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Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos

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CERTAIN LEGAL ASPECTS CONCERNING THE DELIMITATION OF THE TERRITORIAL WATERS OF ARCHIPELAGOS

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Introduction

A. For the purpose of this paper the term "internal waters" means sea areas which are sufficiently closely linked to the land domain to be subject to the regime of internal waters.[1] The waters between and inside the islands and islets of an archipelago may be subject to this regime.

The term "marginal seas" means the belt of water X miles in width outside and parallel to the coastline or outside and parallel to the outer limits of the internal waters where such internal waters exist.

The term "territorial waters" is applied as a term inclusive of both the internal waters and the marginal seas of a State.

B. The very excellent research carried on by the International Law Commission and its Special Rapporteur on the various aspects of the extent and delimitation of territorial waters has clearly demonstrated the complexity of the problems involved. The practices of and views advocated by coastal States vary infinitely, as do the views held by various international authorities and international law publicists.

The legal aspects of the problem are mingled with and dependent upon various factors of a geographical, economical, historical and political nature. Such factors have lately been increasingly invoked by coastal States for the concrete delimitation of their territorial waters and for the solution of the various other problems concerning the seas adjacent to their coasts. And, though the broad principles expressed by the International Court of Justice in the Anglo-Norwegian Fisheries Case[2] to the effect that:

"The delimitation of sea areas has always an international law aspect: it cannot be dependent merely upon the law of the

* This paper was prepared at the request of the Secretariat of the United Nations but should not be considered as a statement of the views of the Secretariat.

[1] Judgement rendered on 18 December 1951, by the International Court of Justice. *I.C.J. Reports, 1951*, p. 133.

[2] *Ibid.*, p. 132.

coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."

unquestionably give a valid and accurate description of governing legal principles, one must bear in mind that the various factors just mentioned may play an important role in determining the legality under international law of concrete acts of delimitation of territorial waters.

The difficulties in trying to establish a single formula of fixed rules are especially evident where the complex problems concerning the delimitation of the territorial waters of archipelagos are concerned.

C. As a starting point the following definition of the term archipelago may be laid down: an archipelago is a formation of two or more islands (islets or rocks) which geographically may be considered as a whole.

One glance at the map is sufficient to show that the geographical characteristics of archipelagos vary widely. They vary as to the number and size of the islands and islets as well as with regard to the size, shape and position of the archipelagos. In some archipelagos the islands and islets are clustered together in a compact group while others are spread out over great areas of water. Sometimes they consist of a string of islands, islets and rocks forming a fence or rampart for the mainland against the ocean. In other cases they protrude from the mainland out into the sea like a peninsula or a cape, like the Cuban Cays or the Keys of Florida.

Geographically these many variations may be termed archipelagos. Quite another question is whether the same rules of international law will apply to these highly different geographical formations where the question of the delimitations of their territorial waters is concerned. For the problems here involved it may prove helpful to distinguish between two basic types of archipelagos, namely:

1. Coastal archipelagos

2. Outlying (or mid-ocean) archipelagos

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 "Skjaergard" 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 or outer coastline of the mainland. A few examples suffice in this connexion: the Faeroes, Fiji Islands, Galapagos, Hawaiian Islands, Indonesia, Japan, Philippines, Solomon Islands, the Svalbard archipelago.

D. In addition to the difficulties arising out of the wide variety of the geographical characteristics and the specific economic, historical and political factors involved in each case, the legal approach to the questions involved is further complicated by the fact that such a host of different legal principles — sometimes conflicting — may be invoked for the concrete delimitation of territorial waters. The rules of international law governing bays and fjords, the straight baseline system governing heavily indented coastlines, the rules governing international straits, the rules governing the territorial waters of isolated islands, the principle of the freedom of the seas; these and other principles must constantly be borne in mind in answering the question as to what rules of international law govern the concrete delimitation of the territorial waters of an archipelago.

I

Studies of international bodies and views of international law publicists

1. *Institut de droit international*

At its Lausanne session in 1888, the Institut de droit international placed on its agenda the question of the extent and delimitation of territorial waters. The problems concerning the delimitation of the territorial waters of coastal archipelagos were brought to the attention of the Institut, at its Hamburg session in 1889, by the Norwegian jurist Mr. Aubert (*Annuaire de L'Institut,* vol. 11, pp. 136, 139, *et seq.*). However, neither in the reports of 1892 or 1894 presented by Sir Thomas Barclay as Rapporteur, nor in the resolutions adopted by the Institut at the Paris conference of 1894, was any consideration given to these special questions (See *ibid.*, vol. 12, p. 104, *et seq.* and vol. 13, p. 328, *et seq.*).

Article 2 of the resolutions of the Institut of 1894 merely proposed that the extent of marginal seas should be fixed at six nautical miles from "low-water marks all along the coast" (*ibid.,* vol. 13, p. 329). For bays it was provided in article 3 that the marginal sea should follow the sinuosities of the coast, with the exception that straight baselines could be drawn across the mouth of a bay where the width thereof did not exceed twelve nautical miles. The article provided, however, that historic title might justify wider baselines. Articles 10 and 11 of the resolutions laid down the rules governing straits.

It was not until 1927 that the question of the régime of the territorial waters of archipelagos was seriously discussed in the Institute.[3] Thus the 5th Committee of the Institut with Sir Thomas Barclay and Professor Alvarez as Rapporteurs, proposed an article 5 to the following effect:

[3] The reports by Sir Thomas Barclay in the *Annuaire* of 1912, vol. 25, p. 375, *et seq.*; 1919, vol. 27, p. 62, *et seq.*; 1925, vol. 32, p. 146, *et seq.*, did not take these questions up for discussion. Nor did Professor Oppenheim do so in his report of 1913, *ibid.*, vol. 26, p. 403 *et seq.*

"Where a group of islands belongs to one coastal State and where the islands of the periphery of the group are not further 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 uttermost parts of the islands." (*Ibid.*, vol. 33, part 1, 1927, p. 81) (*unofficial translation*).

As the extent of marginal sea proposed by the Committee was six nautical miles, it follows that a twelve-mile maximum was provided for baselines drawn between the outermost points of an archipelago.

During the Stockholm Conference of 1928, an amendment was proposed to article 5 by the Swedish jurist Reuterskiöld with special relevance to coastal archipelagos, as follows:

"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." (*unofficial translation*).

This proposal did not contain any maximum distance between the islands and islets of an archipelago, but proposed a distance of twice the breadth of the marginal sea between the nearest island or islets of the archipelago and the mainland. However, the final resolution of the Institut contained the following proposal in article 5, paragraph 2:

"Where archipelagos are concerned, the extent of the marginal sea shall be measured from the outermost islands 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." (*Ibid.*, vol. 34, p. 673) (*unofficial translation*).

It must be borne in mind in this connexion that, by a small majority (23-21), the Institut at the Stockholm meeting substituted three nautical miles for the six miles previously proposed by the Institut as the extent of the marginal sea.

2. *International Law Association*

At its 15th conference at Genoa in 1892, the report of Sir Thomas Barclay to the *Institut de droit international* was submitted to the International Law Association for discussion. At the Brussels Conference of the Association in 1895, the reports and resolutions of the Institut were likewise discussed (see *Report of the 15th Conference of the International Law Association*, 1892, pp. 182 *et seq.*, *Report of the 17th Conference* in 1895, pp. 102 *et seq.* See also *Report of the 27th Conference*, Paris, 1912). In 1924 the International Law Association appointed a "Neutrality Committee", with Professor Alvarez as Chairman, to consider the question concerning territorial waters. At the Association meeting in Stockholm in 1924, the Committee presented a report and draft convention on "The Laws of Maritime Jurisdiction in Time of Peace". Professor Alvarez submitted a special draft convention differing in certain respects from the Committee's proposal (*Report of 33rd Conference*, Stockholm, 1924, pp. 259 *et seq.*)

The draft of the Committee contained no specific provisions concerning the territorial waters of archipelagos (*ibid.*, pp. 262 *et seq.*), but it provided, 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 round each of the said islands". In article 4, a twelve-mile maximum was proposed for baselines across the mouths of bays. Articles 13 to 16 contained proposals as to straits.

Professor Alvarez, however, in article 5 of his draft, included the following proposals concerning islands and archipelagos:

"As to islands situated outside or at the outer 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.

"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." (*Report of the 33rd Conference* in 1924, p. 266 *et seq.*) (*unofficial translation*)

In article 4 of his draft, Professor Alvarez proposed a zone of marginal seas of six nautical miles from low-water marks. Though Professor Alvarez also proposed a twelve-mile maximum for baselines across the mouths of bays (article 5), no maximum was suggested regarding the distance between the islands of an archipelago.

At the 34th Conference of the Association at Vienna in 1926, the question of the territorial waters of archipelagos was discussed. The draft convention as amended by the Conference contained no reference to archipelagos. (*Report of 34th Conference*, Vienna, 1926, pp. 40 *et seq.*)

3. *American Institute of International Law*

The American Institute of International Law proposed in Article 7 of its project No. 10 (National Domain) the following:

"In case of an archipelago, the islands and keys composing it shall be considered as forming a unit and the extent of territorial waters referred to in article 5 shall be measured from the islands farthest from the center of the Archipelago." (*American Journal of International Law, Spec. Suppl. 20*, 1926, pp. 318, 319.)

This formula corresponded closely to the one suggested by Professor Alvarez to the International Law Association in 1924. As we have seen, it did not provide for any maximum distance between the islands of an archipelago.

4. *Harvard Research in International Law*

The Harvard Research in International Law (1929) had in its draft convention on territorial waters no provisions concerning archipelagos. Article 7 thereof contained certain provisions as to isolated islands to the effect 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".

In the comments to this article it was stated, *inter alia*:

"In any situation where islands are within six miles of each other the marginal sea will form one extended zone. 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." (*American Journal of International Law, Spec. Suppl. 23,* 1929, pp. 241, 276).

5. *The Hague Codification Conference of 1930*

In the amended draft convention prepared by the German jurist Schücking for the Committee of Experts,[4] the following provisions as to archipelagos were included in article 5, paragraph 2:

"In the case of archipelagos, the constituent islands are considered as forming a whole and the width of the territorial sea shall be measured from the islands most distant from the center of the archipelago." (League of Nations document C-196, M-70, 1927, V., p. 72. See also *American Journal of International Law, Spec. Suppl. 20,* 1926, p. 142.)

These provisions contained no maximum as to the distance between the islands of an archipelago, while in the case of bays the draft (article 4) suggested a maximum length of ten nautical miles for baselines.

Article 5 of the draft was applicable to outlying archipelagos as well as to coastal archipelagos. Where coastal archipelagos were concerned, article 5, paragraph 1, containing the following provisions, was also applicable:

"If 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. . . ."

As set forth in the Basis of Discussion No. 12, on Territorial Waters (Ser. L.o.N.P. 1929. V.2, pp. 50 *et seq.*) the replies of the various Governments to the proposals quoted above show a great diversity of views.

Certain Governments rejected the idea that archipelagos should be considered as a single unit. According to their view each island has its own territorial waters. That the territorial waters of two islands might overlap, when they are situated near to each other, had, in their opinion, no legal bearing whatsoever. Other Governments held the view that a single belt of territorial waters could be drawn around archipelagos provided that the islands and islets of the archipelago were not further apart than a certain maximum. The suggestions as to such a maximum varied in different replies.

Finally, certain Governments were of the opinion that archipelagos must be regarded as a whole where the geographical peculiarities warranted such treatment. They advocated no particular maximum distance, but held that the geographical facts of each concrete case must be taken into account.

[4] Appointed by the League of Nations in 1924 to prepare a conference for the codification of international law.

Another question discussed in this same connexion was whether the waters enclosed within the archipelago should be regarded as internal waters or as marginal seas.

As "a possible basis of discussion which would be a compromise" the Preparatory Committee proposed the following as 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." (*Ibid.,* p. 51; also *American Journal of International Law, Spec. Suppl. 24,* 1930, p. 34.)

The compromise thus suggested by the Preparatory Committee proposed to consider the archipelagos as a unit but laid down a distance of twice the breadth of marginal seas as the maximum distance between the islands and islets of an archipelago. The Committee further proposed that the waters enclosed within the islands and islets of the group should not be considered internal waters but marginal seas. (The Committee used the term "territorial waters".)

The success of the Codification Conference on this topic was not spectacular. The question of the territorial waters of archipelagos, together with certain other of the more controversial problems pertaining to the delimitation of territorial waters, was referred to the Second Sub-Committee of the Second Committee of the Conference for further consideration. The Second Sub-Committee, however, was unable to reach an agreement on this point and consequently abandoned "the idea of drafting a definite text on this subject". It merely stated as its "observation" that:

"With regard to a group of islands (archipelago) 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 territorial sea outward in the direction of the high sea. . . . The Sub-Committee did not express any opinion with regard to the nature of the waters included within the group. (Report of the Second Commission, Ser. L.o.N.P. 1930.V.16, p. 219.)

Thereafter the problems of the territorial waters of archipelagos were not taken up for discussion in the plenary meetings of the Conference.

6. *International Law Commission*

In his first report on "The Régime of the Territorial Sea" (A/CN.4/53) the Special Rapporteur, Professor J. P. A. François, included certain proposals on coastal archipelagos in article 10 and article 5, paragraph 2. In article 10 it was provided:

"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 inland waters."

The proposed article 5 concerning "baselines" stated in paragraph 2, *inter alia*:

" 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. . . ."

In his second report (A/CN.4/61), Professor François, as Special Rapporteur, made certain amendments to these articles.

In article 5, paragraph 2, he made the following amendment, *inter alia:*

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

He advocated a ten-mile maximum both for baselines drawn across the mouths of bays (article 6) and for baselines drawn between islands and islets of an archipelago (article 10). Thus his amended article 10 stated:

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

The above-quoted proposal was at variance with the governing principles of international law as expressed by the International Court of Justice in the above-cited Judgement of 18 December 1951 in the Anglo-Norwegian Fisheries Case. The Rapporteur stressed in his first as well as in his second report that 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 ".

With regard to isolated islands, the reports of the Special Rapporteur contained in article 9 the following proposal:

" Every island has its own territorial sea. An island is an area of land surrounded by water, which is permanently above high-water mark." (A/CN.4/61)

In his third report (A/CN.4/77), Professor François maintained his views as to straight baselines for deeply indented coastlines including coastal archipelagos. However, with regard to the more specific principles concerning archipelagos the Rapporteur advanced, in article 12, an entirely new set of rules, thus illustrating in an interesting way the complexity and uncertainty involved in regard to rules governing archipelagos. Article 12 of the new draft provided:

" 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.*"

No indication was given in the report as to how the proposed maximum length of five miles for the straight baselines of archipelagos was arrived at; nor were the reasons given for the proposal that one straight baseline, and one only, could be ten miles in length. The proposed article applied to coastal as well as to outlying archipelagos. The rules here proposed seem to be rather strict, especially in view of the wide variety of geographical differences and peculiarities where archipelagos are concerned.

In its first draft of " Provisional Articles concerning the Régime of the Territorial Sea " adopted in 1954,[5] the International Law Commission proposed — in article 5 concerning straight baselines — provisions more or less similar to those suggested by the Rapporteur. It provided for straight baselines where a coast was deeply indented or cut into, or where islands were situated in its immediate vicinity. The Commission also maintained in its first draft the ten-mile distance as the maximum permissible length for straight baselines. Article 10 of the draft concerning isolated islands contained provisions similar to those proposed by the Rapporteur. But the Commission refrained from making any specific proposals as far as groups of islands were concerned.

In its amended draft articles as set forth in the report on the seventh session (1955) of the International Law Commission,[6] the Commission likewise refrained from drafting any special provisions on groups of islands. Article 10 contained rules concerning isolated islands, while article 5 admitted the use of straight baselines, *inter alia,* " where circumstances necessitate a special régime because the coast is deeply indented or cut into, or because there are islands in its immediate vicinity . . . " Article 5 was thus applicable to coastal archipelagos, and in its second draft the Commission did not provide for any fixed maximum as to the length of such baselines. Article 5 implicity assumed that the waters inside the baselines should be considered internal waters. As far as bays were concerned, article 6 of the 1955 draft contained maximum lengths for straight baselines across the mouths of such bays of twenty-five nautical miles except in the case of historic bays.

In its final draft " Articles concerning the law of the sea " adopted in 1956,[7] the Commission also refrained from presenting any specific provisions concerning archipelagos.

Article 10 contains certain provisions concerning isolated islands to the effect that:

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

In its comments on this article, the Commission made the following observations as to archipelagos:

" The Commission had intended to follow up this article with a provision concerning groups of islands. 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

[5] *Official Records of the General Assembly, Ninth Session, Supplement No. 9* (A/2693).

[6] *Ibid., Tenth Session, Supplement No. 9* (A/2934).

[7] *Ibid., Eleventh Session, Supplement No. 9* (A/3159).

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...

" The Commission points out for purposes of information that Article 5 may be applicable to groups of islands lying off the coast." [8]

In article 5 the drawing of straight baselines was provided for, *inter alia*: " where circumstances necessitate a special régime because the coast is deeply indented or cut into, or because there are islands in its immediate vicinity ".

In this final draft, the Commission proposes a maximum of fifteen miles for straight baselines drawn across the mouths of bays except in the case of historic bays.

As shown in the foregoing, and as especially shown by the various comments made by Governments on the proposals of the Special Rapporteur and the International Law Commission, the wide variety of rules and of state practice prevented the Commission from drafting specific articles concerning the extent and delimitation of the territorial waters of archipelagos. As far as coastal archipelagos are concerned, article 5 of the draft endeavours to embody the principles laid down by the International Court of Justice in its 1951 Judgement in the Anglo-Norwegian Fisheries Case. Where outlying (mid-ocean) archipelagos are concerned, the draft articles of the International Law Commission do not give any specific guidance as to the governing principles of international law.

7. *Views expressed by international law publicists*

The views expressed by international law publicists concerning the territorial waters of archipelagos are mostly brief statements made more or less incidentally in connexion with general observations on the extent and delimitation of territorial waters.[9]

[8] *Ibid.*, p. 17.

[9] See *inter alia,* the statements made by W. E. Hall in *A Treatise on International Law,* para. 38 :

" Certain physical peculiarities of coasts in various parts of the world, where land impinges on the sea in an unusual manner, require to be noticed as affecting the territorial boundaries."

As examples are mentioned the Florida Keys, the Bahamas and the Cuban Cays.

H. Wheaton in *Elements of International Law,* 1866, para. 178, expresses himself in a similar manner as follows :

" The term ' coasts ' includes the natural appendages of the territory which rise out of waters, although these islands are not of sufficient firmness to be inhabited or fortified."

See also Halleck in *International Law,* 4th Edition, London, 1908, vol. I, p. 147 :

" The term ' coasts ' does not properly comprehend all the shoals which form sunken conditions of the land perpetually covered by waters, but it includes all the natural appendages of the territory which rise out of waters."

The German author Münch in *Die Technischen Fragen des Küstenmeers* (The Technical Questions regarding Territorial Waters) (Kiel, 1934) also proceeded to regard archipelagos as units. At page 108, *et seq.,* he made various suggestions as to a possible approach to the concrete delimitations of such archipelagos, with geometric constructions and formulas, proposals which at present seem to be mostly of theoretical interest.

Where the authors have taken up the problems of archipelagos for special discussion they mostly tend to look upon such formations as units with the ensuing legal implications as far as the delimitation of territorial waters is concerned.

Thus Jessup, in his book *The Law of Territorial Waters and Maritime Jurisdiction* (New York, 1927), adopted the following rule (p. 457, see also p. 477):

" 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 archipelagos."

No maximum is proposed as to the distance between the islands and islets of such archipelagos.

Hyde, in his book *International Law,* 2nd ed., vol. I (Boston, 1947), also seems to advocate in a cautious way the view that archipelagos may juridically be considered a unit. He states (p. 485) *inter alia*:

" Where, however, a group of islands forms a fringe or cluster around 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 claims to the waters around them by the exact distance which separates the several units."

In *International Law of the Sea* (3rd Edition), Colombos states as follows (pp. 90-91):

" The generally recognized rule appears to be that a group of islands forming part of an archipelago shall 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, 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 historic and prescriptive grounds." [10]

Schwarzenberger's *International Law,* Vol. I (1949), p. 156, likewise states that " if islands form an archipelago they may in certain circumstances be regarded as a unit in law ".

The French jurist Gidel, in his well-known work *Le Droit International Public de la Mer* (The Public International Law of the Sea), has given the most detailed examination of the problems here involved (vol. III, Paris, 1934, p. 706-727).

As far as coastal archipelagos are concerned, Gidel accepted the rule that such archipelagos shall be treated as a unit. (See pages 718-726.) Gidel, however, favoured a maximum of ten nautical miles for the baselines between the islands and islets of the group or between the mainland and the nearest island of the group. Longer baselines could be justified on " the theory of historic waters ". As to the status of the waters lying between the individual islands of a coastal archipelago, or between the archipelago and the mainland, Gidel

[10] The statement that the extent of territorial waters shall be " measured from the centre of the archipelago " is not entirely clear. The meaning, however, must obviously be that a line shall be drawn around the islands and islets of the archipelago so as to measure the belt of marginal sea from this line enveloping the group.

suggested that they be considered not as internal waters but as waters subject to the rules governing marginal seas (*ibid,* p. 724).

As to outlying (mid-ocean) archipelagos, the views expressed by Gidel were somewhat more ambiguous (*Ibid.*, p. 718):

"In the case of an archipelago situated far from land (mid-ocean archipelago) the measuring of territorial waters must be made in conformity with the ordinary rules, individually around each island; exceptions to these rules may follow from the theory of historic waters. However, pockets of high seas inside the archipelago may be eliminated by the analogous application of the ten mile rule applicable to bays." (*unofficial translation*)

With this latter addition, *viz.* the analogous application of straight lines of ten miles, there does not seem to be much difference between the suggestions made by the author as to the rules of law applicable to coastal archipelagos and outlying archipelagos respectively.

II

State practice

The practices of the various coastal States in delimiting the territorial waters of their archipelagos may have considerable bearing on the establishment of principles of international law in this field.

The following survey does not purport to be exhaustive but it endeavours to give a representative account of the views held, and methods applied, by different States.

1. *State practice concerning coastal archipelagos*

Norway

Due to the special geographical peculiarities of the Norwegian coastline and also to the fact that the International Court of Justice, in its Judgement of 18 December 1951, expressed its opinion on the legality of Norwegian enactments, the state practice of Norway concerning the delimitation of territorial waters outside its coastal archipelagos offers particular interest.

The special features of the Norwegian coastline are — aside from its profusion of fjords and bays — the Norwegian coastal archipelago called the "Skjaergaard". It consists of some 120,000 islands, islets and rocks, and extends along most of the coast. The so-called Norwegian system or Scandinavian system for the delimitation of territorial waters consists in regarding the coastal archipelago as the real outer coastline. The main features of this system — the straight baseline system — are the following:

(*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 base-points.

(*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 connexion between the length of the baselines and the breadth of the marginal sea.

(*e*) The waters inside the baselines 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.

By Royal Decrees of 12 July 1935 and 18 July 1952 the base points and baselines have been fixed in detail all along the Norwegian coasts. All in all, 123 continious baselines are drawn. The longest lines are 45.5 nautical miles, 44 nautical miles, 40 nautical miles and 38.8 nautical miles. Fifty more baselines are ten nautical miles or more in length.

By a Judgement rendered on 18 December 1951, the International Court of Justice held that the Norwegian system laid down in Royal Decree of 12 July 1935 drawing baselines along the outer points of the Norwegian coastal archipelago was not contrary to international law.

Iceland

Iceland has likewise applied the straight baseline system for delimiting its waters. By Fisheries Regulations of 19 March 1952, forty-seven consecutive baselines are drawn around the coasts of Iceland, enclosing the waters of its coastal archipelagos, islands and rocks within these lines. No maximum is stipulated for the lengths of baselines. They vary in length according to the particular geographic features. The longest baselines are 66 and 41 nautical miles (those across the Faxa Bay and Breidi fjords respectively). Fifteen more lines measure 20 nautical miles or more.

A four-mile zone of marginal seas is drawn outside and parallel to the baselines. The waters inside the baselines, including the waters inside or between the islands and islets of coastal archipelagos, are considered internal waters.

Denmark

By various Danish regulations and decrees, the waters between and inside the Danish coastal archipelagos are considered Danish internal waters (see, e.g., Neutrality Decrees of 27 January 1927 and 11 September 1938, and enactments concerning Fishing and Hunting in Greenland Waters of 1 April 1925, 27 May 1950, 7 June 1951 and 11 November 1953). Denmark seems to apply straight baselines for such delimitation and a ten-mile maximum for baselines is provided for in certain of these enactments.[11] The three main passages to the Baltic formed in part or in whole by the Danish archipelagos, namely, the Sound formed by the Swedish coast and the Danish island of Sjaeland, the Great Belt

[11] It should be borne in mind in this connexion that Denmark — but not Norway, Sweden, Iceland or Finland — is a party to the North Sea Fisheries Convention of 1882 providing for a ten-mile maximum for baselines drawn across the mouths of bays and fjords.

formed by Danish islands and the Little Belt formed by islands and Jutland, are held to be international straits. They are thus open to navigation though these waters are situated between and inside the Danish archipelagos.

Sweden

Sweden applies the straight baseline system for the delimitation of its territorial waters, enclosing within the baselines the waters between the islands of a coastal archipelago and between the islands and the mainland. Customs regulations of 7 October 1927, together with Royal Letter of 4 May 1934, laid down the concrete baselines — these baselines probably prevail also for purposes other than customs. No maximum has been fixed for the length of such baselines: thus various lines exceed ten nautical miles. However, none of these baselines are comparable in length to some of the longest lines in force along the coastal archipelago of Norway or Iceland. A four-mile limit of marginal seas is drawn outside and parallel to the baselines. The waters inside the baselines are internal waters.

Finland

Finland also applies a straight baseline system enclosing the waters of its numerous islands and coastal archipelagos, such as the Aaland archipelago and the Torneaa archipelago, within these lines.

By Act of 18 August 1956, and by Presidential Decree of the same date, baselines were fixed for the whole of the Finnish coast. The act provides for a maximum length of baselines of "twice the breadth of the marginal seas", corresponding to eight nautical miles since the breadth of Finland's marginal seas is four nautical miles. The Act further provides that archipelagos situated too far out at sea to be included in the outer coastline shall have their own territorial waters. Such outlying archipelagos are also considered as a whole. Baselines in length twice the breadth of the marginal seas shall be drawn around such archipelago. However, according to article 6 of the Act, the breadth of marginal seas for such outlying archipelagos is three nautical miles. Consequently the maximum length of baselines in these cases is six miles. The waters between and inside the islands or islets of Finnish archipelagos are considered as internal waters.

Yogoslavia

Yogoslavia is also among the nations which include the coastal archipelagos situated almost all along its coast within its outer coastline by the drawing of straight baselines.

By enactment of 1 December (28 November) 1948, baselines have been drawn along the outer fringes of these archipelagos (article 3). The belt of marginal seas of six nautical miles is drawn outside and parallel to these baselines. No express maximum is given or is indicated in the Act as to the length of the baselines, while in certain circumstances a maximum of twelve nautical miles is given as the length of baselines across the mouths of bays and estuaries (article 3, para. 6). The waters between the islands of a Yugoslav coastal archipelago and between the islands and the mainland are considered internal waters.

It may be of interest in this connexion to draw attention to the proposals concerning archipelagos made by the Yugoslav Government in its comments of 20 March 1956 on the draft articles of the International Law Commission. In its comments on article 5 it proposed the following additions concerning archipelagos:

"If a group of islands (archipelago) is situated along the coast the method of straight baselines joining appropriate points on the islands facing the high sea will be applied. The parts of the sea closed in by these lines, islands and coast of the mainland will be considered as internal waters.

"3. If the provision of paragraph 2 of this article cannot be applied to the group of islands (archipelago) due to a great distance from the mainland, the method of baselines will be applied which join appropriate points of the coast towards the high seas. Parts of the sea enclosed by these lines and islands will be considered as internal waters of the archipelago." [12]

The proposal referred to outlying as well as coastal archipelagos. It purports to regard such archipelagos as units and to apply straight baselines "joining the appropriate points" of the several islands and islets of such an archipelago. The waters between and inside the islands and islets of such an archipelago are considered internal waters according to the proposal.

Saudi Arabia

Under articles 4 and 6 of Royal Decree of 28 May 1949, islands and coastal archipelagos are made part of the outer coastline of Saudi Arabia by drawing straight baselines. The maximum length of such baselines is twelve nautical miles. The waters lying between islands, islets and the mainland are internal waters.

Egypt

Article 4 of Royal Decree of 18 January 1951 provides that straight baselines of a maximum length of twelve nautical miles shall be drawn between the mainland and islands and from island to island, thus including coastal archipelagos within the outer coastline. The waters inside such archipelagos are internal waters.

Cuba

The Cuban Cays (string of islands, islets and reefs) extending out into the ocean along the Cuban mainland are likewise by established practice, as expressed in various legislative enactments, regarded as Cuba's outer coastline. Thus article 6, paragraph 2, of the Decree of 8 January 1934, provides:

"The waters situated between the islands, islets or cays and the mainland of Cuba are internal waters."

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The examples given above refer to countries that regard coastal archipelagos as a unit forming an outer coastline from which to measure the marginal sea. They

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[12] *Yearbook of the International Law Commission, 1956*, vol. II, p. 100. See also observations made by the Yugoslav Government in its comments dated 15 March 1955, printed in the report of the International Law Commission its seventh session, 1955 (*Official Records of the General Assembly, Tenth Session, Supplement No. 9*), pp. 46 *et seq.*

all seem to apply straight baselines for such delimitation, though some of them lay down a certain maximum for the length of such baselines. The waters inside such baselines are considered internal waters, thus presumably giving the coastal State the right to close such waters for navigation by foreign vessels unless the passage concerned is an international strait.

There are, however, a number of States that apply other and different methods for the delimitation of their territorial waters where coastal archipelagos are concerned.

United Kingdom

The stand taken by the United Kingdom as to the archipelagos has traditionally been a very strict one. In the Anglo-Norwegian Fisheries Case, it did not recognize the Norwegian claims to measure Norway's marginal seas from straight baselines drawn along the outermost points of coastal archipelagos. The United Kingdom, on the contrary, advocated the arcs of circles method, measuring the territorial waters from low water marks by a consecutive line of intersecting arcs of circles. Each island had, according to the English view, its own territorial waters. But where two islands were not further apart than twice the breadth of the marginal seas the arcs of circles would intersect. In its last written pleadings the United Kingdom somewhat changed its stand. It stated that if, contrary to its belief, customary rules of straight baselines had developed for archipelagos, such rules must be " subject to an absolute limit of ten miles of the length of the baselines". *I.C.J., Pleadings, Oral Arguments, Documents, Fisheries Case, Judgement of 18 December 1951,* vol. II, p. 361). After the Judgement of 18 December 1951 by the International Court of Justice, the United Kingdom has somewhat modified its original views (see for example its comments of 1 February 1955, on draft article 5 in the report of the International Law Commission on its seventh session[13]). In this connexion, mention may also be made of the comments of the United Kingdom dated 15 March 1956, where in connexion with draft article 10 (the régime of the territorial sea) concerning isolated islands it states as follows:

" The United Kingdom Government approve this article. They do not consider that there is any need to make special provisions for groups of islands as such, and agree in principle with the last sentence of the Commission's comment upon this article. They consider that the ordinary rules, in conjunction with the Judgement of the International Court of Justice in the Anglo-Norwegian Case, are adequate to cover this case." [14]

In a few exceptional cases the United Kingdom has, in dealing with overseas territories, treated groups of islands as a unit. Thus, in connexion with the delimitation of the territorial waters of Jamaica, the Law Officers of the Crown maintained in 1864 that " in places where the possession of particular rocks, reefs or banks, naturally connected with the mainland of any part of Her Majesty's territory is necessary for the safe occupation and defense of such mainland, Her Majesty's Government also claim the waters enclosed between the mainland and those rocks, reefs or banks; whatever may be the distance between them and the nearest headland". *(I.C.J., Pleadings, Oral Arguments, Documents, Fisheries Case, Judgement of 18 December 1951,* vol. II, p. 533)

On the other hand the United Kingdom has not made claims to the waters situated between the coastal islands, islets and archipelagos lying off the coast of British Honduras and the mainland. (*Ibid.,* pp. 524-525)

Australia

During the Anglo-Norwegian Fisheries Case the United Kingdom, with the consent of Australia, asserted as to the Barrier Reef — a coastal archipelago situated off Queensland — that, " Queensland has no legislative authority over the sea beyond the distance of three marine miles from low water mark of the mainland and the islands respectively" (*ibid.,* p. 523). Thus, the waters situated between these reefs and the mainland outside the three-mile limit are considered high seas.

United States of America

This country has been one of the staunchest advocates of the view that archipelagos, including coastal archipelagos, cannot be treated in any different way from isolated islands where the delimitation of territorial waters is concerned. Thus, according to information received, the practice of the United States in delimiting, for example, the waters of the archipelagos situated outside the coasts of Alaska is that each island of such archipelagos has its own marginal sea of three nautical miles. Where islands are six miles or less apart the marginal seas of such islands will intersect. But not even in this case are straight baselines applied for such delimitation.

That the Florida Keys have been considered a unit is actually no exception to this practice. The several islands of the Keys are situated so close together and the waters in between are so shallow that they must naturally be considered as a continuous whole.

2. *State practice concerning outlying (mid-ocean) archipelagos*

The highly varied practices of States where outlying archipelagos are concerned clearly illustrate the confusion reigning in this field of international law. The following examples are indicative of the profusion of different views and approaches with regard to the delimitation of the territorial waters of outlying archipelagos.

The Faeroes

This archipelago, consisting of eighteen inhabited islands and numerous islets, skerries and rocks, is situated in the North Atlantic, north of the Britis Isles. By agreement of 22 April 1955 between Denmark and the United Kingdom, the exclusive fishery zones of this mid-ocean archipelago were drawn up in a very

[13] *Official Records of the General Assembly, Tenth Session, Supplement No. 9,* p. 41 *et seq.*

[14] *Yearbook of the International Law Commission, 1956,* vol. II, p. 85.

interesting way. The Faeroes are treated as a unit and the outer limit of territorial waters is drawn by means of a mixed system of arcs and straight lines. Straight lines are used to a great extent for the delimitation of the outer limits of the fishery zones, but arcs of circles have been applied to round off the limits where two straight lines meet. Though the straight baseline system is not expressly applied, it seems apparent that the agreement of 22 April 1955, viewed as a whole is an interesting application of the rule laid down by the International Court of Justice in its Judgement of 18 December 1951, namely, that with heavily indented coastlines the outer limits of territorial waters need not necessarily follow all the sinuosities of the coast, but can be drawn in such a manner as to follow the general direction thereof.

The Svalbard Archipelago

This archipelago situated between 74° 8′ N. Lat. and 10° 35′ E. Long. consists of numerous islands, islets and rocks. The coastline of the archipelago is heavily indented by fjords, bays and sounds. By the Spitzbergen Treaty of 9 February 1920, the Contracting Parties recognized "the full and absolute sovereignty of Norway" to the archipelago. Under the treaty the ships and nationals of the Contracting Parties shall enjoy equal rights of fishing and hunting and have equal liberty of access and entry to the territorial waters of the archipelago.

Norway has not yet laid down the limits of the territorial waters of Svalbard. But it seems reasonable to assume that the Norwegian Government considers the archipelago as a unit and will apply its straight baseline system around the archipelago for such delimitation.

Iceland

Iceland, together with its coastal islands, islets and skerries, may properly be regarded as a mid-ocean archipelago. As previously mentioned, the Icelandic authorities have drawn a consecutive line of straight baselines all along the coast from the outermost points thereof, including the outermost points of islands and islets. However, the Icelandic Government has not applied this appoach to the extreme. It has not included in this line islands lying far out at sea, such as the islands of Grimsey, Kolbeinsey, Hvalsbakur and Geirfugladrangur. Each of these islands has been considered to have its own territorial waters.

Mention may further be made of a *note verbale* dated 25 March 1955, from the Icelandic Government, commenting on the draft articles of the International Law Commission. As to outlying archipelagos, the Icelandic Government stated that such groups "would have an independent baselines system" in conformity with the "general criteria formulated by the International Court of Justice" in the Anglo-Norwegian Fisheries Case.[15]

The Bermudas

This archipelago, situated in the North Atlantic between 32° 14′ - 32° 25′ N. Lat. and 64° 38′ - 64° 52′ W. Long., consist of some 365 islands and islets of coral formation. According to statements presented by the United Kingdom during the Anglo-Norwegian Fisheries Case, it has asserted its authority over the coastal waters within this archipelago "up to a distance of three nautical miles from the outer ledges" (*I.C.J., Pleadings, Oral Arguments, Documents, Fisheries Case, Judgement of 18 December 1951*, vol. II, p. 532).

The Galapagos

This archipelago (also called the Colon archipelago) is situated some 600 miles out in the Pacific west of the mainland of Ecuador and between 1° 42′ N. Lat. - 1° 25′ S. Lat. and 92° - 89° 16′ W. Long. It comprises some fifteen larger islands and a series of smaller islands and islets. According to Presidential Decrees concerning Fisheries of 2 February 1938 and of 22 February 1951, the Government of Ecuador considers this archipelago as a unit, and delimits its territorial waters by drawing straight baselines between "the most salient points of the outermost islands forming the contour of the archipelago of Galapagos" (See the Decree of 1951, article 2, para. 2).

Accordingly, the lengths of the baselines thus drawn around the archipelago are the following:

(*a*) The baseline from the island of Espanola to the island of Santa Maria is some 48 nautical miles.

(*b*) The baseline from Santa Maria to Isabella is some 62 nautical miles.

(*c*) The baseline from Isabella to Darwin is some 32 nautical miles.

(*d*) The baseline from Fernandina to Darwin is some 124 nautical miles.

(*e*) The baseline from Darwin to Genovesa is some 147 miles.

(*f*) Te baseline from Genovesa to San Cristobal is some 76 nautical miles.

(*g*) The baseline from San Cristobal to Espanola is some 47 nautical miles.

According to article 2 of the 1951 Decree, the outer limits of marginal seas are drawn at a distance of 12 nautical miles outside and parallel to the above-mentioned baselines. Inside these limits fishing is reserved for nationals and domiciliaries of Ecuador.[16]

Whether the waters lying between and inside the archipelagos (that is inside the above-mentioned baselines) are considered internal waters or marginal seas is not known.

The Philippines

This archipelago, situated in the Pacific between about 116° - 127° E. Long. and about 5° - 20° N. Lat., is a group of some 7,100 islands scattered over a large expanse of water. According to the *notes verbales* presented by the Philippine authorities commenting on

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[15] *Official Records of the General Assembly, Tenth Session, Supplement No. 9*, p. 29.

[16] Lately even more extensive claims have been made by Ecuador (a limit of 200 nautical miles as the limit of Ecuador's marginal seas).

the draft articles of the International Law Commission, the Philippine Government seems to delimit the territorial waters of the country in a somewhat unique manner (see *note verbale*, dated 7 March 1955,[17] and *note verbale* dated 20 January 1956 [18]).

In these notes it is stated, *inter alia*:

"All waters around, between and connecting different islands belonging to the Philippine Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines." [19]

It is not clear from the above-quoted statement whether the large expanse of water called the Zulu Sea bordered in the east, west and north by the Philippine Archipelago and in the south by North Borneo, and covering tens of thousands of square miles of seas, is claimed as internal waters by the Philippine authorities.

In addition to the "national or inland waters", the Philippine authorities, according to the above cited statements, further claim that:

"All other water areas embraced within the lines described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington, D.C., between the United States and Spain on 7 November 1900, the Agreement between the United States and the United Kingdom of 2 January 1930, and the Convention of 6 July 1932 between the United States and Great Britain, as reproduced in section 6 of Commonwealth Act No. 4003 and article 1 ... of the Philippine Constitution, are considered as maritime territorial waters of the Philippines for purposes of protection of its fishing rights, conservation of its fishery resources, enforcement of its revenue and anti-smuggling laws, defence and security, and protection of such other interests as the Philippines may deem vital to its national welfare and security, without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over those waters." [20]

The lines here referred to are the boundaries of the Commonwealth of the Philippines as laid down in the various conventions mentioned above. They are drawn along certain degrees longitude east and latitude north. The present stand of the Philippine Government seems to be that all the waters situated inside these international treaty limits are to be considered as the marginal seas of the Philippines.

It is not known to what extent the Philippine authorities recognize that the numerous passages between the islands and islets of the Philippine archipelago form international straits which under international law are open to navigation for foreign ships.

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The examples given above show that a number of outlying archipelagos are treated by the respective national authorities concerned as units with regard to the delimination of their territorial waters.

There are, however, on the other hand, a host of cases where outlying archipelagos have not been treated in such a manner by the competent authorities.

Thus, it is clear that usually neither the United Kingdom Government nor the United States Government have proceeded to consider their various insular possessions, for example in the Pacific, as units where the delimination of territorial waters is concerned. The practice generally followed by these States has been to draw a separate belt of territorial waters around each individual island of an archipelago, thus leaving stretches of high seas in between, provided that the distance between the various islands of the group is wider than twice the breadth of the marginal seas. A few examples suffice in this connexion.

The Fiji Islands

This group of islands, situated in the Pacific between 16° - 19° 20′ S. Lat. and 178° W. Long - 177° E. Long., contains some 250 islands and islets. According to statements made by the United Kingdom Government in the Anglo-Norwegian Fisheries Case, this archipelago is not treated as a whole for the delimitation of territorial waters. A separate belt of territorial waters has been drawn around each individual island (*I.C.J., Pleadings, Oral Arguments, Documents, Fisheries Case, Judgement of 18 December 1956*, vol. II, p. 524). According to information received, the Solomon Archipelago has been treated in a like manner.

Cook Islands

According to statements made by the United Kingdom in the Anglo-Norwegian Fisheries Case, the New Zealand Government has not drawn a continuous belt of territorial waters around each separate island thereof (*Ibid.*, pp. 523,524).

Hawaiian Islands

It seems that the Hawaiian Islands were formerly considered as a whole where the delimination of territorial waters was concerned. Thus, by a Neutrality Proclamation of 16 May 1854, the "King of the Hawaiian Islands" proclaimed that "our neutrality is to be respected ... to the full extent of our jurisdiction", and further proclaimed that this included "all the channels passing between and dividing said islands from island to island". Similarly, in a Neutrality Proclamation of 29 May 1877, it was provided that no hostile acts could be committed within the Kingdom including "all its ports, harbours, bays, gulfs, skerries and islands of the seas cut off by lines drawn from one headland to another".[21] However, it seems clear that the present practice of the Government of the United States is not to draw a continuous belt of territorial seas around the archipelago, but to give each island its own belt of territorial waters so as to leave stretches of high seas in the middle of the numerous channels and waterways separating the islands of this archipelago.

[17] *Official Records of the General Assembly, Tenth Session, Supplement No. 9*, pp. 36-37.

[18] *Yearbook of the International Law Commission, 1956*, vol. II, pp. 69-70.

[19] *Ibid.*, p. 70.

[20] *Ibid.*

[21] See Crocker, *The Extent of the Marginal Sea*, pp. 595-596.

III

Judgement of 18 December 1951 by the International Court of Justice and the legal implications thereof

As shown above, little or no guidance as to the governing principles of international law can be drawn either from the practice of the various States or from the views expressed by various international bodies and international law publicists. The results to be derived therefrom, if any, are — in the writer's opinion — that no hard and fast rules seem to exist as to the delimitation of the territorial waters of archipelagos.

The question arises as to whether this implies that we are left without guidance with regard to the governing principles of international law in this respect. The answer is, as was stressed by various Governments in their comments to the draft articles of the International Law Commission, that the rules and principles laid down by the International Court of Justice in its Judgement of 18 December 1951 in the Anglo-Norwegian Fisheries Case may prove to be of far-reaching importance. Admitting that the Court's decisions are not binding for States other than the two parties to the case and, further, that the specific elements of the particular case before the Court will always weigh heavily in deciding the case, it is equally true, however, that in the above-mentioned Judgement the Court expressed clearly and repeatedly its opinion on broad principles of international law, principles also applicable to the problems here discussed.

One of the main questions before the Court was the status of the waters of the coastal archipelagos of Norway, called the "Skjaergaard". These problems were argued before the Court and were decided upon in its Judgement. Though the opinions expressed by the Court in this respect dealt with a special type of coastal archipelago, it would — in the writer's opinion — 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.

Thus, the Court's rejection of the British contention regarding the strict coastline rule "requiring the coastline to be followed in all its sinuosities" and the further emphatic statement by the Court that the so-called "arcs of circles method" advocated by the United Kingdom "is not obligatory by law" are obviously also applicable to outlying archipelagos (*I.C.J. Reports 1951,* p. 129).

Likewise the main principle adopted by the Court, a principle that may perhaps be properly designated as "the general direction of the coast rule", seems aplicable to coastal and outlying archipelagos alike. The court stated in this connexion:

"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. The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight base lines method and that they have not encountered objections of principle by other States." (*italics supplied*) (*Ibid.,* p. 129)

The principle of the general direction of the coast was reverted to later in the Judgement. Thus on page 133 the Court, in connexion with the straight baseline system, stated that "the drawing of baselines must not depart to any appreciable extent from the general direction of the coast". And, along the same lines, it further stated (pp. 141-142) with regard to a baseline forty-four miles long that:

"The baseline has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. 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. Therefore, one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse."

Among the general criteria stressed by the Court for a State's delimitation of its territorial waters the following may be noted: the Court emphasized that there existed "certain basic considerations inherent in the nature of the territorial sea"; that the criteria were not "entirely precise" but would provide "courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question" (*Ibid.,* p. 133). Among these considerations, the Court mentioned "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" (*Ibid.,* p. 133).

Among the criteria given by the Court for deciding whether an area of water may be considered internal waters or not the Court stressed as follows:

"Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters." (*Ibid.,* p. 133)

The criteria here laid down by the Court are equally applicable to outlying archipelagos and coastal archipelagos and the statements thus made are couched in general terms expressing basic principles of international law in this field.

Another principle emphasized by the Court was that:

"A State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements." (*Ibid.,* p. 133)

With a special view to the delimitation of the Norwegian coastal archipelagos, the Court stressed the "geographical realities" which forced it to consider such archipelagos as "a whole with the mainland" to the end that "it is the outer line of the 'skjaergaard' which must be taken into account in delimiting the belt of Norwegian territorial waters" (*Ibid.,* p. 128). As a consequence thereof, the Court stated:

"If the belt of territorial waters must follow the outer line of the 'skjaergaard', and if the method of straight baselines be admitted in certain cases, there is no valid reason to draw them only across bays . . . and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island

formations of the 'skjaergaard', *inter fauces terrarum*." (*Ibid.*, p. 130)

In connexion with such baselines, as well as with baselines in general, the Court expressly rejected the British contention to the effect that under international law there existed a principle limiting the length of baselines to ten nautical miles. The Court emphasized that "the ten-mile rule has not acquired the authority of a general rule of international law" (*Ibid.*, p. 131).

And, with a special view to baselines drawn between the islands, islets and rocks of coastal archipelagos, the Court stated along the same lines as follows:

"The Court now comes to the question of the length of the baselines drawn across the waters lying between the various formations of the 'skjaergaard'. Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.

"In this connexion, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagos to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals." (*Ibid.*, p. 131)

Though the statement here made by the Court was mainly directed at coastal archipelagos it seems equally applicable to outlying archipelagos.

The court further 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 (*Ibid.*, p. 132). In this connexion, however, it must be noted that the result would probably have been a different one if the passage between the islands of the "skjaergaard" had formed a "strait". The question was raised before the Court in regard to the inland water route called "Indreleia", a sheltered waterway lying between the "skjaergaard" and the mainland of Norway. The British contention was that the waters of this inland waterway could not have the status of internal waters, but rather should be looked upon as marginal seas.

The Court's answer to these contentions was as follows:

"The Court is bound to observe that the Indreleia is not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway. In these circumstances the Court is unable to accept the view that the Indreleia, for the purposes of the present case, has a status different from that of the other waters included in the 'skjaergaard'." (*Ibid.*, p. 132)

Though couched in rather broad terms this statement obviously implies that the result might have been a different one had the "Indreleia" passage been a "strait".

IV

Conclusions

The conclusions which may reasonably be drawn from the foregoing — in the writer's opinion — that no hard and fast rules exist as to the delimitation of the territorial waters of archipelagos. In view of the great variety of geographical, historical and economical factors involved, it would hardly be feasible, or even desirable, to try to lay down such hard-and-fast rules in an international convention; rules which might easily prove to be too inelastic to give reasonable weight to the many differences and peculiarities of each individual case. However, this does not mean that rules and principles do not exist, or should not be established, but that such rules ought to have a certain flexibility. With such considerations in mind, the writer ventures to set forth the following suggestions as to the principles of international law which govern this question.

A. *Coastal archipelagos*

Article 5 of the draft articles concerning the law of the sea by the International Law Commission seems reasonably to embody the governing rules and principles laid down by the International Court of Justice in its 1951 Judgement, and also seems to give reasonable weight to the special problems arising out of the delimitation of territorial waters of coastal archipelagos.

However, in view of the special problems involved, the following changes in article 5 may perhaps prove desirable.

According to draft article 5, paragraph 1, first sentence, straight baselines may be used where a coastline is "deeply indented or cut into or because there are islands in its immediate vicinity". If the word "islands" was interpreted strictly, it would prevent the drawing of straight baselines in many cases where such a method seems called for; for example where a string of islets, skerries and rocks (but not islands) is situated in the immediate vicinity of the coast or where a coastal archipelago consisting of islets, skerries and rocks as well as islands is situated along the coast of the mainland. Therefore, the writer ventures to suggest changes in the first sentence of article 5, paragraph 1, so that it will provide as follows:

"Where circumstances necessitate a special régime 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." [22]

B. *Outlying archipelagos*

Where outlying (mid-ocean) archipelagos are concerned, the following principles may be set forth — in the writer's opinion — as the governing principles of international law.

No hard-and-fast rules exist whereby a State is compelled to disregard the geographical, historical (and economical) peculiarities of outlying archipelagos.

[22] Furthermore the writer would suggest an additional change in article 5, paragraph 1. The last sentence of paragraph 1 should be deleted. The Court in its 1951 judgement did not find it contrary to international law to use drying rocks or drying shoals as base points for straight baselines. No valid reason seems to exist for a deviation from the judgement in this respect especially as, in article 11 of the draft, drying rocks and drying shoals may be taken as points of departure for measuring territorial waters where methods other than straight baselines are applied.

Frequently the only natural and practical 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 archipelago — that is 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. Thus the archipelago viewed as a unit has a continuous area of territorial water. Whether or not an outlying archipelago should be treated in such a manner will, to a large extent, depend on the geographical features of the archipelago. The following criteria may be of importance for the delimitation of territorial waters in any particular case:

(*a*) Though a State in delimiting the territorial waters of its outlying archipelagos must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, it is equally clear that such delimitation has international law aspects and such aspects may be especially delicate where outlying archipelagos are concerned.

(*b*) In any given case, the more or less close dependence of the territorial sea upon the land domain of the archipelago will always be of paramount importance.

(*c*) 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.

(*d*) While the distance between the various islands, islets and rocks of an archipelago obviously may play an important role in the question of whether the drawing of straight baselines is appropriate, no fixed maximum exists as to the length of such baselines. On the other hand it is also obvious that exorbitantly long baselines, closing vast areas of sea to free navigation and fishing, are contrary to international law. In such instances there will not be a sufficiently close dependence between the land domain and the water areas concerned.

(*e*) The question as to whether the waters situated between and inside the islands and islets of an archipelago may be considered as internal waters 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 as the surrounding land. Each case must be treated on its individual merits in this respect. The geographical configuration of the archipelago concerned will be of primary importance for such determination, though other factors — such as historical and economical factors — may play a role.

(*f*) Even where the waters between and inside the constituent parts of an archipelago are sufficiently closely linked to the land domain to be considered as internal waters, such waters may form a "strait" and consequently be subject to the rules of international law governing "straits" established for the benefit of free navigation and innocent passage of foreign ships. In view of the foregoing, the writer ventures to propose 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."

According to this proposal, straight baselines may be used for delimiting the territorial waters of an archipelago which may be looked upon as a whole. However, it is possible to apply other methods: for example, a mixture of straight baselines and arcs of circles.

In the writer's opinion, the waters between and inside the islands and islets of the above-mentioned type of archipelago must be considered as internal waters. But, where the waters of such an archipelago form a strait, it is in conformity with the prevailing rules of international law that such a strait cannot be closed to traffic. Whether a water passage is to be considered a strait or not, must be decided in each specific case. Though no definition is universally accepted,[23] a strait is usually defined as a water passage connecting two stretches of open sea with the territorial waters of a State.

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The writer has refrained from taking up for discussion the question concerning the breadth of the marginal sea. This highly controversial topic is not a problem peculiar to archipelagos and consequently — in the writer's opinion — it does not belong in the present paper.

[23] But see the criteria applied by the International Court of Justice in the Corfu Channel Case, *I.C.J. Reports 1949*, p. 28 *et seq.*