed, such comprehensive propositions would result in nothing less than the thorough debilitation of the archipelago concept. If waters within the baselines are permeable by innocent passage in any case, the baselines would be a useless superfluity. Even more simply, if the rights of passage permeate the waters of the archipelago, the archipelago concept is reduced to an exercise in rhetorics.

Second to navigation, resource exploitation, both living and non-living, is a basic aspect of the archipelago position. The Philippines has to view in a pragmatic light the various proposals dealing with fisheries, since fish as a basic source of food for Filipinos is second only to rice. But while fish is the main source of animal protein in the country, the fish output is deficient and is constantly outraced by a population growth of 3.5 per cent. For example, in 1972 the fish requirement was 1,436,472 metric tons but production reached only 1,122,410 metric tons, leaving a deficiency of 313,062 metric tons which had to be filled by importation.[214] Per capita consumption of fish is more than twice the world's average — 40.7 kilograms of fish per year. It is a figure exceeded only by that of Japan.

As an important element of the Philippine economy, fishery supplies food, produces income, provides employment and earns badly-needed foreign exchange. As an export trade, fish and fisheries products are fast developing. The total export of fisheries products rose from U.S. $3 million in 1970, to almost U.S. $7 million in 1971, to about U.S. $10 million in 1972; the figure was expected to hit U.S. $19 million in 1973.

Against this background, the archipelago concept would mean a diminution of pressure on Philippine fisheries, which suffers from poor productivity brought about by the complete absence of dissolved oxygen and dissolved nutrients. The waters between the islands of the archipelago would be closed to fishing activities by other states and would be reserved exclusively for the fish-eating population of the country.[215]

In addition to fisheries, marine mineral resources are also a concomitant of the archipelago position. Interest in marine minerals was aroused

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[213]Mendoza, *Statement Before the Asian-African Legal Consultative Committee, delivered at the 15th Session of the AALCC on 9 January 1974*, 3 PHIL. Y. INT'L. L. 43 (1974).

[214]In 1972, the Philippines imported 64,000 metric tons of fish and fish products valued at about US $22 million.

[215]See Ronquillo, *The Impact of the Law of the Sea on Philippine Fisheries*, 3 PHIL. Y. INT'L. L. 144-146 (1974).

a few years ago when the search for petroleum spurred the offshore drilling of four wells, the onshore drilling of two wells for oil [216] and the dredging and concentration of iron sand.[217] Geological evidence supports the potential of sub-sea mineral deposits. According to the Assistant Director of the Bureau of Mines of the Republic of the Philippines:

> It is believed that petroleum exists in offshore areas of the Archipelago and that minerals — iron sand and other heavy mineral sands, phosphorite, coal, iron ore, manganese and possibly copper, aside from minerals that may be won from sea water — abound in the bottom of our surrounding waters.[218]

The most important target in the national plans for marine resources development is petroleum. Areas favorable to petroleum occurrence in offshore areas have been delimited by marine geological and geophysical studies. There is an apparent potential, not yet assessed, of placer deposits in unconsolidated sediments in the continental shelves. In some shores of the country, large deposits of titaniferous magnetite sand were discovered. In the year 1972-73, onshore and offshore mines exported a total of 1,377,150 tons of iron sands (magnetite) with small amounts of titanium and vanadium. There have been reports of discoveries of associated heavy minerals in offshore areas,[219] but so far no development efforts have been undertaken.

Offshore sources of sand and gravel are expected to be developed in the next decade in order to offset the depletion of river and shore deposits brought about by consumption requirements of 3,580 million cubic meters a year. Some exploitation is being done of minerals dissolved in sea water, such as sodium chloride, of which 213,560 metric tons are extracted a year. Phosphate used by fertilizer plants might be deposited in shore and offshore areas. Finally, there is a similar possibility of finding manganese nodules in the offshore areas.

As for marine scientific research, the Chief Geophysicist of the Bureau of Coast and Geodetic Survey of the Republic of the Philippines delivered, in part, the following statement before Sub-Committee III of the U.N. Committee on the Seabed, Palais des Nations, Geneva, on 11 August 1972:

> In waters under national jurisdiction, marine scientific researchers must have the prior permission of the coastal state. Full information on the objectives of the programme, the time and duration of the research, the area of

[216] On Palawan Island.
[217] West of Pangasinan in Lingayen Gulf.
[218] Comsti, *Marine Mineral Resources of the Philippines*, 3 PHIL. Y. INT'L. L. 157 (1974).
[219] At northwestern Palawan.

> operation or deployment, the equipment and personnel involved including the tonnage of the vessel must be given to the coastal state at the time a request for permission is submitted. The request must include an invitation for scientists of the coastal state to participate in the research during their stay in coastal waters, an offer to share in the samples, data or records obtained and finally, a pledge that the results of the researches will be published in international journals or publications and copies of the data shall be furnished to oceanographic data centers.[220]

Against the Philippine proposal for an archipelagic regime, the most dramatic objection was made by Malta at the 1973 summer session of the U.N. Seabed Committee at Geneva. The representative of Malta observed that the archipelago principles before the Sub-Committee would convert about 20% of the world's oceans into internal waters. But as a member of the Philippine delegation was quick to rebut, "the observation made apparently proceeds from the wrong premise that waters of archipelagos are now regarded as high seas."[221] He informed the assembly that the Philippine government had just completed a bridge connecting the islands of Leyte and Samar, and to say that waters under the bridge are high seas would be anachronistic.

To the expressed fear that the principle of archipelagos would allow just about any state of more than one island or a continental state with an oversea island, no matter how distant, to claim the status of archipelagos, reference was directed to the notions of "due process" in national law and of *jus cogens* in international law.

Since the Philippines is an archipelago in all senses — geographic, historic, political, economic — it would accord with the generally accepted rule of international law relative to a group of islands constituting an archipelago, if the archipelago concept is supplied by using straight baselines joining the outermost islands of the archipelago. The waters within the baselines, around, between, and connecting the islands would be treated as historical internal waters, while the waters seaward of the baselines and extending up to the international treaty limits of the Philippines would be treated as historical territorial sea. The question of free navigation in straits would not arise because neither San Bernardino Strait, Surigao Strait, Basilan Strait, nor Mindoro Strait is an international strait in the sense that it has normally been used for international traffic. None is a traditional sea lane, nor does any deny access by a state to its territory.[222]

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[220]Manansala, *Scientific Research and the Third Law of the Sea Conference*, 3 PHIL. Y. INT'L. L. 166-67 (1974).

[221]Mendoza, *Statement Delivered Before Sub-Committee II on August 20, 1973*, 3 PHIL. Y. INT'L. L. 39 (1974).

[222]Ridao, *supra*, note 1, at 78-79.

The Philippine position is that the waters of a strait are not high sea, and could be regarded as the territorial sea, or even the internal sea; but it is necessary to distinguish between territorial sea and internal sea, according to the official spokesman:

> The Philippines could not accept a proposal which did not take that distinction into account, since that would suppose that traffic could pass through the internal waters of his country, without any form of restriction. If it was decided that the waters of a strait formed part of the territorial sea, there would appear to be no need to envisage special rules for straits, since application of the right of innocent passage would be sufficient.

He also added that the Philippines could not accept the right of overflight over territorial or internal seas.[223]

It appears that the Philippines would be willing to accept a proposal for the limitation of baselines, *e.g.*, 80 nautical miles except that one percent of such lines may exceed 80 nautical miles provided they do not exceed 100 nautical miles. The Philippine government also appears amendable to a proposal for a land to water ratio, *e.g.*, 1:5. Whether it will ultimately vote for these proposals, however, might be a matter of consultation with the other archipelagic states of Indonesia, Fiji, and Mauritius.

But the Philippines apparently does not find acceptable a proposal for unimpeded passage through archipelagic waters, including transit of submerged submarines and overflight. Neither, it seems, does it look with a kindly eye on the concomitant proposal that the lines surrounding archipelagic waters shall be designated *archipelagic lines* as opposed to *baselines* which will imply that the waters within are internal waters.

The feeling of the Philippine government appears to be that a majority of the participants to the U.N. Conference on the Law of the Sea are committed in principle to the archipelago concept, with varying degrees of qualifications centered principally on transit through archipelagic waters. The Republic of the Philippines appears optimistic that the archipelago principle will be accepted, either in the Law of the Sea conference, or through customary international law. It appears less optimistic on the success of the concept of historic territoiral waters.

2. INDONESIA[224]

Indonesia is the largest archipelago in the world. It is unique because

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[223]Comment by Justice Secretary Vicente Abad Santos, Co-Chairman of the Philippine delegation, on the U.K. proposal concerning straits used for international navigation, 11 July 1974, at the Third UN Conference on the Law of the Sea, Caracas, Venezuela.

[224]See *Indonesia and the Law of the Sea*, in J.J.G., SYATAUW, SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW, 168-205 (1961).

of its peculiar shape and varied composition. Some of the largest islands in the world are separated from innumerable smaller and tiny islands by very shallow, as well as some of the deeper, waters of the world. These waters range from a few to some hundreds of miles.

The case of Indonesia resembles greatly that of the Philippines, as evidenced by the use of identical terms. But although similar, the two cases bear the following distinctions: *Firstly,* perhaps because the Indonesian archipelago occupies a more central geographical position in Southeast Asia, the case of Indonesia has received much more protest and criticism. *Secondly,* while the Philippines is a unique example of archipelago in the sense that it has two large centers (Luzon and Mindanao) surrounded by thousands of islands and separated by relatively broad waters, Indonesia is even more unique because it has not only one or two centers, but at least four main parts — Sumatra, Java, Borneo, and Celebes. In Indonesia, the whole state apparatus and development might be seriously jeopardized if one of these four islands were isolated from the rest. In this light, the "archipelago as one unit" concept attains a compelling superiority over the "each island its own territorial waters" theory. In fact, Indonesia has built its case for the contention that the archipelago is one single unit on this great degree of interdependence.[225] In contradistinction, the Alaskan archipelago of the United States and the archipelagos of the United Kingdom are minor parts of each of these countries; they are not vital to the integrity of the state and are understandably treated by giving each islands its own territorial waters.

Indonesia has a total area of more than three million square miles, of which only about 730,000 square miles comprise land area. The archipelago has a maximum length of 2,750 miles and a maximum width of 1,150 miles. It occupies a position of strategic importance between the Asian and Australian continents and within most of the important Asian waters: the Pacific Ocean on the east, the Indian Ocean on the west, the Strait of Malacca, South China Sea, and Sulu Sea on the north, and the Indian Ocean and the Arafura Sea on the south. The lines of international communication which flow through the Seeda Strait, the Strait of Macassar, and Torres Strait bestow commercial and maritime importance on the area.

The presence of large continental shelves demonstrates the role of

[225]The Explanatory Memorandum to Act No. 4, 1960, provides: "The main objection against the way of fixing the boundary of the territorial sea mentioned above is the fact that this method took little or no account at all of the special nature of Indonesia as an archipelago. According to this old method of measuring the territorial sea, *i.e.*, starting from a baseline in the form of the low-water line, each island in Indonesia would theoretically have its own territorial sea. (The Indonesian archipelago consists of about 13,000 islands of which about 3,000 are inhabited)."

Indonesia as the bridge between the two neighboring continents.[226] The former interconnection is clearly shown by the crescents of islands making up the archipelago.[227]

Before World War II, Indonesia, as the Dutch colony of the Netherlands Indies, generally applied the same principles of the law of the sea as the mother country, as laid down in the Territorial Sea and Maritime Districts Ordinance of 1939.[228] These laws remained the basic documents on the law of the sea in Indonesia. When the Dutch government transferred sovereignty over the Netherlands Indies on 29 December 1949 to the independent Republic of the United States of Indonesia, transitional measures provided that existing laws and regulations at the time of transfer of sovereignty would remain in force until such time that they would be expressly revoked.[229] This provision was adopted as Article 192 of the Constitution of the United States of Indonesia and since 1950 as Article 142 of the Provisional Constitution of the Republic of Indonesia.[230] However, some parts of the Ordinance of 1939 were revoked by the Indonesia Declaration of 13 December 1957.

The government in effect declared that Indonesia is an archipelago and must therefore be treated as one unit; that all waters surrounding, between, and connecting the islands of the archipelago, regardless of breadth, are to be considered as internal waters; that the breadth of Indonesian territorial sea is twelve miles, to be measured from baselines connecting outermost points of the islands at the fringe of the archipelago; that innocent passage is guaranteed; and that all other provisions of the Territorial Sea and Maritime Districts Ordinance of 1938 remain in force, *e.g.*, those with respect to fishing, search of vessels, hot pursuit and protection of cables, pollution of sea water and other regulations for the purpose of ensuring orderliness and safety.

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[226]The Sahul Shelf in the east is the undersea extension of Australia, New Guinea, and the islands around it. The same is true of the Sunda shelf in the west with the islands of Sumatra, Java, and Borneo. Both shelves are covered with shallow waters from 10 to 200 meters.

[227]The mountain range of Sumatra, Java, the Sunda Islands, eastwards to the crescent of islands around the Banda Sea, constitute the oversea extension of the mountain range of the Southeast Asian mainland which runs through the Malay Peninsula northwards.

[228]In LAWS AND REGULATIONS OF THE REGIME OF THE TERRITORIAL SEA, U.N. Legislative Series 193-201. (ST/LEG/SER. B/6) (1957).

[229]One of the documents of the Round Table Conference at The Hague of 1949, the Agreement on Transitional Measures, states in Article 8: "All provisions in existing legal regulations and administrative ordinances inasmuch as they are not incompatible with the transfer of sovereignty... remain in force without modification, as regulations and ordinances of the Republic of the United States of Indonesia... as long as they are not revoke or modified by the competent organs."

[230]ENGELBRECHT, DE WETBOEKEN, WETTEN EN VERORDINENGEN BENEVENS DE VOORLOPIGE GRONDWET VAN DE REPUBLIEK INDONESIE, (THE CODE BOOKS, STATUTES AND ORDINANCES INCLUDING THE PROVISIONAL CONSTITUTION OF THE RFPUBLIC OF INDONESIA) 17, 33, 67 and 95 (1956).

This Declaration of 1957 was realized on 18 February 1960 when the government passed Act No. 4,[231] containing virtually the same principles. Under Article 1, baselines "consist of straight lines connecting the outermost points on the low water mark of the outermost islands," and all waters lying within these baselines are Indonesian internal waters. But foreign vessels are granted the right of innocent passage if neither prejudicial to nor violating the sovereignty and security of Indonesia. The Indonesian system therefore blurs the dividing line between internal and territorial waters which were previously distinguished by the right of innocent passage.

The right of innocent passage accorded to foreign ships in Indonesian internal waters is however qualified by the proviso that their behavior should not be detrimental to the security of the state. Under this proviso, the Indonesian government has far-reaching authority to close all "internal waters," *i.e.*, all waters between the islands of the archipelago, to foreign ships at any time, and to merchant vessels if they are considered to endanger the security of the state.

THE JURISTIC APPROACH TO ARCHIPELAGOS

A. *Fisheries Case* (*United Kingdom v. Norway*) I.C.J. REP. 116 (1951)

Under a 1935 decree, Norway delimited its northern territorial waters by drawing base lines from point to point on the islands, or *skjaergaard*, off the coast. The United Kingdom objected, contending that firstly, the outer limits of Norwegian territorial waters must not be more than four miles from some point on shore; and secondly, that with the exception of bays, the base line must be the actual low-water mark. Both parties agreed that four miles might be used as the breadth of territorial waters in view of the historic Norwegian claim to four miles. The court upheld Norway's claim to use the straight baseline.

The court examined the geographical characteristics of the *skjaergaard* of about 120,000 islands, rocks, and reefs. It noted that the coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea; instead, it noted that what really constitutes the Norwegian coast line is the outer line of the *skjaergaard*. For the purpose of measuring the breadth of the territorial sea, the court found that it is the low-water mark as opposed to the high-

[231]Published in U.N. Documents A/Conf. 19/5 Add. 1, 3-4 (1960).

water mark, or the mean between two tides, which has generally been adopted in the practice of states. It took notice of the agreement between the parties that in the case of a low-tide elevation (drying rock) the outer edge of the low-tide elevation at low water may be taken into account as a basepoint for calculating the breadth of the territorial sea.

The court specially rejected the idea that the base line must "follow all the sinuosities of the coast," and likewise rejected the American proposal at the 1930 Conference for the "envelopes of arcs of circles" method of measurement from points on shore. Instead, the court accepted "the principle that the belt of territorial waters must follow the general direction of the coast." It pointed out that the 10-mile limit for bays was not accepted by Norway or binding in international law, and rejected the British claim that by analogy no base line could exceed 10 miles from land to land. The court concluded: "In this connection, the practice of States does not jutsify the formulation of any general rule of law."

Noting the absence of rules having the technically precise character alleged by the U.K. Government, the court said it did not follow that the delimitation undertaken by the Norwegian government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. Since the coastal state is competent to undertake the act of delimitation, it is necessarily a unilateral act, but its validity with regard to other states depends upon international law. "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law," the court held.

It then enumerated certain basic considerations inherent in the nature of the territorial sea which can provide courts with an adequate basis for their decisions: (1) While a coastal State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base lines must not depart to any appreciable extent from the general direction of the coast, for the territorial sea has a close dependence upon the land domain. (2) The choice of baselines is determined by a sufficiently close link between the sea areas lying within these lines and the land domain, such that the sea areas are subject to the regime of internal waters. This idea should be literally applied in the case of a coast, the geographical consideration of which is as unusual as that of Norway. (3) Finally, not to be overlooked are certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. The method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; even before the

dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.

The principle affirmed by the World Court — that the waters lying between and inside the constituent islands of archipelagos must be regarded as internal waters — is relevant to the case of the Philippine archipelago insofar as the delimitation of the outer limits of its "inland waters" is concerned. This principle tends to confirm the international validity of the straight baselines which have been drawn by national legislation around the coastlines of the island territory of the Philippine archipelago to enclose its 'inland waters." But beyond this, the principle affirmed in the judgment has no great relevance to the determination of the extent of Philippine territorial waters, and the manner in which it is to be reckoned.

In the case of Indonesia, the *Anglo-Norwegian Fisheries* case is in general not very relevant, but at least it proves the fallacy of looking at doctrines as being almost sacrosanct, and the rejection by the World Court of this contention also meant the rejection of the British view that the laws of territorial domain were a fixed and inflexible set of rules governing all states and all situations.[232] The Indonesian claim finds fuller support in Judge Alvarez' separate opinion in the case, where he enunciated the principle that should be created in the absence of existing general principles.

Judge Alvarez supports the legitimate claim of the coastal state. He starts by noting that there is no uniform rule possible with regard to territorial water, owing to the great variety of geographical and economic conditions. He then proceeds to point out that each state has a right to determine the extent of its maritime domain, "provided that it did so in a reasonable manner . . . that it did not infringe upon the rights acquired by other nations and did not harm the general interests or commit an *'abus de droit'*."

In the *Anglo-Norwegian Fisheries* case, the court expressed opinions dealing with a special type of coastal archipelago. Even then, to Evensen it would "be erroneous to assume that the principles there laid down were devoid of importance for the delimitation of the territorial waters of other coastal archipelagos and of outlying (mid-ocean) archipelagos."[233] The court rejected the British contention regarding the strict coastline

[232]Evensen, *The Anglo-Norwegian Fisheries Case and its Legal Consequences*, 46 AM. J. INT'L. 609-630 at 628-629 (1952).
[233]Evensen, *supra*, note 35 at 300.

rule "requiring the coastline to be followed in all its sinuosities," and further declared to be "not obligatory by law," the "arcs of circles method" advocated by the United Kingdom. These pronouncements are also applicable to outlying archipelagos.

Evensen thinks that similarly applicable to outlying archipelagos is the principle of "the general direction of the coast rule" adopted by the court. It said: "The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later."[234] Further on, it emphasized that "the drawing of baselines must not depart to any appreciable extent from the general direction of the coast."[235] And further, "In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the general direction of the coast."[236]

Contrary to Evensen's view. Kusumaatmadja[237] believes that the rule on "the general direction of the coast" is hard to apply to mid-ocean archipelagos, as it envisages coastal archipelagos only, *i.e.*, island formations forming part of a (continental) land mass. Hence, the latter authority proposes that in an article on the regime of mid-ocean archipelagos, this provision should be replaced y onbe that would require that the drawing of such baselines shall not depart to any appreciable extent from the general contour of the archipelago. The baselines are drawn according to this general contour. The waters between and inside the constituent islands (and islets) of the archipelago are considered as internal waters, or territorial waters. Where the waters form a strait, they cannot be closed to the innocent passage of foreign ships.

Like Kusumaatmadja, McDougal and Burke[238] doubt whether the three general criteria enunciated by the court in the *Anglo-Norwegian Fisheries* case are all relevant to archipelagic islands as for coastal groups. They describe as "particularly devoid of usefulness" the suggestions that baselines ought to conform to the "general configuration of the archipelago viewed as a whole." Since the "general direction of the coast" is too difficult to determine with any constancy for mainland coasts fringed with islands, they believe it is even less likely that verbal equivalents will afford a useful criterion of appraisal for archipelagos.

Nevertheless, it appears that at least the criteria laid down by the

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[234] I.C.J. REPORTS 129 (1951).
[235] *Ibid.*, 133.
[236] *Ibid.*, 142.
[237] *Supra*, note 1 at 171.
[238] *Supra*, note 146 at 418.

court for a state's delimitation of its territorial waters and internal waters are also applicable to coastal archipelagos. The criteria for delimitation of territorial waters are "certain basic considerations inherent in the nature of the territorial sea" such as "the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal state a right to the waters off its coasts."[237] The criteria for delimitation of internal waters are "the more or less close relationship existing between certain sea areas and the land formations which divide or surround them," and allowance to the state of "the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements."[240]

Even the court's statements on baselines are applicable to outlying archipelagos. It rejected expressly the British contention that under international law there existed a principle limiting the length of baselines to ten nautical miles, emphasizing that "the ten-mile rule has not acquired the authority of a general rule of international law."[241] It then held that the waters lying between and inside the coastal archipelagos in question, that is, inside the straight baselines, must be regarded as internal waters.[242] But in this connection, Evensen notes "that the result would probably have been a different one if the passage between the islands of the *'skjaergaard'* had formed a 'strait'."[243]

B. *The Island of Palmas Case (United States and the Netherlands) Scott, Hague Court Report 2d.* 83 (1932) (*Perm. Ct. Arb.* 1928) 2 *U.N. Rep. Intl. Arb. Awards* 829

Palmas is an island about two miles long by three-fourths of a mile wide, with a population of 750. At the time, it had little strategic or economic value. It lies about 48 miles southeast of Mindanao in the Philippines (then part of the U.S. territory) and some 51 miles from Nanusa in the Netherlands Indies. It lies within the boundaries of the Philippines as ceded by Spain to the United States in 1898, but was claimed by the Netherlands. The question "whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory" was submitted to an arbitrator acting for the Permanent Court of Arbitrator. The arbitrator decided that the Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territory.

The United States founded its claim on title by cession under the

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239I.C.J. REPORTS, *supra*, note 234 at 133.
240*Ibid.*
241*Ibid.* at 131
242*Ibid.*, 132.
243EVENSEN, *supra*, note 35 at 301.

Treaty of Paris. The arbitrator noted that the cession transferred all rights of sovereignty which Spain may have possessed in the region indicated in Article III of the Treaty and therefore also those concerning the Island of Palmas (or Miangas), but he stressed that Spain could not transfer more rights than she herself possessed. He recognized that the U.S. communicated the Treaty of Paris to the Netherlands, and that no reservations were made by the latter in respect to the delimitation of the Philippines in Article III. The question then arose: Can the silence of a Third Power, in regard to a treaty notified to it, exercise any influence on the rights of this Power or on those of the Powers signatories of the Treaty?

The answer, said the arbitrator, may depend on the nature of such rights. He ruled: "Whilst it is conceivable that a conventional delimitation duly notified to third Powers and left without contestation on their part may have some bearing on an inchoate title not supported by any actual display of sovereignty, it would be entirely contrary to the principles laid down above as to territorial sovereignty to suppose that such sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory."

In the last place, the arbitrator considered title arising out of contiguity. He acknowledged that states have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, but held that "it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a state from the mere fact that its territory forms the *terra firma* (nearest continent or island) of considerable size. He underlined the lack of sufficiently frequent and precise precedents, and the uncertainty of the alleged principle itself.

In careful language, he ruled: "The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one state rather than another, either by agreement between the parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular state, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other states from a region and the duty to display therein the activities of a state. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results. This

would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitations between the different parts are not naturally obvious."

The arbitrator observed that "Article III of the Treaty of Paris is so worded that it seems as though the Philippine Archipelago, within the limits fixed by that Article, was at the moment of cession under Spanish sovereignty." By this observation, he lends support to the Philippine position that the geographical lines described in the treaty are boundary lines.

The arbitrator also held that maps would be of special importance in cases where they do not assert the sovereignty of the country the government of which has caused them to be issued. When annexed to a legal instrument, he said, they have the value of such an instrument, involving more than recognition or abandonment of a right. Under this holding, the 1902 Philippine maps published by the U.S. Bureau of Insular Affairs which reproduced the lines traced by Article III, and the 1929 Philippine charts published by the U.S. Coast and Geodetic Survey and attached to the 1930 Boundary Convention between the United States and Great Britain, indicate express recognition by the United States and Great Britain of the territorial limits of the Philippine Archipelago as defined in the Treaty of Peace of 10 December 1898 and the 1930 Boundary Convention.

SUGGESTED PERSPECTIVES: THE MANAGEMENT OF OCEAN SPACE

The archipelago concept as strongly advocated by the quintuple group of the Bahamas, Fiji, Indonesia, Mauritius, and the Philippines, most recently at the Third U.N. Conference on the Law of the Sea, presently turns on the key issues of definition and transit of archipelagic waters. As we have seen, the issue has also been complicated by the addition of arguments for archipelagic treatment of island groups belonging to continental states. Conference statements on the issue indicate substantial differences of view.[244]

The contrariety of views is only natural in view of the present lack of hard-and-fast rules as to the delimitation of the territorial waters of archipelagos. The feasibility or even desirability of laying down such

[244]U.S. Delegation Report, The Third U.N. Conference on the Law of the Sea, Caracas, Venezuela, June 20-August 29, 1974.

hard-and-fast rules seems questionable after a consideration of the multitudinous geographical, historical, and economical factors involved. Bearing in mind then, that rules and principles must possess a certain flexibility in order to give reasonable weight to the peculiar contours of each case, Evensen suggests[245] some principles of international law. For coastal archipelagos, he would modify Article 5 of the draft articles concerning the law of the sea by the International Law Commission in order to read:

> Where circumstances necessitate a special regime because the coast is deeply indented or cut into or because there are archipelagos, *islands*, or *islets* in its immediate vicinity, the baseline may be independent of the low water mark.

For outlying archipelagos, he sets out governing principles premised on the recognition that no hard-and-fast rules exist whereby a state is compelled to disregard the geographical, historical (and economical) peculiarities of outlying archipelagos. His solution is to treat such outlying archipelagos as a whole for the delimitation of territorial waters by drawing straight baselines from the outermost points of the constituent islands, islets, and rocks — and by drawing the seaward limit of the belt of marginal seas at a distance of X nautical miles outside and parallel to such baselines. Using this method, the archipelago as a unit would have a continous area of territorial water.

His criteria for the delimitation of territorial waters in any particular case are based on the recognition that though a state must be allowed a certain practical latitude, its delimitation has international law aspects which may be especially delicate where outlying archipelagos are concerned. The more or less close dependence of the territorial sea upon the land domain of the archipelago, will always be of paramount importance. Accordingly, the drawing of the baselines must not depart to any appreciable extent from the general direction of the coast of the archipelago viewed as a whole. No fixed maximum exists as to the length of straight baselines; but the distance between the various islands, islets and rocks of an archipelago may be an important consideration, and exorbitantly long baselines, closing most areas of sea to free navigation and fishing, are contrary to international law. The question as to whether the waters situated between and inside the islands and islets of an archipelago may be considered as internal waters must be treated on its individual merits in each case. The answer to this question depends upon whether such water areas are so closely linked to the surrounding land domain of the archipelago as to be treated in much the same manner

[245]EVENSEN, *supra*, note 35 at 301-302.

as the surrounding land. Rules may be played by such factors as the geographical, historical, and economical. Finally, such water areas may form a "strait" and be subject to the rules of international law governing "straits" as to the rights of free navigation and innocent passage of foreign ships.

Evensen thus proposes the following additional article on outlying archipelagos:

> 1. In the case of an archipelago which belongs to a single state and which may reasonably be considered as a whole, the extent of the territorial sea shall be measured from the outermost points of the outermost islands and islets of the archipelago. Straight baselines as provided for under Article 5 may be applied for such delimitation.
>
> 2. The waters situated between and inside the constituent islands and islets of the archipelago shall be considered as internal waters with the exceptions set forth under paragraph 3 of this article.
>
> 3. Where the waters between and inside the islands and islets of an archipelago form a strait, such waters cannot be closed to the innocent passage of foreign ships.

The Evensen proposal for the special regime of an archipelago has not yet been adopted by any of the international conventions, but neither is there a general denunciation of the archipelago concept in these conventions. The contention of the archipelagic states that from time immemorial each archipelago constituted one unit, is parallel to the general trend in the world community towards greater awareness of historical claims. Under the "historic unit" concept of archipelagos, one ensuing result would be that the intermediate waters assume the character of historic waters.

The debate on the archipelago concept cannot be conducted at a luxurious pace, for the longer it continues, the nearer draws a confrontation between the major maritime states and the developing insular states, with dark repercussions for peace with the third world states. Admittedly, the search for a solution is studded with problems, some of them paradoxical. While a workable regime must satisfy the requirements of certain of the archipelagic states, it must not compromise general maritime objectives nor breed a proliferation of claims by less qualified island states.

Some of the problems arising out of the concept might be solved by a strict and objective definition of an archipelago. It has been suggested[246] that such a definition may be based on the principles of a real dispersion, adjacency, and geographic integration. The principle of areal dispersion requires two or more major axes which would relate to each other

[246]Hodgson, *supra*, note 36 at 164.

by a ratio of 1:10 or longer. The principle of adjacency calls for construction lines of 48 nautical miles or less, drawn along the perimeter of the archipelago, which would join islands together; where required, a limited number of construction lines, up to 80 nautical miles in length, could then be drawn to unite major insular components. And the principle of geographic integration sets out a ratio between territorial sea and insular waters (such as 1:1) or a ratio between land and water within the baseline system (such as 1:5).

The problem with this technical approach to the definition of an archipelago is that it does not consider the totality of the archipelago concept. An archipelago is both a geographical and a political concept.[247] While such questions as the maximum permissible distance between the constituent islands, the maximum permissible length of baselines, the minimum or maximum size of an island entitled to be regarded as a constituent part of an archipelago, and the minimum number of islands required for a group of islands to be regarded as an archipelago, might at first glance seem to call only for a criterion of distance, on deeper thought, equal account has to be taken of the geophysical features of the situation.

An archipelago is uniquely characterized by its pervasive unity and the interdependence of life on land and the surrounding seas. Distance criteria seeking to establish maximum permissible distances such as twice the breadth of the territorial sea, or the closing line of bays, are dismissed as "irrelevant and arbitrary, apart from the fact that these criteria raise rather than answer questions.[248] The problem is even more complicated by its political aspect, for as a political entity, an archipelago may comprise less than it would as a purely geographical entity,[249] and vice versa.

Second only to the problem of definition is the problem of transit through archipelagic waters, or to put it in another way, the problem of jurisdiction by the archipelagic state over archipelagic waters. The choice lies between jurisdiction for all purposes and exclusive jurisdiction over resources. The archipelagic states have indicated a willingness to guarantee freedom of navigation by conceding the right of innocent passage through archipelagic waters, or restricted to certain sea lanes. Such an arrangement is not congruent with the traditional law of the sea. "The archipelagic waters would then become a concept *sui generis*, as in traditional terms it would be *internal* waters (being on the inward side of

[247]Kusumaatmadja, *supra*, note 1 at 169-172.
[248]*Ibid* at 170.
[249]The Indonesian archipelagic state does not include the northern part of Borneo (East Malaysia), Eastern New Guinea (Papua and the Territory of New Guinea) and Eastern Timor (Portuguese).

straight baselines) while being subject to the right of innocent passage (thus having the status of territorial waters in traditionl terms)."[250] If the straight baselines are considered as construction lines, both the waters on the inner side and the outer side of the line, up to the accepted breadth of the territorial sea, would be territorial waters.

Less major but similarly pestiferous problems abound. For purposes of delimitation, what is the central reference point for the archipelago? What is the general direction of the coast? In computing the land-water ratio, what criteria should be used — geographical alone or both geographical and political? Should the traditional terms be used, considering that confusion is likely to arise?

Since the terms internal waters, territorial seas, and territorial waters *vis-a-vis* archipelagos have definite meanings in the contemporary international law of the sea, it has been proposed to replace them by "archipelagic waters" comprising both the waters on the inner side ("internal waters") as well as on the outer side ("territorial sea") of the baselines."

Procedurally, the provisions on the special regime of mid-ocean archipelagos should form part of the Convention on the Territorial Sea and Contiguous Zone, either in the form of amendments to the present Articles 4 and 10 or of a new article, coming after Article 10 on islands. Or, for wider independence from existing law and state practice, the provisions on mid-ocean archipelagos could form part of a new Treaty on Ocean Space Treaty. Malta, for example, has submitted the Draft Ocean Space Treaty to the U.N. Seabed Committee. The draft adopts an innovative basis for a special regime of archipelagos:

> 1. The jurisdiction of an island State or of an archipelago State extends to a belt of ocean space adjacent to the coast of the principal island or islands the breadth of which is 200 nautical miles. The principal island or islands shall be designated by the State concerned and notified to the competent organ of the International Ocean Space Institutions. In the event of disagreement with the designation made by the archipelago State any Contracting Party may submit the question to the International Maritime Court for adjudication.
>
> 2. The jurisdiction over ocean space that may be claimed by a State by virtue of its sovereignty or control over islands, other than those referred to in paragraph one, shall be determined in a special convention.

While this draft has been described as a bold one, it sounds reminiscent of the draft produced by the American Institute and the League Committee, and adopted with slight modifications as Article II in Jessup's work:[251]

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[250]Kusumaatmadja, *supra*, note 1 at 170.
[251]JESSUP, *supra*, note 137 at 457.

> In the case of archipelagos, the constituent islands are considered as forming a unit and the extent of territorial waters is measured from the islands farthest from the center of the archipelago.

Whether the approach is conventional or unconventional, it must be calibrated to the recognized historic function of the international law of the sea: "that of achieving an appropriate balance between the special exclusive demands of coastal states, and other special claimants, and the general inclusive demands of all other states in the world arena."[252] But while the interests of coastal and non-coastal states are competing and often conflicting, they share a complementary nature encapsulated in the term "security." While we are led to a consideration of the ultimate alternatives — consensus or the unrestrained exercise of naked power — we are faced with only one ultimate sanction for the law of the sea: mutual restraint and tolerance inhering in a recognition of common interest. In weighing the archipelago concept, as in studying the other contemporary controversies over the law of the sea, a wise guideline has been laid down:

> The choice before the states of the world in the present crisis of the law of the sea is whether, for the illusory mess of pottage obtainable in an uneconomic extension of exclusive right, they will forego their heritage of inclusive rights and its promise of even greater future achievement in community and particular values.[253]

The case of the archipelagic states is of greater import as an example of contemporary claims with regard to expectations of "young" nations than as a manifestation of existing prescriptions. When "older" nations advert to "well-established rules of international law" as the *sine qua non* for membership in the family of nations, the archipelagic states are understandably resentful, particularly when the implied criticism of their conduct is directed to highly controversial matters. Quite cogently, they have questioned certain rules of international law created before they gained statehood.

In particular, the international law of the sea is deficient with regard to the waters of an archipelago. Consequently, the archipelagic states feel entitled to stake out their own positions after serious perusal of existing theories. While initially the archipelago concept had a hostile reception, the international milieu has turned more hospitable, and there are well-founded expectations that the forthcoming Convention will include provisions for an enlightened special regime for archipelagos. After all, the archipelagic states are guided not only by their own interests but also by discreet respect for the legitimate claims of other states.

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[252]McDougal & Burke, *Crisis in the Law of the Sea: Community Perspectives v. National Egolsm*, 67 YALE L. J. 540-589 (1958).

[253]*Ibid.* at 589.

In the final analysis, only a balancing of claims and counterclaims will produce a reasonable solution. The archipelagic states adhere to a balancing process which takes into account not only historical rights on the waters of archipelagos, but also authoritative arguments originally fashioned by the legal minds of the West. The nature of this balancing process augurs well for the attitudes of reciprocity and the abilities at accomodation which are the keystones of a reasonable solution.

The failure to agree on territorial sea claims brings with it dire impact on minimum public order, fisheries, navigation and flight, scientific research, and the exploration and exploitation for extractive resources. Unilateral extension of the territorial sea will also certainly have consequences on the power position and the wealth position of some states, thus adversely affecting, in terms of total production, such desirable things as the store of knowledge about this plannet.[254] All these adverse effects can be avoided in part by an early consensus on the archipelago concept, which can be effectuated today on the basis of general categories of information already known about the general relationship of the adjacent waters to the islands involved. Unlike the position of the International Law Commission in 1956, an international convention today cannot plead lack of technical information on the subject.

It has been suggested[255] that of particular relevance to policy are such items as the use of the waters concerned for international transport, both ocean and air, the dependence of the populace upon the food resources of the adjacent ocean, use of the same areas by other states, the importance of inter-island transport and the difficulties peculiar thereto which might call for exercise of local authority affecting community use, and the special problems of archipelago states with respect to both security and the exit and entry of goods and persons.

"The important question for policy is whether any or all of these factors establish a need for comprehensive coastal authority over the adjoining ocean, as these states sometimes suggest, or whether more limited, specially designed zones of authority might adequately protect exclusive interest."[256] Whether primacy is to be accorded to inclusive interests, as learned authors indicate, or to exclusive interests, as archipelagic states argue, or whether a calculus of the biosphere might yield a more calibrated solution, remains to be seen. But in any case, the archipelago concept should not be long kept out of sight; for we cannot afford to let the present crisis in the law of the sea degenerate into future catastrophe.

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[254]Burke, *Consequences for Territorial Sea Claims of Failure to Agree at the Next Law of the Sea Conference*, in LAW OF THE SEA INSTITUTE SIXTH ANNUAL CONFERENCE, 1971 PROCEEDINGS.

[255]McDougal & Burke, *supra*, note 252 at 418-419.

[256]*Ibid.*, 419.