TERRITORIAL WATERS OF ARCHIPELAGO COUNTRIES

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PREFACE

Preface:

Although the problem of delimitation of territorial waters of coastal archipelagos had been thoroughly discussed in the famous Anglo-Norwegian Fisheries case, and partially settled in the 1958 Conference on the Law of the Sea, 'archipelago' as a legal concept and the question of establishment of a special regime for the mid-ocean archipelagos did not receive much attention during the last two Conferences on the Law of the Sea. In view of the persistent claims regarding the archipelago concept by certain mid ocean archipelago countries such as Indonesia, Phillipines, and Fiji and strategic importance of these countries lying as they do on the principal sea-routes of the world, the problem can no longer be ignored.

Further, the progress of science and technology has revealed the existence of enormous quantities of wealth in the oceans sufficient to satisfy man's predicted needs for thousands of years to come. This has led to ever-wider claims over the sea-bed resources by most of the coastal states. These facts, coupled with economic backwardness of the archipelago countries, and the dependence of their population on coastal waters for their livelihood, have aggravated the importance of the question of delimitation of territorial waters of these countries. The United Nations Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction

has rightly included the subject of archipelagos in its list prepared for the proposed Conference on the Law of the Sea to be held in 1974.

Plan of Work:

In the present study, an attempt has been made to evaluate the claims of the archipelago countries, both coastal and mid-ocean, in the light of bitter opposition from the big maritime Powers. Looking at the problem historically and the views of learned institutions and publicists in this regard in Chapter II, particular attention has been focussed on the delicate question of delimitation of territorial waters of coastal states in general, especially the developing countries in Chapter III. An attempt has also been made to analyse and emphasise the importance of the Anglo-Norwegian Fisheries case, which, twenty-two years after its pronouncement continues to be a controversial subject.

Chapter IV deals with the claims of the mid-ocean archipelagos. Particular attention has been given to the various arguments advanced by the representatives of Indonesia, the Phillipines and the Fiji Islands, in various international meetings. Emphasis is placed on the peculiar geographical features, economic backwardness, and political and security problems of these countries.

Chapter V is a recapitulation of the various claims of the archipelago countries and projection into the future with a hope that in the Third Conference on the Law of the Sea, to be held in 1974, some concrete results relating to the question of archipelagos will be arrived at.

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(H.P. Rajan)

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CHAPTER I

INTRODUCTION: THE CONCEPT OF ARCHIPELAGOS

Introduction: The Concept of Archipelagos

The subject of territorial waters has always been one of the most controversial topics in international law. Even today, despite the extensive work done by the International Law Commission and the three International Conferences to codify the Law of the Sea,[1] there is no agreement among States as to the width of the territorial sea. While some States insist on a rigid three-mile limit under all circumstances, there are countries which claim sovereignty over waters upto 200 miles from their coasts. Even more confusing are the extensive claims to territorial waters as advanced by some States because they form an archipelago. The treatment of this vital aspect of international law relating to territorial waters at the last two Conferences on the Law of the Sea was largely perfunctory.

The "concept of archipelagos", as it is more commonly known, and the question of establishment of a special regime concerning mid-ocean archipelagos are matters which will require attention at the next law of the sea conference proposed to be held in 1974. Ignorance of the details of their claims cannot and should not long persist in view of the strategic importance of the States now making such claims - principally Indonesia

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1. 1930 Conference held under the auspices of the League of Nations and 1958 and 1960 Conferences held under U.N. auspices.

and the Philippines.[2] Furthermore, the growing importance of the Sea in the life of every nation is evidenced by the fact that such claims for wider national jurisdiction are being increasingly put forth by so many States.

The term "archipelago" was originally used for that part of the Mediterranean which separates Greece from Asia (The Aegean Sea of the ancients). However, it has now come to mean any sea which like the Mediterranean is thickly interspersed with islands, or rather the group of islands themselves.[3] The Encyclopaedia Britannica defines an archipelago as an "island-studded sea".[4] W.G. Moore describes it as a "group of islands" and a "sea studded with islands".[5] But according to Fitzmaurice,

> The latter phrase may, however convey an erroneous impression. The real essence of an archipelago is the concept of a self contained and relatively compact group, not a loose congeries of islands dotted over a large extent of sea. Alternatively if an archipelago is to be understood in this latter sense, there can obviously be no case at all for treating its territorial sea on a "group" basis; for there is no real group. A group implies closely connected units, where the extent of land is fairly high in proportion to that of the intervening spaces of sea. If opposite is the case, there is merely an area of sea with some islands in it. [6]

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2. Joseph W. Dellapenna, "The Phillipine Territorial Water Claims in International Law", Journal of Law and Economic Development, Vol. 5, No. 1 (1970), p. 45.

3. See Chamber's Encyclopaedia (London, 1955), Vol. 1, p. 533.

4. Encyclopaedia Britannica (London, 1957), Vol. 2, p. 272.

5. W.G. Moore, A Dictionary of Geography (London, 1967), p. 10.

6. Gerald Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea", International and Comparative Law Quarterly (London), Vol. 8 (1959), p. 88 (fn.). Emphasis added.

It is submitted as the learned jurist points out that an archipelago is a unit by itself - self contained and compact and, it is in the absence of an appropriate geographical or geological term to define it, that terms like "group of islands" or a "sea-studded with island" etc. are used. An archipelago is not an island at all, nor is it a fringe of islands along the coast of a body of land. It may be an extension of the land-mass of the continent itself. For example, Indonesia is a complex archipelago consisting of about 13,000 islands. They are said to be the remainder of an once continuous area which was broken up by movements of the sea and the earth crust.[7]

The possible origin of archipelagos has been the subject of considerable geologic conjecture and controversy. Willis advanced a "submarine rim and disc" theory according to which igneous materials were forced up in arcuate patterns around the edges of giant submarine disc platforms.[8] Van Bemmelen proposed a "mounding up" of magmatic materials along structural lines of weakness, possibly along lines of regmatic fracture.[9] In essence, these theories suggest that the archipelagos are merely portions of submerged mountain masses arranged along lines of structural weakness, or, in other words, these islands

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7. J.J.G. Syatauw, Some Newly Established Asian States and the Development of International Law (The Hague, 1961), p. 169.

8. Bailey Willis, "The Phillipine Archipelago: An Illustration of Continental Growth", Proceedings of the Sixth Pacific Science Congress, 1939, Vol. 1 (1940). Quoted in Frederick L. Wernstedt and J.E. Spencer, The Phillipine Island World (Berkeley, Calif., 1967), p. 10.

9. R.W. Van Bemmelen, The Geology of Indonesia (The Hague, 1949), Vol. 1A. Quoted in Wernstedt and Spencer, ibid.

(or rather land masses) are the tops of submarine volcanoes, horsts and anticlorina.[10] That is perhaps the reason why too many islands, islets, rocks and reefs are clustered together over a proportionately small area.[11] As Chambers Encyclopaedia points out, new land masses could be raised from beneath the sea sometimes through volcanic origin and sometimes extended by coral growth.[12] No wonder these areas are generally susceptible to volcanic eruptions and earthquakes.

The geographical characteristics of archipelagos vary widely. They vary as to the number and size of islands and islets as well as with regard to the size, scope and position of the archipelagos.[13] They can broadly be classified into two categories.

(1) Coastal Archipelago (or continental); and

(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.[14] Examples are the well known

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10. Wernstedt and Spencer, n. 8, p. 10.

11. For example, the Norwegian skajaergaard consists of some 120,000 islands, rocks and reefs; Indonesia consists of more than 13,600 islands; Phillipines about 7,000 islands.

12. See Chamber's Encyclopaedia, n. 3, p. 533.

13. Jens Evensen, "Certain Legal Aspects concerning the Delimitation of Territorial Waters of Archipelagos", United Nations Conference on the Law of the Sea, Official Records, Vol. 1, UN Doc. A/Conf. 13/18 (1958), p. 290.

14. Ibid.

Norwegian "skjaergaard", coasts of Finland, Greenland, Iceland, Sweden, Yugoslavia and certain stretches on the coasts of Alaska and Canada.[15] 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.[16] Examples of mid-ocean archipelagos are the Faeroes, Fiji Islands, Galapagos, Hawaiian Islands, Indonesia, Japan, Phillipines, Solomon Islands, the Svalbord Archipelago etc.

The geographical characteristics of the archipelagos, coupled with specific economic, historic, political and security problems of each case complicate any legal approach to the questions involved in the delimitation of their territorial waters.

At this stage, therefore, it may be relevant to briefly survey some of the attempts made in the past in relation to this subject.

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15. Ibid.

16. Ibid.

CHAPTER II

THE DEVELOPMENT OF THE LAW RELATING TO ARCHIPELAGOS

The Development of the Law Relating to Archipelagos

As early as 1899, the question of territorial waters of archipelagos was brought to the attention of the Institut de droit International, at its Hamburg Session by a Norwegian Jurist Aubert.[1] However, no consideration was given to this question. It was only in 1927-28 at the Stockholm Session that the following text was adopted:

> 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. 2 [Art. 5, para 2]

By a small majority (23 votes to 21), the Institut at the Stockholm meeting adopted the breadth of the marginal sea as three nautical miles.[3]

At the International Law Association meeting in Stockholm in 1924, Prof. Alvarez submitted a special draft convention, Article 5 of which included the following proposals concerning islands and archipelagos.[4]

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1. See Jens Evensen, "Certain Legal Aspects Concerning the Delimitation of Territorial Waters of Archipelagos", United Nations Conference on the Law of the Sea, Official Records, Vol. 1, UN Doc. A/Conf. 13/18 (1958), p. 290.
2. Ibid.
3. Ibid.
4. Ibid.

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

In Article 4 of this draft, Prof. Alvarez proposed a zone of marginal seas of six nautical miles from low water marks. 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. It is significant to note, however, that Prof. Alvarez preferred to treat islands and archipelagos separately as two distinct entities.

The Hague Conference 1930

During the preparation of the Hague Codification Conference of 1930, there was a great diversity of views reflected mainly in three currents of opinion[5]:

(a) A single belt of territorial sea can only be drawn around archipelagos if the constituent islands are not further apart than a certain maximum;

(b) Archipelagos, both coastal and outlying, must be considered as single units, irrespective of the distance between the constituent islands;

(c) The solution sub (b) can only be accepted where geographical peculiarities warrant it.

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5. J.H.W. Verzijl, International Law in Historical Perspective (Leyden, 1970), Vol. 3, p. 73.

Parallel with this difference of views ran the connected question whether the waters enclosed within the group should be regarded as internal waters or as marginal seas.[6] The following compromise was suggested by the Preparatory Commission in its 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. [7]

No definite results were achieved. The majority of Sub-Committee-II of the Second Committee of the Conference suggested a maximum distance of ten miles between islands or between mainlands and islands and did not express any opinion concerning the nature of the enclosed waters.[8] No discussion took place in the plenary sessions of the conference.[9] One of the characteristic features of the manner in which the Hague Conference considered the problem was, that no distinction was made between the rules applicable to the coastal archipelagos and those applicable to

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6. Ibid.

7. League of Nations Doc. No. C.74. M.39. 1929V, p. 61. Quoted in Verzijl, ibid.

8. See Verzijl, ibid.

9. Ibid.

mid-ocean archipelagos.[10]

International Law Commission and the 1958 Conference

During the preparation of the Geneva Conference of 1958 by the International Law Commission successive and ever-changing suggestions were made by the Special Rapporteur, Professor Francois, and the Commission itself, but the latter stated in the end that, in view of the complications caused by the different forms which the problem takes in different archipelagos, it was unable to overcome the difficulties involved.[11] The Commission was prevented from stating an opinion, not only due to disagreement on the breadth of the territorial sea, but also because of lack of technical information on the subject.[12] Even the conference did not arrive at any definite solution.

Views of Publicists

It may be beneficial to know the views of international law publicists on this as yet unsolved problem. By far the most detailed examination of the subject was conducted by the French jurist Gidel.[13] He preferred to treat the coastal

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10. Max Sorensen, "The Territorial Sea of Archipelagos", in Varia Juris Gentium, Liber Amicorum J.P.A. Francois, (Leyden, 1959), p. 318.

11. See Verzijl, n. 5, p. 73.

12. GAOR, Session 11, yr. 1956, Supplement No. 9 (A/3159), p. 17.

13. Gidel, Le Droit International Public de la Mer (Paris, 1934), Vol. 3, pp. 706-27. Translated and quoted in Evensen, n. 1, p. 294.

archipelagos as a unit and favoured a maximum of ten nautical miles for the baselines between the mainland and the nearest island of the group, although he felt that longer baselines could be justified "on the theory of historic waters".[14] He did not consider the waters lying between the individual islands of a coastal archipelago, or between the archipelago and the mainland, as inland waters but preferred to treat them as subject to the rules governing marginal seas.[15] As to mid-ocean archipelagos, Gidel said,

> 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 this rule 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. [16]

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 on the one hand and outlying archipelagos on the other.[17]

To the question whether, in case of a group of islands each has its own territorial sea, or whether the whole complex has one, D.P.O'Connell says,

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14. Evensen, n.1, p.294.

15. Ibid.

16. Ibid.

17. Ibid.

> ... the most that can be said is that the State concerned may elect the baseline technique to "box in" its archipelago if this is really a geographical entity such that the waters between the islands are withdrawn from international commerce and assimilated to internal waters. 18

It is significant, however, that the learned author emphasises the geographical characteristics of the archipelago.

In a very general manner, Jessup has adopted the following rule:

> 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 centre of the archipelagos. 19

Colombos seems to be of the view that

> the generally recognised 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 group 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 historical or prescriptive grounds. 20

Commenting on the above statement, Jens Evensen says that the extent of territorial waters shall be -

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18. D.P.O' Connell, International Law (London, 1965), Vol. 1 , p. 549.

19. Phillip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction (New York, 1927), p. 457.

20. C. John Colombos, The International Law of the Sea (London, 1967), edn. 6, p. 120.

> ... "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. 21

It is significant, however, that Colombos also treats islands (and group of islands) and archipelagos as separate geographical entities.

Having thus examined the prevailing controversy and the absence of any definite rules of international law governing the territorial waters of archipelagos, the claims of coastal and mid-ocean archipelagos may now be examined separately.

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21. Evensen, n. 1, p. 294.

CHAPTER III

COASTAL ARCHIPELAGOS

Coastal Archipelagos

The most typical example of a coastal archipelago is the Norwegian "skajaergaard" stretching out almost all along the coast of Norway forming a fence as it were .. a marked outer coastline toward the sea.[1] The legal position of such archipelagos was clarified by the judgement of the International Court of Justice in the Anglo Norwegian Fisheries case which has evoked mixed reaction. On the one hand, it is suggested that in the best tradition of judicial law making, the decision, based on practical considerations, helped clear up a rather unsatisfactory part of international law. However, according to Sir Humphery Waldock,

> The judgement of the International Court of Justice in the Anglo-Norwegian Fisheries case will rank among the boldest and most important judgements pronounced by any international tribunal. It lays down rules of law which diverge fundamentally from those accepted by the majority of States at the Codification Conference on Territorial Waters held at The Hague in 1930. 2

It is also felt that the case is an unsatisfactory precedent and an authority likely to prove disappointing when sought to

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1. Jens Evensen, "Certain Legal Aspects Concerning the Delimitation of Territorial Waters of Archipelagos", United Nations Conference on the Law of the Sea, Official Records, Vol. 1, U.N. Doc. A/Conf.13/18 (1958), p. 290.

2. Humphery Waldock, "The Anglo-Norwegian Fisheries Case", British Yearbook of International Law (London), Vol. 28 (1951), p. 114.

be applied in practice.[3]

Be that as it may, it can be safely said that the questions involved, namely, delimiting the fisheries zone and indeed territorial waters of a coastal State, together with the exhaustive presentations made by both the litigant parties on the general principles of international law in this field, and finally the views expressed by the International Court on these principles, make it one of the most important cases ever decided by the International Court of Justice or its predecessor at the Hague.[4]

It may therefore be interesting to study this case in some detail.

The Fisheries Case[5]

The Norwegian coast is known for its distinctive configuration. Its coastline is broken and deeply indented by fjords and bays while the coastal sea is studded with thousands of islands, islets, rocks and reefs, commonly known as the Norwegian "skajaergaard". The area constitutes rich fishing grounds in which from time immemorial the local population have found their livelihood. As a result of complaints from the King of Denmark at the beginning of the

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3. Wilberforce, "Some Aspects of the Anglo-Norwegian Fisheries Case", Transactions of Grotius Society for the Year 1952 (Leyden), Vol. 38 (1953), p. 151.

4. Jens Evensen, "The Anglo-Norwegian Fisheries Case and its Legal Consequences", American Journal of International Law (Washington, D.C.), Vol. 46, p. 609.

5. International Court of Justice, Reports, 1951.

seventeenth century, British fishermen refrained from fishing in Norwegian coastal waters for a long period from 1616-18 until 1906. But from 1906 onwards, the British fishermen returned to this territory. This led the Norwegian Government to take measures and specify the limits within which fishing was prohibited to foreigners. In 1911, a British trawler was seized and condemned for having violated these measures. Negotiations ensued between the two Governments. These were interrupted by the war in 1914. But from 1922 onwards such incidents recurred and the number of arrests also increased. In 1933 the United Kingdom protested against the Norwegian decrees which delimited the coastal areas.

On 12 July 1935, a Norwegian Royal Decree was enacted delimiting the fisheries zone in which all fishing rights were reserved for Norwegian nationals. The limits of this zone were to be measured four miles seaward from certain fixed straight baselines drawn between fixed points on the mainland, islands, and rocks.

The United Kingdom, while acknowledging the four miles zone for the purpose of the present dispute, challenged the validity under international law of the lines of delimitation set out in the 1935 decree. The main issues before the Court were:

(a) whether the method employed for the delimitation of the fisheries zone in the 1935 decree was contrary to international law, and

(b) were the baselines fixed by the 1935 decree in application of this method contrary to international law?

The Court held

(a) by ten votes to two, that the method employed for the delimitation of the fisheries zone by the 1935 decree was not contrary to international law, and

(b) by eight votes to four, that the base-lines fixed by the said decree in application of this method was not contrary to international law.

While coming to these conclusions the Court had on occasion to go into a variety of factors like the geographic, economic, and other problems of the region. It may, therefore, be interesting to deal with the majority, the individual and the dissenting opinions separately.

The Majority View

The majority considered it necessary to discuss the topography of the region in detail. Thus, while elaborating the geographic features of this region it said

> The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the "skjaergaard". 6

They also explained that the region is mountainous, consisting of shallow banks and veritable under-water terraces which constitute rich fishing grounds and particularly emphasised that "in these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing".[7]

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6. Ibid., p. 127.

7. Ibid., p. 128.

It added that "such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law".[8]

Affirming that for the purposes of measuring the breadth of the territorial sea it is the low-water mark, as opposed to the high water mark or the mean between the two tides, it said,

> This criterion is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory. 9

To the question whether the relevant low-water mark was that of the mainland or of the skajaergaard, it answered,

> since the mainland is bordered in its western sector by the "skajaergaard" which constitutes a whole with the mainland, it is the outer line of the "skajaergaard" which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities. 10

while dealing with the application of the low-water mark rule it explained,

> Where a coast is deeply indented and cut into ... or where it is bordered by an archipelago such as the "skajaergaard" along the western sector of the coast here in question, the base-lines

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8. Ibid.

9. Ibid. Emphasis added.

10. Ibid. Emphasis added.

> becomes independent of the low water mark, and can only be determined by means of a geometrical construction. In such circumstances the line of low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuousities. Nor can one characterise as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast; the rule would disappear under the exceptions. Such a coast, viewed as a whole calls for the application of a different method; that is, the method of base-lines which, within reasonable limits, may depart from the physical lines of the coast. 11

Coming next to the question of the length of the base-lines, the majority rejected the argument that the ten-mile rule was to be regarded as a rule of international law;

> ... although the ten-mile rule has been adopted by certain states both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law. 12

It further stated that, "in any event the ten-mile rule would appear to be inapplicable as against Norway in-as-much as she has always opposed any attempt to apply it to the Norwegian coast."[13] The majority went on to explain that,

> the attempts that have been made to subject groups of islands or coastal archipelagos to conditions analogous to the limitations

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11. Ibid., pp. 128-9. Emphasis added.

12. Ibid., p. 131.

13. Ibid. Emphasis added.

> concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not gone beyond the stage of proposals. 14

Dealing with the most important question before it, viz., the delimitation of territorial waters, it said that,

> 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. 15

In this connection, therefore, the majority proceeded to lay down certain criteria which it called as "certain basic considerations inherent in the nature of the territorial sea"[16]... which should be borne in mind whenever any delimitation is undertaken. Thus, maintaining that it was the land which confers upon the coastal State a right to the waters off its coasts, it said that "some reference must be made to the close dependence of the territorial sea upon the land domain"[17]. Therefore "a State must be allowed the latitude necessary in order to be able to adopt its delimitation to practical needs and local requirements"[18]. However, sounding a note of caution, the majority said,

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14. Ibid.

15. Ibid., p. 132.

16. Ibid., p. 133. Emphasis added.

17. Ibid. Emphasis added.

18. Ibid.

> ... the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast. 19

The second important consideration according to the majority was

> the more or less close relationship existing between certain sea areas and the land-informations which divide or surround them. The real question raised in the choice of base-lines 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. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway. 20

Finally, it said,

> there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors; that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. 21

In short while dealing with the question of delimitation of territorial waters the majority gave due weightage to the dependency of the coastal state on its coastal waters, its special geographic features and its peculiar economic interests.

Individual Opinion of Judge Hsu Mo

According to Judge Hsu Mo, apart from the cases of bays and islands, the belt of territorial sea should be

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19. Ibid.

20. Ibid. Emphasis added.

21. Ibid. Emphasis added.

measured, in principle, from the line of the coast at low tide.[22] However he added that,

> International law permits, in certain circumstances deviations from this general rule. [23]

According to him, Norway was justified in using the method of straight base-lines because of her special geographical conditions and her consistent past practice which is acquiesced in by the international community as a whole.[24]

Individual Opinion of Judge Alvarez

Advocate for a strong international legal system

Judge Alvarez said,

> ... it now happens with greater frequency than formerly that, on a given topic, no applicable precepts are to be found, or that those which do exist present lacunae or appear to be obsolete, that is to say, they no longer correspond to the new conditions of the life or peoples. [25]

In all such cases, he said,

> ... the court must develop the law of nations, that is to say, it must remedy its shortcomings, adapt existing principles to these new conditions and, even if no principles exist, create principles in conformity with such conditions. [26]

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22. Ibid., p. 154.
23. Ibid.
24. Ibid.
25. Ibid., p. 146. Emphasis added.
26. Ibid.

He maintained that for the traditional individualistic regime on which social life had hitherto been founded, there was being substituted, a regime of interdependence, and that, consequently, the law of social interdependence is taking the place of old individualistic law. He then proceeded to elaborate the characteristics of this new law.[27]

To the question of territorial sea in particular he explained that

> (1) Having regard to the great variety of the geographical and economic conditions of the States, it is not possible to lay down uniform rules, applicable to all, governing the extent of the territorial sea and the way in which it is to be reckoned.
>
> (2) Each State may therefore determine the extent of its territorial sea and the way in which it is to be reckoned, provided it does so in a reasonable manner, that it is capable of exercising supervision over the zone in question and of carrying out the duties imposed by international law, that does not infringe rights acquired by other States, that it does no harm to general interests and does not constitute an abus de droit.
>
> In fixing the breadth of its territorial sea, the State must indicate reasons, geographic, economic, etc. which provide the justification therefor. [28]

He concluded,

> (1) Norway - like all other States - is entitled, in accordance with the general principles of the law of nations now in existence, to determine not only the breadth of her territorial sea, but also the manner in which it is to be reckoned.

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27. Ibid., p. 153.

28. Ibid., p. 150.

(2) The Norwegian Decree of 1935, which delimited the Norwegian territorial sea, is not contrary to any express provisions of international law. Nor is it contrary to the general principles of international law, because the delimitation is reasonable, it does not infringe rights acquired by other States, it does no harm to general interests and does not constitute an abus de droit. 29

The Dissenting Opinion of Sir Arnold McNair

In an elaborate dissenting opinion, Sir Arnold McNair maintained that the method of delimiting territorial waters was an objective one, and that while the coastal State was free to make minor adjustments in its maritime frontier when required so in the interests of clarity and practical objects, it was not authorised by international law to manipulate its maritime frontier in order to give effect to its economic and other social interests.[30] He strongly felt that

> ... the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law; moreover, the approbation of such a practice would have a dangerous tendency in that it would encourage states to adopt a subjective appreciation of their rights instead of conforming to a common international standard. 31

Rejecting the argument that, the special character of the Norwegian coast, the poverty and barrenness of the land, and

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29. Ibid., p. 153.

30. Ibid., p. 161.

31. Ibid., p. 169.

the vital importance of fishing to the local population etc., constituted sufficient grounds for a different method of delimitation, he said,

> Norway has no monopoly of indentations or even of skerries. A glance at an atlas will show that although Norway has a very long and heavily indented coast-line, there are many countries in the world possessing areas of heavily indented coast-line. 32

As examples he cited the coast of Canada, the West Coast of Scotland and the West Coast of Northern Ireland.[33]

In short, he felt that special geographic features of a region or its peculiar economic and social interests did not influence the method of delimitation of territorial waters.

Dissenting Opinion of Judge Read

Judge Read was also of similar view. He said that,

> It is unrealistic to suggest that the Northern Coast of Norway is unique or exceptional in that it has a broken coast-line in East Finnmark, or because West Finnmark, Troms and Nordland are bordered by a coastal archipelago, deeply indented by fjords and sunds. 34

He also cited Scotland, Canada and South America as example of broken coast-lines. He feared that

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32. Ibid.

33. Ibid.

34. Ibid., p. 193.

> there could be no greater danger to the structure of international law than to disregard the general rules of positive law and to base a decision on the real or imaginary exceptional character or uniqueness of the case under consideration. 35

Such is the story of the Anglo-Norwegian fisheries case. It has been a subject of considerable controversy and has led to many debates, discussions, and comments from various people conversant with international law and practice. An attempt to analyse some of these important criticisms will be made below.

Criticism of the Judgement

Most of the criticisms directed against the majority judgement in the Fisheries case was based on the following grounds:

(i) The geographical configuration of the Norwegian coast is by no means "exceptional". The acceptance of the straight base-line system therefore constitutes an unwarranted derogation from the general rules of international law.

(ii) A considerable evidence of State practice and a formidable body of authority diametrically opposed to some of the pronouncements of the majority, were practically ignored by the Court.

(iii) The manipulation of the limits of territorial waters for the purposes of vague factors like economic and social interests has no justification in law and it encourages states to adopt a subjective appreciation of their rights instead of conforming to a common international standard.

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35. Ibid.

Sir Humphery Waldock said that

> The Court has here made some very important pronouncements on general international law apparently against the weight both of state practice and juristic opinion without adequately explaining why it rejected all the former authority or how it felt able to present its own conclusions as rules of international law binding upon States. 36

Commenting on the court's adoption of the rule that the belt of territorial waters should follow the general direction of the coast, he maintained that such a rule was adopted by reference to a use of straight base-lines by a handful of states. He asserted:

> Whatever was the principle acted on by these states, their practice does not go nearly as far as the rule laid down by the Court. To say that this practice met with no objection of principle by other states is a somewhat strong statement in view of the clear opposition to anything like it at the 1930 Conference, quite apart from the individual protests of some states which were before the Court. <u>At best, the Court appears to have made a minority practice the basis of a general rule of customary law</u>. 37

Speaking about the special geographic features of a coast as a criterion laid down by the Court as a justification for a departure from the "general direction of the coast" rule, he said

> The court makes the unity of the islands with the mainland as the determining factor.... 38

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36. Waldock, n. 2, p. 167.

37. Ibid., p. 148. Emphasis in the original.

38. Ibid., p. 145.

On the Court's reference to "economic interests" of the State as a criterion for the delimitation of territorial waters, he protested that

> The Court did not here explain in what way economic interests evidenced by long usage operate as 'criterion' or the relation of this criterion to the "general direction of the coast rule". 39

And that

> These criteria, which are for the most part subjective constitute only the vaguest kind of legal yardstick for measuring the validity of claims. 40

Referring to the Court's emphasis that the delimitation of sea areas could not be dependent merely on the will of the coastal State and that its validity was dependent on international law, he argued,

> ... by erecting subjective factors into primary tests of claims to inland waters, the court has materially strengthened the 'will' of the coastal state as an element in the law and correspondingly weakened the 'will' of other states as a check upon its claims. 41

He asserted that

> The principle that a unilateral claim going beyond generally accepted practice does not make law for other states without their concurrence is a fundamental constitutional principle without which any formulation of maritime law is meaningless. Without this principle the freedom of the seas would be at the mercy of national ambition or exclusiveness. 42

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39. Ibid., p. 149.

40. Ibid., p. 169.

41. Ibid., p. 170.

42. Ibid.

He was afraid,

> The judgement in the Anglo-Norwegian fisheries case permits a considerable expansion of inland waters under the 'general direction of the coast' rule. And every expansion of inland waters has the necessary consequence of pushing the limit of territorial waters farther out into areas hitherto regarded as high seas. In some cases the consequences may be to oust foreign fishermen from waters in which they have fished regularly for centuries and in other cases ... to jeopardize existing rights of innocent passage through inland channels. 43

He said that,

> ... the future claims to inland waters within the 'general direction of the coast' principle are presumably, not to be regarded as unilateral extensions of coastal waters impinging on the prescriptive rights of other states on the high seas, but rather as claims having prior agreement of other states. Certainly, when some reversal of the movement from mare clausum to mare liberum is already evident, it is particularly necessary that the consensual basis of maritime rights should not be unduly weakened. 44

Similarly, contending that "if the Court's reference to geographic realities meant the treatment of fringe as part of the mainland was necessary in order to enable a base-line system on the Norwegian pattern to be established", Fitzmaurice argued,

> ... this was probably correct in fact - though of course, the reliance on geographic features presupposed and assumed that the employment of such a system already constituted a valid method of delimiting territorial waters where those features existed. In short, the existence of a 'skajaergaard' may justify the use of the

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43. Ibid., p. 171.

44. Ibid. Emphasis in the original.

> straight base-line system in a given case if such a system is a valid one in principle of indented coasts; but it is not a legal reason why such a system is valid. 45

Some authors pointed out that the judgement was not a precedent and had, therefore, no legally binding effect except between the parties themselves. Thus, according to D.H.N. Johnson,

> In the strict sense the judgement is not a precedent. This is so for the formal reason that international law does not recognise the principle of stare decisis and Art 59 of the Court's Statute expressly provides that "the decisions of the Court has no binding force except between the parties and in respect of that particular case". 46

He suggested that,

> The judgement is also not a precedent in the strict sense for the reason that the Court went out of its way to stress the exceptional feature of the case, even to the extent of making those exceptional features one of the basis of its decision. 47

Colambos also felt that,

> ... no exaggerated importance should be given to the court's findings. It cannot be held that it created a precedent since it dealt with a unique geographical configuration of a coast which - as the Court repeatedly said - was "exceptional". 48

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45. Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54; Points of Substantive Law - I", British Yearbook of International Law, Vol. 31 (1954), p. 393.

46. D.H.N. Johnson, "The Anglo-Norwegian Fisheries Case", International and Comparative Law Quarterly (London), Vol. 1 (1952), pp. 179-80.

47. Ibid., p. 180.

48. C. John Colambos, International Law of the Sea (London, 1967), edn. 6, p. 117.

Such are the criticisms that are directed against the majority view. But were these criticisms really justified? In the following pages we shall discuss various factors that go into the process of decision making, and assess the validity of these criticisms.

Function of Law in the Modern Community

Judge Read in his dissenting opinion said that there could be no greater danger to the structure of international law than to disregard the "general rules of positive law"[49]. It is submitted, however, that circumstances do arise when the "positive law" becomes inadequate and insufficient to cope with them effectively. It is precisely at this point when law can no longer be regarded as a "command of the sovereign", that the courts tread into the field of judicial law making, although they would never admit doing so. Factors like equality, equity, good faith etc., are fundamental concepts of jurisprudence, which are very often invoked by the courts in arriving at any conclusion. Coupled with these, are factors like social interests, morality, public policy etc., which play a vital role in the process of decision making. The positivist approach of following the "strict letter of the law" is no longer acceptable or practicable. Law has been correctly described by Roscoe Pound as "social engineering". Decision making process involves merely a balancing of "interests" of the parties.

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49. See I.C.J. Reports, n. 5, p. 193.

In this process, a variety of factors are called into play. The need for the application of these factors is too obvious to demand any elaborate explanation. On the other hand, the non-application of these factors makes the judgement comparatively weak. The main problem for a jurist is to ensure, interpretation and application of legal rules on the basis of an intelligent understanding of the social facts to which it is to be applied. The International Court of Justice, as well as the municipal courts of many countries, are rightly proceeding in this direction.

"We are living in a wholly new world, a newer world than any of our conflicting ideologies has sufficiently appreciated; a world in which politics, strategy, economics, science and technology, and not least the range and intensity of human aspirations, have been transformed within our lifetimes; a world in which change at an ever accelerating rate has become the status-quo".[50] In this new world man must refind his true vocation.[51] Obviously law in such a changing society cannot remain static.

The so-called traditional international law, as Professor Anand rightly points out, is nothing but an instrument developed by and for the benefit of the rich industrial, and powerful states of Western Europe and the

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50. C.W. Jenks, A New World of Law? (London, 1969), p. 3.

51. Ibid.

United States.[52] This law not only permitted discrimination against the non-western peoples, but sanctified their exploitation and subjugation.[53] It is this law - law of the colonial and imperialist age - which is being questioned today.[54] In the so-called "positive law" is hidden the element of power and the element of interest, which serves the interest of prosperous nations.[55] It is this law that is changing.

In the absence of an international legislature or other efficient means of peaceful change in international law, any contribution to this effect by the International Court of Justice - the principal judicial organ of the United Nations - is obviously welcome. When the Court in the Fisheries case accepted the straight base-line method of delimitation and rejected the "coast-line" rule and the ten-mile rule, it did so precisely because it could contemplate that these rules could no longer be acceptable in the ever-changing world and thereby made a valuable contribution to the development of international law. There is little doubt that the strengthening of international legal order is in the interests of the whole world. Obviously we cannot confront

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52. R.P. Anand, New States and International Law (Delhi, 1972), p. 45.

53. Ibid., p. 44.

54. Ibid.

55. B.V.A. Roling, International Law in an Expanded World (Amsterdam, 1960). Quoted in Anand, ibid., p. 45.

the moral challenge of to-morrow with the intellectual baggage of yesterday.[56] And the action of international law is no more the prerogative of Western Christian Civilised Powers, but the common task of the world community.[57]

Changing Law for the Changing Seas

The Fisheries case has made another substantial contribution to the development of international law in that it exposed the inadequacy of the existing international law of the sea. That the oceans are an enormous source of wealth enough to satisfy man's predicted needs for thousands of years to come has been revealed by science and technology only recently. Already the technology now used for fishing has enormously increased the rate of fish catch. Most of the coastal nations depend upon fish which constitute a major part of their food supply; and it hardly needs to be emphasised that Science and technology is progressing at a very rapid rate. The economy of many countries of the world depends to a large extent on exports of fish and fish products. Aquaculture or science relating to farming of the sea has progressed in many parts of the world.

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56. C.W. Jenks, Law in the World Community (London, 1967), p. 1.

57. R.P. Anand, "'Tyranny' of the Freedom-of-the-Seas Doctrine", in the forthcoming issue of International Studies (Delhi), Vol. 12, No. 3.

Oil, gas and petroleum are other very important minerals extracted from the sea. From an almost negligible amount two decades ago, off-shore drilling has resulted in an increase of oil and gas to about one-sixth of the total world production in 1964, 1×10^{10} 42 - gallon barrels plus about 5×10^{3} cubic feet of natural gas.[58]

Ambassador Arvid Pardo of Malta, giving a survey of the mineral resources available from the sea-bed before the first Committee of the United Nations General Assembly in August 1967 quoted figures which are certainly staggering:[59]

(a) 43 billion tons of Aluminium equivalent to reserves for 20,000 years at the 1960 world rate of consumption as compared to the known land reserves for 100 years.

(b) 358 billion tons of manganese equivalent to reserves for 400,000 years as compared to known land reserves of only 100 years.

(c) 7.9 billion tons of copper equivalent to reserves for 6,000 years as compared to only 40 years for land.

(d) Nearly one billion tons of Zirconium equivalent to reserves for 100,000 years as compared to 100 years on land.

(e) 14.7 billion tons of nickel equivalent to reserves for 150,000 years as compared to 100 years on land.

(f) 5.2 billion tons of cobalt equivalent to reserves for 200,000 years as compared to land reserves for 40 years only.

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58. Paul M. Fye, et al, "Ocean Science and Marine Resources", in Edmund A. Gullion, ed., Uses of the Seas (Englewood Cliffs, N.J., 1968), p. 42.

59. Quoted in full in W. Friedman, Future of the Oceans (New York, 1967), p. 21.

(g) Three-quarters of a billion tons of Molybdenum equivalent to reserves for 30,000 years as compared to 500 years on land.

In addition, the Pacific Ocean nodules contain 207 billion tons of iron, nearly 10 billion tons titanium, 25 billion tons of magnesium, 1.3 billion tons of lead, 800 billion tons of Vanadium and so on.

Although sea has always offered its abundant resources to the mankind, it is only recently that man has begun to perceive its true potential.[60] As Professor Anand rightly points out,

> Attracted by the prospects of getting vast resources right at their door step, it is only natural that most of the coastal states are interested in protecting it. Even if they are unable to exploit these resources immediately, they do not want to lose an opportunity of exploiting them in the future when they might have the financial resources and technological capability to extract them. 61

It is high time, that there emerges a new law governing the oceans. The old and traditional concepts are to a large extent now outdated. Most of the old rules, such as the 'freedom of the sea doctrine' or the three-mile rule of territorial waters, were designed to suit the interests of the big maritime Powers. The so-called "freedom" of the seas was always interpreted by the technologically advanced and powerful military states as giving them a right to threaten

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60. See Anand, n. 57.

61. Ibid.

smaller states or to subjugate and colonize other peoples.[62] The freedom of high seas has been transformed today into a licence to overish and pollute.[63] Nobody can still be unaware of the dangers of continuing laissez-faire on the high seas and a system which permits such grave inequalities.[64] Louis Henkin points out,

> The Law of the Sea is changing and will probably change faster in the years ahead. Increasing uses require increased regulation. The rights of the coastal state need to be clarified. The continental shelf must have an end. Competition in fishing ought to be regulated and fish conserved, freedom of scientific research reasserted, military uses controlled. Most important, perhaps, there is a wealth of treasure in the Sea for future generations, and decisions have to be made that will determine how these resources will be exploited, for whose benefit, with what consequences for individuals and nations. 65

Most of the nations have already issued proclamations claiming wider territorial waters. Thus compared to 13 states which claimed 12 miles territorial waters in 1960, 52 states now claim 12 miles territorial waters, and another 11 states claim between 18 miles and 200 miles.[66] At least 10 Latin American states have extended their maritime zone to 200

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62. Ibid.

63. Ibid.

64. For a detailed analysis, ibid.

65. Louis Henkin, "Changing Law for the Changing Seas", in Gullion, n. 58, pp. 95-96.

66. Quoted in Anand, n. 57.

miles.[67] In 1970, Canada extended its jurisdiction to 100 miles and termed it as "pollution free" zone. Several Asian-African States have extended their fisheries zone ranging from 20 to 200 miles and most of them favour an exclusive economic zone in the sea-bed for exclusive exploitation of its mineral resources.[68] A group of 13 Latin American States bordering on the Carribean Sea (plus Guyana and El Salvador) held a meeting in July 1972 at Santo Domingo and declared a territorial sea of 12 miles plus an economic zone to a maximum distance of 200 miles which they called as "patrimonial sea".[69] That in short, explains the changing law for the changing seas.

In this changing world, we are likely to be confronted with more and more new problems. The problem of archipelagos is such a problem. Hardly any attention was paid to this problem during the last two conferences on the law of the sea. The only pronouncement of authority on this subject so far has been the judgement of International Court of Justice in the Anglo-Norwegian Fisheries case. Even if this judgement is regarded as an instance of judicial legislation, and not an application of pre-existing principles to the special

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67. Ibid.

68. Ibid.

69. Jorge Castaneda, "The Concept of Patrimonial Sea in International Law", Indian Journal of International Law (New Delhi), Vol. 12, No. 4 (1972), p. 538.

facts, its significance for the development of law cannot be underestimated.[70] The principle of straight base-lines following the general direction of the coast must henceforth be regarded as having acquired a prominent place in international law.[71] According to Sir Hersch Lauterpacht,

> It is probable that in the Fisheries case the refusal of the Court to recognise the validity of the widely accepted rules relating to base-line ... sprang up from the conviction, articulate or otherwise, of the unsatisfactory nature of these rules in modern conditions, in particular in relation to the geographical and economic circumstances of the situation with which it was confronted and which involved the very livelihood of a fishing population threatened by foreign competition armed with modern and efficient equipment. 72

Commenting on the "realities" namely, the special geographic configuration, peculiar economic interests and the dependency of the local population on coastal waters, he said,

> such realities are not, in law irrelevant. For the full appreciation of these realities constitutes the landmark of reasonableness - or the continued reasonableness - of the rule. 73

Manley O. Hudson asserted:

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70. Ian Brownlie, The Principles of Public International Law (Oxford, 1966), p. 174.

71. L. Oppenheim, International Law, Vol. I - Peace (London, 1970), edn. 8, p. 489.

72. H. Lauterpacht, Development of International Law by the International Court (London, 1958), p. 192.

73. Ibid., p. 193.

> The judgement of the Court, supposred by a firm majority, takes high place in the annals of international jurisprudence. It paves the way for a much sounder approach to the subject of territorial waters than was current before 1930, and it clears up many of the confusions which dominated the consideration of the topic at the conference held at the Hague in that year. 74

The Law relating to coastal archipelago having been enumerated, it is now possible to look into the State practice of coastal archipelagos relating to the delimitation of their territorial waters.

State Practice:-

Norway: Norway, the typical example of a coastal archipelago, adopts a straight base line method for the delimitation of its territorial waters. This method is sometimes known as the "Norwegian System" or the "Scandinavian System". 75 The main features of this 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 base-lines 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.

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74. Manley O. Hudson, "The Thirtieth Year of the World Court", American Journal of International Law, Vol. 46 (1952), p. 30. Emphasis added.

75. Evensen, n. 1, p. 295.

(e) The waters inside the baselines are considered internal waters. Thus, the waters of fjords bays and the waters between and inside the islands, islets and rocks of the "skajaergaard" 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.

The Royal Decrees of 12 July 1935 and 18 July 1952 fixed the base points in the above manner. The Decree of 1935 was held to be valid under international law by the International Court of Justice as we have seen, by its judgement rendered on 18 December 1951.

Iceland: Iceland has also adopted the method of straight baselines. By its Fisheries Regulation of 19 March 1952, it has used this method and has enclosed waters of its coastal archipelagos, islands and rocks within these lines.[76] Reference may also be made to the recent Icelandic extension of its fisheries zone to fifty nautical miles to be effective from 1 September 1972. Both Federal Republic of Germany and United Kingdom have protested against this extension and have referred the matter to the International Court of Justice for adjudication. It is significant to note that, while indicating certain interim measures of protection, the Court expressly said,

> It is also necessary to bear in mind the exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development. 77

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76. Ibid.

77. See I.C.J. Reports 1972, Order of 17 August 1972, p. 16.

Denmark: Denmark is a party to the North Sea Fisheries Convention of 1882 which provides for a ten mile maximum for baselines drawn across the mouth of bays and fjords. Denmark thus applies straight base-line method for delimitation and prescribes a ten-mile maximum limits for such lines.[78]

Sweden: Sweden also applies the straight base-line system for the delimitation of its territorial waters. It provides for a four-mile limit of marginal seas and considers the waters enclosed as internal waters.[79]

Finland: It also applies the straight base-line system. The Finnish Act of 18 August 1956 and a Presidential Decree of the same date provides for a maximum length of base-lines of "twice the breadth of the marginal seas".[80] This corresponds to eight nautical miles since the breadth of Finland's marginal seas is four miles.

Yugoslavia: By an enactment in 1948, it has adopted the straight base-line method drawn along the outer fringe of these archipelagos. The belt of marginal seas is six nautical miles.[81]

Saudi Arabia: By a Royal Decree of 28 May 1949, islands and archipelagos are made part of the outer coastline of Saudi

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78. Evensen, n. 1, p. 296.

79. Ibid., p. 296.

80. Ibid.

81. Ibid.

Arabia by drawing straight base-lines. The maximum length of each base-lines is twelve nautical miles. The enclosed waters are treated as internal waters.[82]

Egypt: Egypt by a Royal Decree of 1951 provides for drawing straight base-lines for its coastal archipelago and considers the waters enclosed as internal waters.[83]

Cuba: The Cuban Cays (string of islands, islets and reefs) are regarded as the outer coastline and straight base-lines are drawn from the same. The waters enclosed are treated as internal waters.[84]

Thus we find that most of the coastal archipelagos of the world consider their coastal islands as one composite unit and draw their base-lines from the same, adopting the straight base-line system of delimitation. Indeed, the straight base-line method of delimitation has already become an accepted rule of international law.

However there are a few countries, Australia, Japan, the United Kingdom, United States and USSR, which adopt a different system of delimitation and are staunch opponents of treating archipelagos as a distinct entity. These are industrially advanced and "big maritime powers". Their economies do not depend on the seas alone, nor do their local

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82. Ibid.

83. Ibid.

84. Ibid.

populations entirely depend on their coastal waters for their livelihood. These nations advocate a narrow territorial-water-limit for it suits their own interests. They can with the help of their advanced technology explore farther areas of the sea. Obviously, for these advanced nations, the development of any law which curbs their power is unwelcome. But the principles pronounced in the Anglo-Norwegian Fisheries case are of binding legal character. Although criticised by these big maritime nations, the judgement does not lose its legal significance. As Max Sorensen rightly pointed out,

> What had previously been a controversial issue of international law was now decided.... 85

The correctness of this statement is further evidenced by the generalisation and elaboration of this pronouncement in Article 4 of the 1958 Convention on the Territorial Sea. Verzijl rightly pointed out that the principle adopted in regard to Norway must now be held also to apply to such archipelagos as lie around the coast of Ireland, Denmark, Sweden, Finland, Yugoslavia and Cuba.[86]

It may not be out of place to mention a few words about the Article 4, para 1, of the Geneva Convention on the Territorial Sea and Contiguous Zone. It provides,

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85. Max Sorensen, "The Territorial Sea of Archipelagos", in Varia Juris Gentium, Liber Amicorum, J.P.A. Francois (Leyden, 1959), p. 318.

86. J.H.W. Verzijl, International Law in Historical Perspective (Leyden, 1970), Vol. 3, p. 74.

> In localities where the coastline 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 base lines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

The straight base-line method can be adopted in cases where the coast is deeply indented and cut into or where it contains coastal archipelagos. The article thus prescribes straight base-lines solely for geographical reasons. Does this mean that every instance of frequent indentations, however minor they be, calls for the adoption of a straight base-lines system? Professors Mc Dougal and Burke suggest,

> If physical features are to be elevated to such decisive importance, it ought to be for some clearly stated purpose which permits appraisal ofaclaim in terms of specific criteria indicating adherence to that purpose. 87

The geographical factor is included as a criterion in the Convention primarily because of the practical difficulties involved in following the sinuosities of a coast deeply indented. It is submitted that this geographical justification must be coupled with economic justification. However, the Convention merely mentions in Article 4, para 4, that,

> Where the method of straight base-lines is applicable under the provisions of para 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by a long usage. 88

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87. Mc Dougal and Burke, Public Order of the Oceans (New Haven, Conn., 1962), p. 408.

88. Article 4, para 4 of the Convention on Territorial Sea and Contiguous Zone.

It is felt that an express provision prescribing for economic justification would have been preferable, for economic interests and expectations underlie claims to a straight base-line system.[89] As rightly pointed out by Professors Mc Dougal and Burke,

> If the 1958 provision is generally regarded as authoritative, as it is likely to be, it is unfortunate that major economic differences will have to be discussed in terms of specious arguments about the general direction of the coast and about the supposed relationship of certain waters to adjoining land masses. And it is entirely possible that claims with no substantial basis in local need, and fundamentally destructive of a wider community interest will be sanctioned because of wholly irrelevant geographic conditions. 90

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89. See Mc Dougal and Burke, n. 87, p. 409.

90. Ibid.

CHAPTER IV

MID-OCEAN ARCHIPELAGOS

Mid-Ocean Archipelagos

The legal status of mid-ocean or outlying archipelagos is much more complex. They claim to delimit their territorial waters from the outermost points of the outer most island of their archipelagos. It is asserted on the other hand, that an island in an archipelago does not differ from any other island and that each should have its own belt of territorial sea.[1] The Phillipines and Indonesia and Fiji (which joined them in 1971) vehemently argue for the acceptance of the "archipelago concept", namely, to treat all the islands as one single unit and draw the belt of their waters from the outermost points of the outermost islands. Such a claim is principally based on the preservation of their economic, political, security and other social interests. The chief objection against such a claim is that it converts parts of high seas into territorial waters. The problem is further complicated in the absence of any accepted rule of law on the subject. The Geneva Convention of 1958 does not contain any provision relating to mid-ocean archipelagos. The International Law Commission was prevented from stating an opinion in this matter not only because of disagreement on the breadth of the territorial sea, but also because of lack

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1. Mc Dougal and Burke, The Public Order of Oceans (New Haven, Conn., 1962), p. 411.

of technical information on the subject.[2]

It is submitted, that the Anglo-Norwegian Fisheries case[3] judgement does throw some light on the subject although Max Sorensen feels otherwise. While maintaining that the Fisheries judgement resolved the problem of coastal archipelagos, Sorensen said that,

> ... the geographical criteria on which it relied for recognising that a system of straight base-lines could be applied were such that outlying archipelagos could hardly have been contemplated. The condition for instance that a base-line "must not depart" to any appreciable extent from the general direction of the coast does not seem directly applicable to a group of islands at some distance from a main coast. [4]

It is difficult to accept such a line of argument. Though the opinions expressed by the Court in this respect dealt with a special type of coastal archipelago, 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 or of outlying (mid-ocean) archipelagos.[5] 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

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2. GAOR, Session 11, yr. 1956, Supplement No. 9 (A/3159), p.17.

3. International Court of Justice Reports, 1951.

4. Max Sorensen, "The Territorial Sea of Archipelagos", in Varia Juris Gentium: Liber Amicorum J.P.A. Francois (Leyden, 1959), p. 318.

5. Jens Evensen, "Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos", United Nations Conference on the Law of the Sea, Official Records, Vol. UN Doc. A/Conf.13/18 (1958), p. 290.

emphatic statement that the so-called "arcs of circles method" advocated by the United Kingdom was "not obligatory by law", were obviously also applicable to outlying archipelagos.[6] Likewise, 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 delimitation of any territorial sea.[7] So also the criteria laid down by the Court for the delimitation of territorial waters, namely, the special geographic features, the peculiar economic interests and the dependency of the local population on the coastal waters,[8] are equally applicable to the outlying archipelagos. Thus the Court said that -

> A state must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements. 9

The Court repeatedly stressed the "geographic realities" of the region. This fact, coupled with the above statement, shows the importance and the significance of this judgement even in respect of outlying archipelagos.

With this background in mind, we may now proceed to analyse the claims and counter-claims relating to the mid-ocean archipelagos. The Phillipines, Indonesia and the Fiji islands are the three principal mid-ocean archipelagos,

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6. Ibid.

7. Ibid.

8. Ibid., p. 300.

9. I.C.J. Reports, n. 3, p. 133.

vociferously arguing for the acceptance of the "archipelago concept" and treat their islands as one single unit. Although supported by the developing countries, they face the bitterest opposition from industrially developed maritime Powers particularly Australia, Japan, Netherlands, United Kingdom, United States and the USSR. It may, therefore, be interesting to treat the claims and the counter-claims separately.

The Claims

(1) The Phillipines: It is an archipelago consisting of more than 7,000 islands of which only about 800 are inhabited.[10] Its land area is some 115,600 sq. miles.[11] The rest are rocks or beautiful coral formations that break the surface of the sea.[12] As an island State, with only two islands (Mindanao and Luzon) containing land as much as 75 miles from the coast,[13] the sea has always played a major role in the life of the people.[14] Phillipines is a maritime country, and to-day there are fourteen domestic and thirty seven international shipping lines serving the country, moving between the more than sixty active inter-island ports in vessels ranging in size from

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10. Onofre D. Corpuz, The Phillipines (Englewood Cliffs, N.J., 1965), p. 7. See also Alden Cutshall, The Phillipines: Nation of Islands (Princeton, N.J., 1964), p.8.

11. See Corpuz, n. 10, p. 3.

12. See ibid., p. 7.

13. Ibid.

14. Joseph W. Dellapenna, "The Phillipines Territorial Water Claim in International Law", Journal of Law and Economic Development, Vol. 1, No. 1 (1970), p. 46.

outrigger canoe to ships of 5,000 tons displacement.[15] These inter-island ports are the cultural, economic and political foci of the local areas they serve.[16] Consisting of a fairly large population, this developing country obviously looks forward to the oceans for its economic and other needs especially when science and technology is revealing the existence of enormous wealth in the seas.[17]

The Phillipines claim relating to territorial waters first came to the attention of other governments of the world through note verbales addressed to the International Law Commission in 1955 and 1956. In the first note verbale from the permanent Delegation of the Phillipines to the United Nations, dated 7 March 1955, the policy of the Phillipine Government was summarised as below:

> All waters around, between and connecting different islands belonging to the Phillipine 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 Phillipines. 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 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 the Commonwealth Act No. 4003 and

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15. Ibid., p. 47.

16. Ibid.

17. Ibid.

> article 2 of maritime territorial waters of the Phillipines for the purposes of protection of its fishing rights, conservation of its fishing 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 these waters. All natural deposits or occurrences of petroleum or natural gas in public and/or private lands within the territorial waters or on the continental Shelf, or its analogue in an archipelago, seaward from the shores of the Phillipines which are not within the territories of other countries belong inalienably and imprescriptbly to the Phillipines, subject to the right of innocent passage of ships of friendly foreign states over those waters. 18

Reiterating the above statement, the Phillipines Government in a second note verbale to the United Nations dated 20 January 1956 added,

> In view of the foregoing consideration ... the Phillipine Government assumes that high seas cannot exist within the waters comprised by the territorial limits of the Phillipines as set down in the international treaties referred to above. 19

It was further stressed that,

> In case of archipelagos or territories composed of many islands like the Phillipines, which has many bodies of water enclosed within the group of islands, the State would find the continuity of jurisdiction within its own territory disrupted, if certain bodies of water located between the islands composing its territory were declared or considered as high seas. 20

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18. GAOR, Session 10, yr 1955, Supplement No. 8A (A/2916), p. 37.

19. See the Yearbook of International Law Commission, Vol. 2, 1956, p. 70.

20. Ibid.

Such a claim covers vast areas of Western Pacific and of the South China Sea. The largest body of water claimed as internal waters is the Sulu Sea with an area of about 86,000 square miles.[21] However, the freedom of innocent passage has been expressly granted through these waters.[22]

During the debate in the sixth committee of the General Assembly at its eleventh session, the Phillipines delegate Talentino explained that,

> the territorial sea is subject to the sovereignty of the Coastal State, to the exclusion of other States - which other states can have rights therein only by way of exception, provided either in international law or in treaties and conventions. 23

Advancing reasons for his country's territorial water claims during the 1958 Conference on the Law of the Sea, the Phillipines delegate, Arreglado argued, that it is

> ... the generally recognised principle that compact outlying archipelagos should be treated as a whole, the waters lying between and within the islands, islets and rocks of such archipelagos being considered as internal waters and that such archipelago should be surrounded by a single belt of territorial sea. 24

Maintaining that these principles were justified by the theory of historic waters, as in the case of historic bays, he contended that

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21. Jorge R. Coquia, "Territorial Waters of Archipelagos", Phillipines International Law Journal, Vol. 1 (1962), p.148.

22. See GAOR, n. 18.

23. See U.N. Doc. No. A/Conf.13/19, Vol. 1, 3 December 1957, p. 212.

24. U.N. Conference on the Law of the Sea, Official Records, Vol. 4, p. 7.

> States consisting of archipelagos such as the Phillipines were entitled to the same measure of treatment and justice as that accorded to states with heavily indented coastlines. 25

Referring to the definition of an archipelago in the Encyclopaedia Britannica as an "island-studded sea" and in Dictionaire de l'Acade'mic Fransaise as "Une'etendue de mer Parsemée entrecoupee d'iles" (a stretch of sea studded and divided up by islands), he said

> These definitions fully bore out his contention that the sea areas linking the islands and islets of the Phillipine archipelago were a single entity and as much a part of the archipelago as the islands themselves. 26

He then explained that the perimeter of the Phillipines group consisted of a continuous chain of islands and islet of varying sizes and that straight base lines could be drawn between appropriate outer islands without encompassing unreasonably large expanses of water, the largest water mass enclosed being the Sulu Sea. He further explained that underneath the waters surrounding the chain was a shelf forming a continuous submarine platform which was nowhere more than 100 fathoms below surface.[27] Thus, all the sea areas within the chain were surrounded and enclosed on all sides by the land domain of the Phillipines. He then argued that

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25. Ibid.

26. Ibid. Emphasis added.

27. Ibid.

> every principle laid down by the International Court of Justice in its judgements of 18 December 1951 in the Anglo-Norwegian Fisheries case was applicable to the waters between the islands of the Phillipines archipelago. Although no hard and fast rules could be laid down for the delimitation of the territorial waters of outlying archipelagos, there were rules which took into account the special geographic, historical and economic peculiarities of states consisting solely of archipelagos, such as the Phillipines, and they should be observed. 28

Every State, he pleaded, should have the freedom to determine its land and sea limits in complete security, or else it would be at the mercy of the play of international forces.[29] He feared that the unity of Phillipines would be destroyed and that "it would lose its independence" if there were stretches of sea between its islands controlled by other states.[30]

In a statement before the second U.N. Conference on the Law of Sea at Geneva on 25 March 1960, Senator Tolentino explained that the principal reasons for the extension of sovereignty of State over its territorial sea are

(1) The security of the State

(2) The furthering of its commercial, fiscal and political interests and

(3) The exclusive enjoyment of the products of the sea close to its shores for the welfare of its people. 31

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28. Ibid. Emphasis added.

29. Ibid.

30. Ibid.

31. Quoted in Coquia, n. 21, p. 146.

He suggested that,

> ... The territorial sea is not a mere juristic concept; it is vitally linked with the political and economic security of the coastal state. The question of the breadth of the territorial sea is, therefore, as to each coastal state, inseparably connected with the question of self-preservation or survival. 32

Similar view was expressed by the Phillipines delegate in the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (hereinafter referred to as Seabed Committee). Senator Tolentino took the stand that the time when the three mile limit had been universally applied was past and diversity was now the rule.[33] He argued:

> Each state set limits of its sovereignty and jurisdiction over the waters adjacent to its shores for reasons of security, economics, history, geography or because of other considerations. That was a reality which could not be ignored and which the international regime would have to take into account if it was to command universal acceptance. 34

He explained that,

> Phillipines in no way advocated adoption of a permissive rule giving free rein to the unilateral initiative of states. It did however demand <u>that what was accomplished fact should be recognised; that states had set diverse limits to their zones of jurisdiction</u>. 35

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32. Ibid.

33. See U.N. Doc. No. A/AC.138/SR-55, 22 March 1971, p. 125.

34. Ibid.

35. Ibid. Emphasis added.

Therefore, he pointed out, the Phillipines Government considered the waters between its islands as a part of the archipelago and that it was vital not only to its economic life but also to its security. Apart from these considerations, he claimed that Phillipines possessed a historic title to these waters.[36]

Historic Claims of the Phillipines. The historic claims of the Phillipines archipelago was best explained by Senator Tolentino during the Second Conference on the Law of the Sea in 1960.[37] For over three centuries, as is well-known, the Phillipines Islands remained a colony of Spain. After the Spanish-American war, just before the close of the nineteenth century, the Phillipines was ceded by Spain to the United States under the Treaty of Paris of 1898. Article III of that Treaty described the territory being ceded not only by the phrase "archipelago known as the Phillipines Islands" but also by metes and bounds indicating the latitudes and longitudes of the perimetric boundary of the said territory.[38] Three decades later, on 2 January 1930, a treaty was signed, in Washington D.C., between the United States and the United Kingdom concerning the boundary between Phillipines and North Borneo. With reference to the Phillipines archipelago, the

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36. Ibid.

37. See Coquia, n. 21, p. 147.

38. See Senator Tolentino's statement before the 1960 Conference on the Law of the Sea. Quoted in ibid.

phrase "the territory over which the present Government of the Phillipines Islands exercises jurisdiction" was used. The Government of Phillipines was then a mere agency of the United States, which exercised sovereignty over all the territory, both land and sea included within the boundary limit set forth in the Treaty of Paris of 1898.[39] Legislation applicable to the waters of the sea was promulgated in the Phillipines with the express approval of the American Governor-General, the representative of U.S. Sovereignty over the Phillipines.

The Tydings-Mc Duffie Act of 1933, which provided for the independence of the Phillipines, required the approval of the Constitution, which the Phillipines would adopt by the President of the United States. A constitution so adopted, approved and signed by President Roosevelt, described in its very first article the territory of the Phillipines. When the United States withdrew all her authority and sovereignty over this territory on 4 July 1946, the Republic of Phillipines succeeded in the exercise of such sovereignty and jurisdiction over the same territory. When the Fillipino people ratified their constitution in a plebiscite, they knew it contained the description and delimitation of this territory over which they would exercise sovereignty upon acquiring independence.[40] Such is the

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39. Ibid.

40. Ibid.

historic title upon which the Phillipines bases its claim as one of the grounds for the acceptance of the archipelago concept, and drawing of base-lines from the outermost points of its outermost islands. They thus claim the Phillipine Islands as one single geologic, geographic and historic unit.

The Indonesian Territorial Water Claims: Similar claims for the recognition of the "archipelago concept" have been advanced by Indonesia. It is a complex archipelago consisting of more than 13,000 islands including five major islands, namely Sumatra, Java, Borneo, Celebes and New Guinea. Strategically, her position is important as a bridge between the Asian and Australian continents with the Pacific Ocean on its east and the Indian Ocean on its west.[41] The Malacca Strait and the South China Sea separates it from Asia while the Sulu Sea separates it from the Phillipines. The commercial and maritime importance of this area is enhanced by the many lines of world communication which pass through these waters.[42]

Indonesia is regarded as a remainder of a once continuous area which was broken up by the movements of the sea and the earth crust.[43] Geologically, therefore, it

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41. J.J.G. Syatauw, Some Newly Established Asian States and the Development of International Law (The Hague, 1961), p. 169.

42. Ibid.

43. Ibid.

is a single complex unit.

The Indonesian claim to wide territorial waters received much attention on 13 December 1957, when the Indonesian Government issued a declaration expressing its intention to include all waters, surrounding, between and connecting the islands constituting the Indonesian State as internal waters, and claimed a twelve-mile wide territorial water belt.[44] This intention was given practical shape by Act No. 4 of 18 February 1960.[45] The 1957 declaration gave the following reasons for such an intention:

> The geographical composition of Indonesia as an archipelago consisting of thousands of islands has its own particular characteristics for the purposes of territorial unity, and in order to protect the resources of Indonesia, all islands and the seas in between must be regarded as one total unit. [46]

However, the declaration expressly guaranteed the freedom of innocent passage.[47]

This declaration evoked much comments and criticisms from other states. Their reactions can be divided into three categories. First, those countries which bitterly criticised the Indonesian declaration as being contrary to international law. They were Australia, France, Japan, Netherlands, New Zealand, United Kingdom and United States.[48] These nations

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44. Ibid., p. 170.

45. Ibid.

46. Quoted in ibid., p. 173.

47. Ibid.

48. Ibid., p. 174.

are big maritime Powers and their interests were directly affected by such a declaration. Secondly, there was a great majority of states which did not react in any way, and were thus either indifferent or tacitly approved, or perhaps disapproved, the Indonesian claim.[49] Finally, there were a few States, like Russia, which unequivocally favoured the Indonesian claims and considered them as fully in accordance with the rules of international law.[50]

It was during the 1958 Conference on the Law of the Sea that the Indonesian delegate Subardjo elaborated the Indonesian claims. He said that

> The traditional method of measuring the territorial sea from the low-water mark was based on the assumption that the coastal state possessed a land territory forming part of a continent. In the case of archipelagos, such a system could not be applied without harmful effects. An archipelago being essentially a body of water studded with islands rather than islands with water round them, the delimitation of its territorial sea had to be approached from a quite different angle. In the opinion of the Indonesian government, an archipelago should be regarded as a single unit, the water between and around the islands forming an integral whole with the land territory. 51

He then explained that in the case of this complex archipelago, consisting of more than 13,000 islands, apart from the difficulty in exercising jurisdiction, there was

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49. Ibid., p. 175.

50. Ibid.

51. UN Conference on the Law of the Sea, Official Records, Vol. 3 (1958), p. 43.

the problem of communication which was extremely important.[52] He added that if each of Indonesia's component islands were to have its own territorial sea, the exercise of effective control would become extremely difficult, more so in the event of outbreak of any hostilities.[53] Further the use of modern means of destruction in the interjacent waters, would have disastrous effect on the local population and on the living resources of the maritime areas concerned.[54]

In case of an outbreak of domestic hostilities the problem is indeed very serious. If the intervening waters are treated as high seas, the usual traffic regulations have to be followed. Before sufficient help can be rushed to the troubled spots, serious damage might take place. Further, the possibility of help and encouragement to the insurgents by a third State cannot be ruled out. For, it is easier to supply arms and other necessary ammunitions through the high seas. In the interests of security, therefore, such waters must be treated as territorial waters.

Stressing their economic interests, Njotowijono, the Indonesian delegate to the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, asserted in 1971

> ... the islands of which there were more than 13,000 and the intervening waters formed a single unit. For the Indonesian people and

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52. Ibid.

53. Ibid.

54. Ibid.

> government that was an axiomatic fact of life. It was also an economic necessity, for it was from the sea that from time immemorial, the inhabitants of the Indonesian islands had drawn sustenance. 55

He emphasised that the archipelago concept had a political significance too; for the integrity of its land, sea and air space was essential for the country's survival.[56] He assured, however, that Indonesia did not wish to interfere with the freedom of navigation, essential for international trade. It guaranteed the freedom of innocent passage which did not endanger national security, public order, national interests, peace and the latest hazard - the well being of the coastal population who were being threatened by pollution caused by accidents at sea.[57] As Kusumaatmadja, the Indonesian delegate to sub-committee - I of the Sea-Bed Committee said,

> In arguing the need to allow warships to pass unimpeded through straits forming part of the territorial waters of another state, some delegations had suggested that such passage would not endanger the security of the coastal states. His delegation disagreed. The interests of the coastal State could only be fully protected from the harmful effects of the passage of foreign warships if, in addition to an assurance of good intention of the passing warships, an absolute guarantee could be given that there would be no accidential encounters with other warships of an unfriendly nature, or accidental discharge of weapons; given the potential of modern weapons of mass

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55. U.N. Doc. A/AC.138/SR.55, 22 March 1971, p. 132. Emphasis added.

56. Ibid.

57. Ibid.

> destruction, such encounters or accidents would have disastrous consequences for the coastal state and its population. His delegation did not consider that such a guarantee could be given. It therefore took the view that passage of warships through straits forming part of the territorial sea of a State should be subject to regulation by that State. The purpose would not be to prevent passage but rather to make sure that it would not be harmful to the coastal state and its population. 58

That was the reason why Indonesia could not accept "corridors of free-passage" through the territorial sea.[59]

Reiterating the Indonesian claims, Sharif, the Indonesian delegate to the First Committee of the General Assembly, said at its twenty-fifth session:

> From time immemorial, the inhabitants of the Indonesian archipelago, like the people of any islands or island groups, regard the seas surrounding our islands as part and parcel of our national life and a God-given source of living. <u>While farmers are tilling the soil of plains and mountains and making agriculture and cattle breeding their main source of living, the seas have similarly become the playground and the main source of living for our fishermen and seafaring people of the coastal areas.</u> 60

He emphasised that

> when industry and mining are making progress on land it is only natural that the people start looking beyond their horizon and extend their explorations to the area of the adjacent waters and the subsoil underlying the sea. 61

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58. U.N. Doc. A/AC.138/SC.1/SR.16, 6 August 1971, p. 200.

59. Ibid.

60. U.N. Doc. A/C.1/PV.1785, 4 December 1970, p. 3. Emphasis added.

61. Ibid., pp. 4-5.

Maintaining that Indonesia finds itself exactly in a similar situation as that of Phillipines, he strongly advocated the "archipelago concept" as a necessity for reasons of economic, ecological, defence, security, national unity, territorial integrity and in the application of the inherent sovereign rights of coastal States.[62]

The Fiji Claims: Fiji is the third archipelago country, which joined Indonesia and Phillipines in 1971 in advancing the archipelago claims. 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.[63] It is a small mid-ocean archipelago and is not strategically as important as the Phillipines and Indonesian.

Mc Loughlin observer from Fiji said in the Sea-bed Committee that one of its difficulties in trying to develop a viable local fishing industry was, that its vessels had to compete with foreign owned fleets which were using the sea within the Fiji archipelago for large-scale fishing and were employing highly developed technology and long line techniques.[64] He pointed out that petroleum exploration concessions had been granted over a total of 15,000 square miles of off-shore areas while applications were under

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62. Ibid., p. 6.

63. Evensen, n. 5, p. 299.

64. U.N. Doc. A/AC.138/SR.62, 26 July 1971, p. 10.

consideration for a further 12,000 square miles, and applications were being invited for an additional 6,000 square miles.[65] The people of Fiji, he said,

> were in consequence deeply aware of the importance to them of their marine environment and of the necessity for control over the resources of their archipelagic waters and of the sea-bed and sub-surface of the sea bed in the vicinity of the archipelago. 66

He emphasised that

> The position of Fiji as a mid-ocean archipelago was not unique; there were many other small nations and emerging territories with roughly similar geographic features. Fiji, however, was more dependent than most countries on the development of her marine environment for her economic development. It was of importance to such countries, and of vital concern to Fiji, to control the development of their marine environment in order to ensure that such development was in their best interests and to prevent any form of depredation or pollution that might endanger that environment or deplete its resources. 67

After discussing some of the attempts made in the past to evolve a satisfactory rule governing the delimitation of territorial waters of the mid-ocean archipelagos, he observed:

> ... the concept of treating the islands comprising an archipelago as a unit had been accepted, but there had been no agreement on the permissible distance between each island on the circumference. 68

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65. Ibid.

66. Ibid.

67. Ibid.

68. Ibid., p. 12.

Invoking the authority of the judgement of the International Court of Justice in the Anglo-Norwegian Fisheries case he argued:

> The principles utilised by the Court should not be confined only to coastal archipelagos, but were equally applicable to mid-ocean archipelagos. For example, the condition that a base-line must not depart to any appreciable extent from the general direction of the coast was equally applicable to mid-ocean archipelagos if it was recognised that it was merely a method of expressing the requirement for an intrinsic relationship between a line of natural features and the land to which those features formed a barrier. In that case the essence of the mid-ocean archipelago was that such a relationship existed between the features themselves, so that the situation was analogous to that of a complex coast of a continental country. 69

While maintaining that Fiji considered waters enclosed as territorial waters subject to the right of innocent passage he argued that -

> The interests of archipelagic state could be satisfied without undue harm to other states, if it was accepted that the enclosure of waters by archipelagic base-lines did not have the effect of depriving other states of their right of innocent passage. That right should however, in his delegations view, be subject to the regulations of the archipelagic state with respect to police, customs, quarantine and control of pollution, and should not involve any derogation from the exclusive right of that state with respect to the exploration and exploitation of the natural resources of the waters so enclosed and of the subjacent sea-bed and the sub-soil thereof. 70

Similar arguments were advanced by Nandan, the delegate from Fiji before the Sea-bed Committee in 1972.

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69. Ibid., pp. 13-14.

70. Ibid., p. 16.

Commenting on the Fisheries case, he added,

> ... the Court had determined the criteria to be applied in testing the validity of delimitations with territorial limits of waters previously considered to have formed part of the high seas. It would appear from that judgement that the islands composing an archipelago must be linked as a geographical entity or as an intrinsic economic unit. 71

He felt that -

> the interests of archipelagic states could be accommodated without prejudice to those of other states by acceptance of the view that the enclosure of waters by archipelagic baselines did not have the effect of depriving other states of their right of (innocent) passage through those waters. If the rules applied by the International Court of Justice for drawing straight baselines were valid for oceanic archipelagos, the rules applicable to the closure of coastal waters formerly considered to be part of the high seas were likewise equally applicable to the closure of oceanic waters which had had the same status. 72

It is clear, therefore that Fiji also advocates acceptance of the "archipelago concept" primarily for economic, political and security considerations while strongly emphasising the dependence of its local population on the coastal waters.

Apart from the Fiji, Indonesia and the Phillipines, there is a second group of mid-ocean archipelagos which are insular dependencies of sovereign states. They are:

1. The Faeroes: By an Anglo-Danish agreement of 22 April 1955, it is treated as a unit delimitated by a mixed system of straight base-lines and arcs of circles.[73]

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71. U.N. Doc. A/AC.138/SR.73, 10 March 1972, p. 6. Emphasis added.

72. Ibid., p. 27.

73. Evensen, n. 5, p. 298.

2. The Norwegian Spitzbergen or Svalbard Archipelago: The coastlines of the archipelago is heavily indented by fjords, bays and sunds. By the Spitzbergen Treaty of 9 February 1920, the Contracting Parties recognised, "the full and absolute sovereignty of Norway" to 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 base-line system around the archipelago for such delimitation.[74]

3. The Ecuadorian Galapagos or Colon Archipelago: 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 base-lines between the "most salient points of the outermost islands forming the contour of the archipelago of Galapagos". [The Decree of 1951, Art. 2 (para 2).] The nature of the waters enclosed is not mentioned.[75]

4. Cook Islands: According to statements made by the United Kingdom in the Fisheries case, the New Zealand Government has not drawn a continuous belt of territorial waters around

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74. Ibid.

75. Ibid.

each separate island thereof.[76]

5. The Bermudas: According to the statements presented by the United Kingdom in the 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".[77]

6. Hawaiian Islands: It seems that the Hawaiian Islands were formerly considered as a whole where the delimitation 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 parts, harbours, bays, gulfs, skerries and islands of the seas cut off by lines drawn from one headland to another. However, it seems clear that the present practice of the Government of 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 seas around the

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76. I.C.J. Pleadings, Oral Arguments, Documents, Fisheries Case, Judgement of 18 December 1956, Vol. 3, pp. 423-4. quoted in ibid.

77. Evensen, n. 5, p. 298.

archipelago, so as to leave stretches of high seas in the middle of the numerous channels and waterways separating the islands of this archipelago.[78]

The reasons advanced by the mid-ocean archipelago for extensive territorial water claims on the basis of the "archipelago concept" may be summed up as follows:

(1) For the preservation of their territorial and national integrity;

(2) For the exchange of local travel and communications within a single political entity;

(3) For the security of the State;

(4) For furthering their commercial, fiscal and political interests;

(5) For effective and adequate protection in case of an outbreak of hostilities including domestic hostilities, in any of their component islands;

(6) For the exclusive enjoyment of the products of the sea close to their shores for the welfare of their people;

(7) For the economic interests of their States and in particular, the preservation of the interests of their local population which depend on these coastal waters for their livelihood, and who are incapable of competing with foreign fishermen with modern equipments of advanced technology;

(8) For the effective implementation of their police, customs and quarantine regulations;

(9) For the protection of their marine environment.

The territorial sea is not a mere juristic concept. It is vitally linked with the political, economic, and security interests of the State. The question of territorial

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78. Ibid., p. 299.

sea is, therefore, inseparably connected with the question of self preservation and survival of each coastal State.[79]

Opposition by Big Maritime Powers

The major opposition to the "archipelago concept" has come from the big maritime Powers, like Australia, Great Britain, France, Japan, Netherlands and United States. Their objections are primarily based on the grounds that these delimitations are contrary to the accepted principles of international law. The Phillipines claim to extensive waters has not been opposed so strongly as the Indonesian claim.[80] This is only to be expected for Indonesia has relatively more strategic importance, by virtue of its geographic location, as one of the largest waterways in the world.

In separate protest notes in 1958, Australia, France, Great Britain, Japan, Netherlands, New Zealand and the United States declared that they could not recognise the validity of what would amount to Indonesian sovereignty not only over a vast expanse of high seas, including the Java Sea, but over the corresponding air space as well. They emphasised that the Indonesian claim was not in accordance with the recognised principles of international law.

Rejecting the validity of the Indonesian claim, the British Foreign Office issued the following statement on

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79. See Senator Tolentine's statement before the Second UN Conference on the Law of the Sea at Geneva on 29 March 1960. Quoted in Coquia, n. 21, p. 146.

80. See Dellapenna, n. 14, p. 53.

16 December 1957:

> H.M. Government see no reason to abandon their long standing policy of upholding the freedom of the seas. In our view the waters between many of the Indonesian islands have always constituted and do constitute, part of the high seas. 81

The United States protest note also emphasised that any action to put the Indonesian declaration of 1957 into effect would be in serious conflict with the principle of freedom of seas.[82]

It is important to note that the big maritime powers oppose all extensions of territorial waters. As a Japanese representative is reported to have said:

> So far as the breadth of the territorial sea is concerned, the only law which has been observed long enough in the international society and supported by a substantial number of countries is the three-mile rule. No other rule other than three-mile rule has been established, whether in respect of continent, island or a group of islands. 83

Therefore, he asserted:

> ... Japan cannot recognise any unilateral claim to territorial seas the extent of which exceeds three miles, until or unless this particular claim is in due course recognised by the society of nations as a newly established part of international law. 84

Discounting the need for the acceptance of the "archipelago concept", a British representative said that

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81. See Keesing's Contemporary Archives, 1-8 March 1958, p. 16043.

82. Ibid.

83. See Hisahiko Okazaki in "Comments on Territorial Waters of Archipelagos", Philippine International Law Journal, Vol. 1 (1962), p. 166.

84. Ibid.

Britain was itself an archipelago but maintained that each individual island had its own territorial waters. He said:

> We do not accept the extension of the baseline principle to archipelago - we have a set of Islands called Shetland Isles which are very much like Batanes group. Despite this we do not consider that the existence of islands some distance from the mainland constitutes a right to claim the waters in between. 85

The United States opposition rests mainly on the grounds that - 86

(1) The three mile limit is the only established rule of international law. Therefore every extension of the territorial sea is an encroachment on the high seas.

(2) The 1958 Geneva Convention provided that coastal States may exercise jurisdiction beyond the limits to the territorial sea over the resources of the continental shelf. They provided that such jurisdiction may be exercised also for such purposes as customs, immigration, sanitation control and for the prevention of smuggling. Within the contemplation of these conventions, there is ample authority for States to exercise the jurisdiction necessary to protect the resources of its continental shelf and police its control areas.

(3) Extension of national control over areas of high seas would create risks from which consequences harmful to navigation will follow. This would increase the hazards of navigation and difficulties of piloting of vessels.

(4) There is in all possibility harassment for merchant shipping on account of altered and lengthened

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85. See David P. Aiers, ibid., p. 170.

86. See Carl B. Klein, ibid., pp. 172-4.

shipping routes, besides creating import payment problems etc. for these states.

(5) Territorial sea extensions threaten to restrict the freedom of civil flights and may affect defensive military operations.

The United States also suggested that broad territorial waters would mean additional financial burdens on these nations in the effective administration and patrol of the enlarged areas. Further, a broader territorial sea would carry with it the additional burden of financing the establishment and maintenance of navigational aids required by international conventions and customs.[87]

Changing Law

We have already mentioned that the so-called "traditional international law" is undergoing a rapid change and the law of the sea is fast changing.[88] Indeed, the authority and continued usefulness of the freedom of the sea doctrine can be safeguarded only if it is interpreted in the light of changing circumstances and acted upon on the basis of reasonableness.[89]

The principle controversy relates to the question of

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87. Ibid.

88. See Ch. III, pp. 29 ff.

89. R.P. Anand, "The Tyranny of the Freedom of the Sea Doctrine", in the forthcoming issue of International Studies, Vol. 12, No. 3 (July 1973).

passage through the archipelagic waters. Whereas the Maritime Powers vehemently argue for absolutely "free passage", the archipelagic states are bitterly opposed to anything like the "corridors of free-passage",[90] through their waters although they expressly guarantee the freedom of "innocent passage". It is important to note that in the exercise of their right of "innocent passage" through territorial waters, all submarines are required to navigate on the surface and to show their flag.[91] This is most objectionable to the naval powers who want the widest possible area of high sea for navigation. They fear that if missile-launching submarines are not permitted to hide beneath the surface, much of their deterrent effect would be lost. On the other hand the coastal States argue that if these submarines as well as powerful nuclear submarines are allowed to sail beneath the territorial waters, they would pose serious threat to the security of the coastal States. Further, since they are always prone to accidents or explosions, they would greatly endanger the local population. It is certainly not a welcome proposition to live under the conscious possibility of total destruction and mass extinction. Nobody would like to have an atom-bomb on his door-step irrespective of the strongest assurances of it being safe.

It is also emphasised that merchant ships of all the

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90. See for example the statement made by Kusumaatmadja, the Indonesian Delegate to the Sub-Committee I of the Sea-bed Committee, n. 58.

91. Article 14, para 6 of the 1958 Convention on the Territorial Sea and Contiguous Zone.

countries have a great interest in these routes and that fish is an important source of protein for all mankind.[92] It is submitted that law is based on a balance of economic interests of the coastal State and the international community. The interests of the former cannot be ignored and must be protected. It is all the more essential since these archipelagos fall squarely under the category of "developing nations", and face stiff opposition in their development process.

A narrow limit of three miles, once a convenient limit for territorial waters, is no longer acceptable to a vast majority of the countries. It is still being advocated by these few big Powers obviously because it benefits them. They change their views whenever their interests change. It is perfectly understandable why United Kingdom or United States treats its own archipelagos in a restrictive way, giving every island its own territorial waters. These archipelagos are minor, non-vital parts of the main country and even a total loss of these islands would not constitute a disaster for the whole country.[93] But the position of Indonesia or Phillipines or even Fiji is vastly different. Their whole state apparatus and development precariously depend on the unity of their islands - which unity is thoroughly shattered if there are stretches of high seas between these component islands. Hence they call for wider territorial sea and reject the redundant three-mile rule.

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92. See Feliciano in n. 83, pp. 157, 159.

93. Syatauw, n. 41, p. 188.

Appraisal and Recommendation

It is clear that no consensus has evolved for any particular system of delimiting the territorial waters of these outlying archipelagic islands. But as pointed out at the very beginning of this chapter, the pronouncement of the judgement in the Anglo-Norwegian Fisheries case has had an important bearing on this problem. The main point underlying the Court's decision was its emphasis on close relationship between the mainland and its coastal waters. The criteria of peculiar economic interests and the close dependence of the local population on their coastal waters are equally applicable to the mid-ocean archipelagos. Furthermore, geographically and geologically, the mid-ocean archipelagos rank as exceptional. These exceptional characteristics therefore necessarily call for a new system of delimitation.

Considerations of equity and justice also demand a different method of delimitation of coastal waters of these countries. The latter are highly susceptible to volcanoes and earthquakes. Apart from their unique geographic features and underdeveloped economic conditions, they are at the mercy of the nature. The people of these countries now look towards the ocean with the hope of compensating some of their natural handicaps. Luckily for them, science and technology has revealed the enormous wealth-potentials of the sea. But unluckily for them, they are in the clutches of power politics. It is important to consider their case on the basis of equity and justice. As Jenks rightly pointed out:

> In the Anglo-Norwegian Fisheries case, the Court mentioned as elements in its decision certain geographical factors and economic interests which must be regarded as equitable rather than legal considerations, such as the unusual configuration of the coast, the fact that "in these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing," and "certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage". 94

Commenting on this line of reasoning of the Court, Shabtai Rosenne said:

> ... the Court has permitted the first steps to be taken towards creating a conception of international equity, not contra legem in the sense that it is sometimes said that a decision ex aequo et bono may be a decision contra legem: but intra legem, it being the substantive law.... 95

The acceptance of the "archipelago concept" would mean vesting in the coastal State of exclusive discretionary control over access of all ships and aircrafts through these enclosed waters. Professors Mc Dougal and Burke point out,

> The local state does not require complete freedom of decision in order to achieve adequate protection against undesirable effects introduced by foreign vessels in the adjacent waters: controls can be made considerably more selective than absolute exclusion of all vessels for whatever reason appeals to local authorities. 96

However, they admit that the concept of innocent passage reduces somewhat the play of coastal discretion.[97] It is

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94. C.W. Jenks, The Prospects of International Adjudication (New York, 1964), p. 328.

95. Shabtai Rosenne, International Court of Justice (Leyden, 1957), p. 428.

96. Mc Dougal and Burke, n. 1, pp. 413-14.

97. Ibid.

submitted that the alternative to the vesting of such a discretion to the coastal states, is to introduce the concept of free passage. It would then mean vesting of absolute discretion in the naval Powers to introduce foreign vessels of any kind in these waters, with complete freedom of movement, even without surfacing and showing the flag as required by the 1958 Convention. Faced with such an alternative, the former seems to be preferable . It is unreasonable to assume that vesting of such a discretion in the coastal states would necessarily mean arbitrary exclusion of any foreign vessel without any compelling reason to do the same. As regards warships, it has been rightly suggested that the coastal State should have absolute discretion to exclude them from the intervening waters.[98]

So far as fisheries are concerned, it is pointed out that "Island groups are not, ... necessarily characterised by a need for using fish as food nor do all these realistically so categorised have needs in the same degree".[99] It is suggested, therefore,

> ... exclusive allocation of fishery resources to all archipelago states would therefore be destructive of total community values. [100]

It is difficult to accept such a line of argument. Fish need not solely be used by the coastal population as their staple

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98. Ibid., p. 415.

99. Ibid.

100. Ibid.

food. To-day tinned and canned food-products are an important export commodity. These developing archipelago countries can surely use fish for such a purpose and boost their economy. In the economic interests of these countries, therefore, exclusive allocation of fishery resources is recommended.

Regarding the problem of aircrafts, we tend to agree with Professors Mc Dougal and Burke that

> it would be illusory ... to consider that exclusion of aircraft from the air above the waters of the archipelago offered any substantial degree of security. 101

Therefore, a system of identification of aircraft, such as that used by the United States and Canada, would appear to be a reasonable way of permitting archipelago states to meet this problem.[102]

The problem of archipelago countries neglected in the past, is likely to be discussed in the forthcoming conference on the law of the sea at Santiago in Chile during 1974. The most important question the conference will have to decide is the question of the width of territorial waters. The traditional three-mile rule is outdated. Claims to-day range from 3-miles to 200 miles with additional fishery zones. It seems, however, that a good number of states claim a twelve-mile territorial water belt,[103] which may be accepted as a

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101. Ibid., p. 414.
102. Ibid.
103. See George A. Doumani, Science, Technology and American Diplomacy: Exploiting the Resources of the Sea-bed (A Study prepared for the subcommittee on National Security Policy and Scientific Development of the Committee on Foreign Affairs, U.S. House of Representatives (Washington, D.C., 1971), pp. 88-89.

compromise in the forthcoming Conference.

As regards the question of archipelagos, Article 37 para 1, of the draft of the Ocean Space Treaty presented by Arvid Pardo of Malta reads:

> 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. 104

Such a proposal, it is submitted, is most unlikely to be accepted. Jens Evensen had suggested the following proposal in his preparatory document for the 1958 Geneva Conference:[105]

> 1. In 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 base-lines as provided for under Art. 5 [Art. 4 of the Convention I] 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.

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104. See U.N. Doc. A/AC.138/53, 23 August 1971, p. 27.

105. Evensen, n. 5, p. 302.

In the 1974 Conference, a compromise will have to be arrived at between the extreme claims of exclusive control over extensive waters and the rigid demand for "free passage" through these waters. It is submitted that the Jens Evensen proposal still seems to be the most reasonable and should be accepted.

CHAPTER V

CONCLUSION

The Concept of Archipelagos and the forthcoming Conference on the Law of the Sea

More or less neglected so far, the issue relating to archipelagos is likely to receive wide attention in the 1974 Conference on the Law of the Sea. In view of the oceanographic importance of States like Indonesia and the Phillipines which are vigorously making claims for extensive territorial waters on the basis of their "archipelago concept", the international community no longer can afford to ignore their claims.

The Geneva Conventions on the Law of the Sea have proved inadequate and have come to be seriously challenged. As Professor O'Connell explains:

> The Geneva system has been jeopardised because of two circumstances which were not sufficiently anticipated at the Conference, namely, decolonisation and technological progress. In the absence of agreement on the extent of the territorial sea, and of sufficient guarantees against irresponsible spoliation of coastal resources, new states feel that Geneva rules confine them in bonds which were contrived in the interests of the economic and strategic supremacy of the great powers. Increasingly they have come to question the whole continuance, especially when they contemplate the means now available to highly capitalised nations to exploit the sea and the sea-bed. 1

It is hoped that a more satisfactory system will evolve out of the third more widely represented conference on the Law of the Sea. If these hopes are belied, and the Conference results in a stalemate, the existing rules are likely to be honoured

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1. D.P. O'Connell, "Legal Controls of the Sea", Round Table (London), No. 248 (1972), p. 413.

more in breach than in observance.[2] A new era of colonialism may dawn on the sea-bed. Tensions among nations with regard to fishing, transport and exploitation of the resources of the sea would greatly increase. In the race for the newly discovered wealth, an unfair competition will prevail - the rich will become richer and the poor will go poorer. Pollution and other hazards will also increase.

An important factor which should not be ignored while evolving a law for the delimitation of territorial waters is the character of territorial waters as appurtenant to the land territory. It is the land which confers title on the coastal waters. As the islands are the "natural appendages" of the coast which they border, the protection of the territory is to be reckoned from these islands. Only that method of delimitation should be adopted which is most favourable to the coastal State, as explained by the International Court of Justice in the Fisheries case.[3]

The problem of coastal archipelagos has been resolved by the majority judgement in that case and by the incorporation of the principles of this judgement in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. The Convention prescribes straight base-lines on geographical

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2. E.D. Brown, "The 1973 Conference on the Law of the Sea: The Consequences of the Failure to Agree", in Lewis M. Alexander, ed., The Law of the Sea: A New Geneva Conference: Proceedings of the Sixth Annual Conference of the Law of the Sea Institute (Kingston, R.I., 1972), p. 67.

3. See I.C.J. Reports 1951, p. 128.

grounds leaving states free to apply this method of delimitation for every minor indentations. It is suggested that Article 4 of the Convention should be modified incorporating an express provision calling upon the coastal states to provide an economic justification as well for the application of the straight base-line system. The system of straight base-lines has, of course, great practical advantages. It makes it easier to define exactly the outer limit of the territorial sea on a chart; it facilitates navigation, inspection and supervision by authorities of the coastal states.[4]

The problem of mid-ocean archipelagos is more complex. The strongest advocates of the archipelago concept and the right to draw base-lines for measuring territorial waters from the outermost points of the outermost islands, are Indonesia and the Phillipines. Fiji joined them only in 1971. Because of the oceanographic importance of Indonesia and Phillipines, their claims have met with bitter opposition. Most of the other mid-ocean archipelagos are the insular dependencies of sovereign states, most of which are big maritime Powers and they are staunch opponents of the claims for wider territorial waters. The latter are most concerned about their right of navigation through large areas of water enclosed by the archipelagos. They would like to have "free passage" through

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4. See the remarks of Sorensan, the delegate from Denmark in the United Nations Conference on the Law of the Sea, Official Records, Vol. 3 (1958), p. 5.

these waters and especially through straits which would be closed. On the other hand, the archipelago countries are most sceptical about this so-called right of "free passage" which is not permitted even under the present system of international law which, it hardly needs emphasis, is tilted in favour of the big maritime Powers. However, having regard to the economic backwardness of these archipelago countries, their peculiar geographic features and dependency of their local population on the coastal waters, it may be suggested, that these mid-oceans archipelagos should be allowed to draw their territorial water belt from the outermost points of their outermost islands.

It hardly needs emphasis that international law is fast changing; so is the law relating to the sea. Whatever new rules are adopted to tackle the new problems, certain fundamental and overriding principles of law like equity, justice, public policy cannot be ignored. As rightly pointed out by Jenks,

> General legal principle, 'equity' and public policy are neither separable nor competing influences. It is their confluence and mutual interaction which will determine the extent to which law responds to the challenges of the time and international adjudication, as an expression of and influence upon the development of the law, plays an 'increasing part in the growth of world community'. 5

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5. C.W. Jenks, The Prospects of International Adjudication (New York, 1964), p. 768

Mid-ocean archipelagos not only possess exceptional geographic and geologic features but are also at the mercy of the nature in that they are very prone to earthquakes and volcanic eruptions. Besides these handicaps, these countries have poor economic conditions. They naturally look forward to the sea to amend some of their natural handicaps. Equity and justice demand a special and a more liberal treatment for them. Any rules that are evolved in the forthcoming conference must take into account all these considerations. The ever-changing society demands new laws and regulations to cope up with the new problems. We certainly cannot meet "the moral challenge of tomorrow with the intellectual baggage of yesterday"[6].

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6. C.W. Jenks, "Law in a World of Change: An Agenda for a Dialogue", in his Law in the World Community (London, 1967), p. 2.

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