

## ARCHIPELAGO CONCEPT OF LIMITS OF TERRITORIAL SEAS

John R. Brock

### INTRODUCTION

The oceans of the world are the free world lifelines. Operational mobility for free world naval and air forces is being drastically reduced by encroachments on the high seas by nation-states in a unilateral try at extending territorial waters in various ways. The purpose of this study is to review the efforts of certain nations to try to extend their internal and territorial waters through a unique method of measurement referred to as the archipelago concept or archipelago theory of territorial waters. This not only restricts severely the mobility of the fleets but also greatly narrows the commerce and free trade routes of the world and is thus limiting upon all nations, large and small, rich and poor.

The legal status of the unilateral declarations by Indonesia and the Philippines is reviewed in this paper. The U.S. position established in connection with the archipelago concept through decisions of the courts, by legislation, and by diplomatic action is reported. The present status of the archipelago concept so far as can be determined by the decisions of the International Court of Justice and by the international conventions is carefully surveyed. The opinions of international lawyers

writing on this subject are also covered. The necessary future action of the United States seems clear, and the suggested procedure is set forth in this thesis.

### I—BACKGROUND

**The Seas Are Our Strength.** The freedom of navigation on the high seas means the essential liberty of maritime transportation. The importance of mobility which the seas provide us was eloquently stated by Hanson W. Baldwin as follows:

The days of isolation are ended: the world needs us; we need the world. Our strategic concept must meet a threat as varied and as complex as any in our history. If we would lead from strength, we must emphasize those elements of power in which we excel: our developed economy and great wealth, our industrial power and our technological expertise, our sea and air power, and our nuclear delivery capability. We must utilize the great waters and the skies and space above us for the flexibility and mobility which the United States, more than any other world power, can exploit.<sup>1</sup>

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

Certainly today seaborne mobile forces remain the key to any consideration of land hostilities—in offense or in defense. Since the United States is a seapower—a maritime nation—and Russia is basically a land-locked nation, the U.S.S.R. would like to see the United States denied as much as possible the freedom of the use of the great ocean highway covering three fourths of the earth's surface. Russia and its satellites as well as some of the new and irresponsible nations would favor limiting the high seas in any way conceivable. The archipelago concept just happens to be another encroachment on the high seas that favors the Russian philosophy.

**Freedom of the Seas: History and U.S. Position.** The historical record of freedom of the seas is familiar. The oceans of the world were at one time claimed for exclusive use of a limited number of states. Venice, Denmark, and England claimed broad rights over portions of the high seas during the medieval period. The promulgation of Papal Bulls of 1493 purported to demarcate Portuguese rights to the east and Spanish rights to the west of an imaginary line 100 leagues west of the Azores.<sup>2</sup> Hugo Grotius, a Dutch jurist, subsequently rationalized the freedom of the seas on the ground that since the sea was not divisible it could not be appropriated to individual use from the common ownership of mankind.<sup>3</sup> Concern for the more general interest of the whole community of states ultimately succeeded in freeing the larger expanse of the oceans for relatively unhampered use of all.<sup>4</sup>

After a prolonged balancing of interests between coastal states and other states of the world community as to authority on the seas, the principles of the freedom of the seas and of a narrow breadth of territorial sea became accepted. By 1900 the three-mile or one-league limit had been positively adopted or acknowledged as law by 20 of the 21 states which claimed or acknowledged a

territorial sea at that time. In the period from 1930 onwards the permitted extent of this narrow breadth of territorial sea has been in increasing controversy, largely because of concern for access to fisheries and because of danger, from a security standpoint, of permitting the blocking-off of large areas of water as territorial sea.<sup>5</sup>

The United Nations Conference on the Law of the Sea concluded at Geneva on 28 April 1958 adopted four international conventions on the law of the sea. The United States joined with Canada in proposing a six-mile territorial sea and an additional six-mile exclusive fishing zone. This proposal was submitted to the 14th Plenary Meeting on 25 April 1958.<sup>6</sup> The proposal narrowly missed obtaining the necessary two-thirds majority. While this proposal indicated that the United States was prepared to depart from its traditional adherence to the three-mile limit in order to achieve conference agreement, Arthur H. Dean, chairman of the American delegation, made it clear that the United States would continue to adhere to the three-mile limit unless the conference agreed on a change in the traditional rule. Dean made the following closing statement at the conference:

We have made it clear from the beginning that in our view the 3-mile rule is and will continue to be established international law, to which we adhere. It is the only breadth of the territorial sea on which there has ever been anything like common agreement. Unilateral acts of states claiming greater territorial seas are not only not sanctioned by any principle of international law but are, indeed, in conflict with the universally accepted principle of freedom of the seas.

Furthermore, we have made it clear that in our view there is no obligation on the part of states adhering to the 3-mile rule to recognize claims on the part of

other states to a greater breadth of territorial sea. And on that we stand.<sup>7</sup>

The United States has always been one of the world's foremost advocates of the doctrine of the freedom of the seas and has vigorously opposed all efforts to restrict the free navigation of its war vessels and merchantmen.

The concept of the freedom of the seas likewise applies to the freedom of the airspace above the seas.<sup>8</sup> Because of this and other reasons, the United States Government, including the Navy Department, has always advocated the three-mile limit of territorial waters delimited in such a way that the outer limits thereof closely follow the sinuosities of the coastline. Sovereign claims of waters of the high seas restrict the range of war vessels and merchantmen. By reducing sovereign claims to the narrow three-mile belt, the range of these vessels is thereby expanded. The time-honored position of the Navy is that the greater the freedom and range of its warships and aircraft, the better protected are the security interests of the United States because greater use can be made of warships and military aircraft.<sup>9</sup>

Not only international prosperity but also international well-being has been enhanced in substantial measure through preservation of the oceans as a common storehouse of riches. Equality of nations has had its fullest exemplification in the fact that all states, irrespective of relative wealth and power position, have been largely free to utilize the oceans. Solidarity and expanding loyalties have been furthered as the oceans have been made to function not as barriers between peoples, such as mountains, but as easily available links of communication and transportation fostering a cosmopolitan sense of identification between peoples of otherwise distant and foreign lands.<sup>10</sup>

**Archipelago Concept.** One of the more significant concepts of encroach-

ment on the areas of high seas is the unilateral attempt of such archipelagic nations as the Philippines and Indonesia to extend their territorial seas and internal waters in an exaggerated fashion and to the great detriment of other members of the international community. The Republic of the Philippines and the Republic of Indonesia, both archipelago states, have claimed sovereignty over all waters around, between, and connecting the different islands of the respective archipelagoes. Sealanes used throughout maritime history would be taken out of areas of the high seas by these unilateral actions. The claim of the Philippines was outlined in a note of the Philippine Foreign Office on 12 December 1955.<sup>11</sup> The Indonesian claim was contained in Act No. 4 of 18 February 1960.<sup>12</sup>

The major claim sometimes made in connection with midocean archipelagoes is to delimit the territorial sea from a line connecting the outermost islands and to include all waters within the line as part of internal waters. The primary counterclaim asserts that an island in an archipelago does not differ from any other island and that each should have only its own belt of territorial sea; in this view, there would be no question of straight baselines or of internal waters.

In the archipelago concept an insular type baseline adapts the idea of a perimeter around an island or group of islands. (See Figures 1 and 2 for examples of midocean archipelagoes and coastal archipelagoes.)<sup>13</sup> Such a line around an island would touch on capes, peninsulas, offshore isles, or other prominent points along the coasts. Such a line around a group of islands, or archipelago, would box in the ensemble, the straight baseline normally touching at the more prominent geographic features of the outermost islands. This type of straight baseline according to a *State Department Geographic Bulletin* is no more justified than a corresponding line along the mainland. Again, each

island has its own normal baseline and where islands are close together their territorial seas tend to coalesce. Otherwise the situation is that sufficient water distances exist between or among the islands to justify their status as high seas.<sup>14</sup>

**Unilateral Extension of Territorial Seas Contrary to International Law.**  
 Authoritative rejection of the concept

of unilateral declaration of extension of the territorial seas by nation-states was made by the International Court of Justice in the Norwegian Fisheries Case:

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a

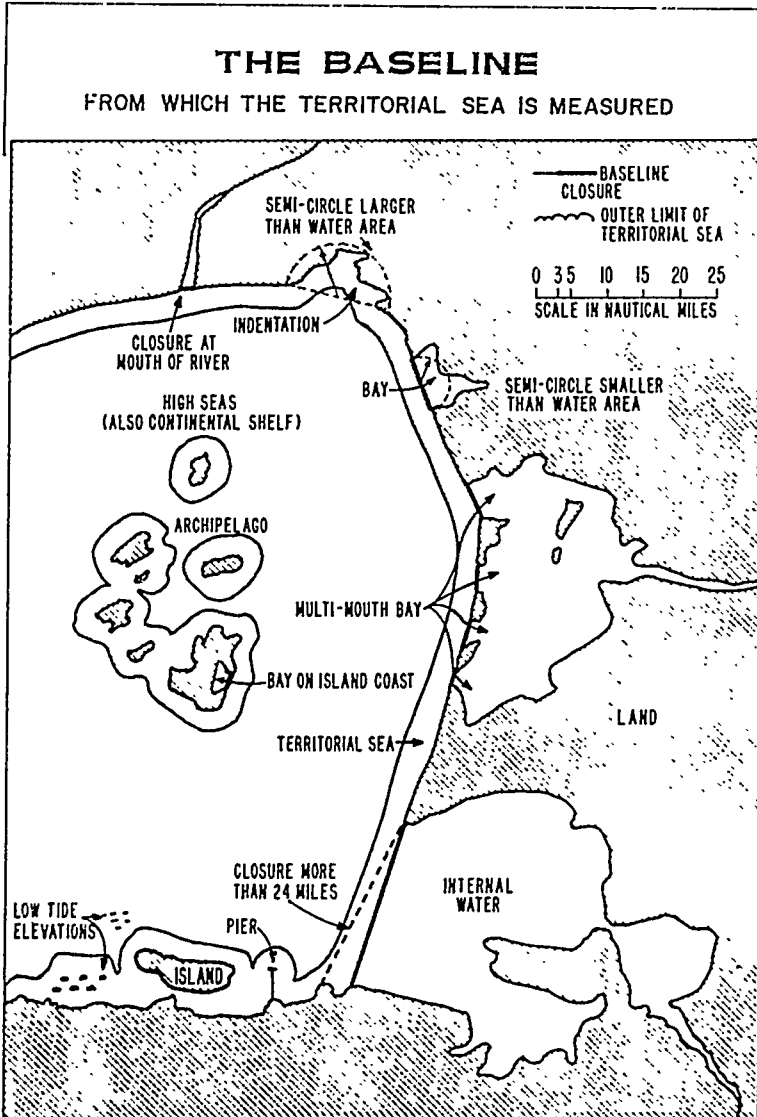


Figure 1

# THE STRAIGHT BASELINE

ALONG DEEPLY INDENTED COAST OR ONE FRINGED WITH ISLANDS

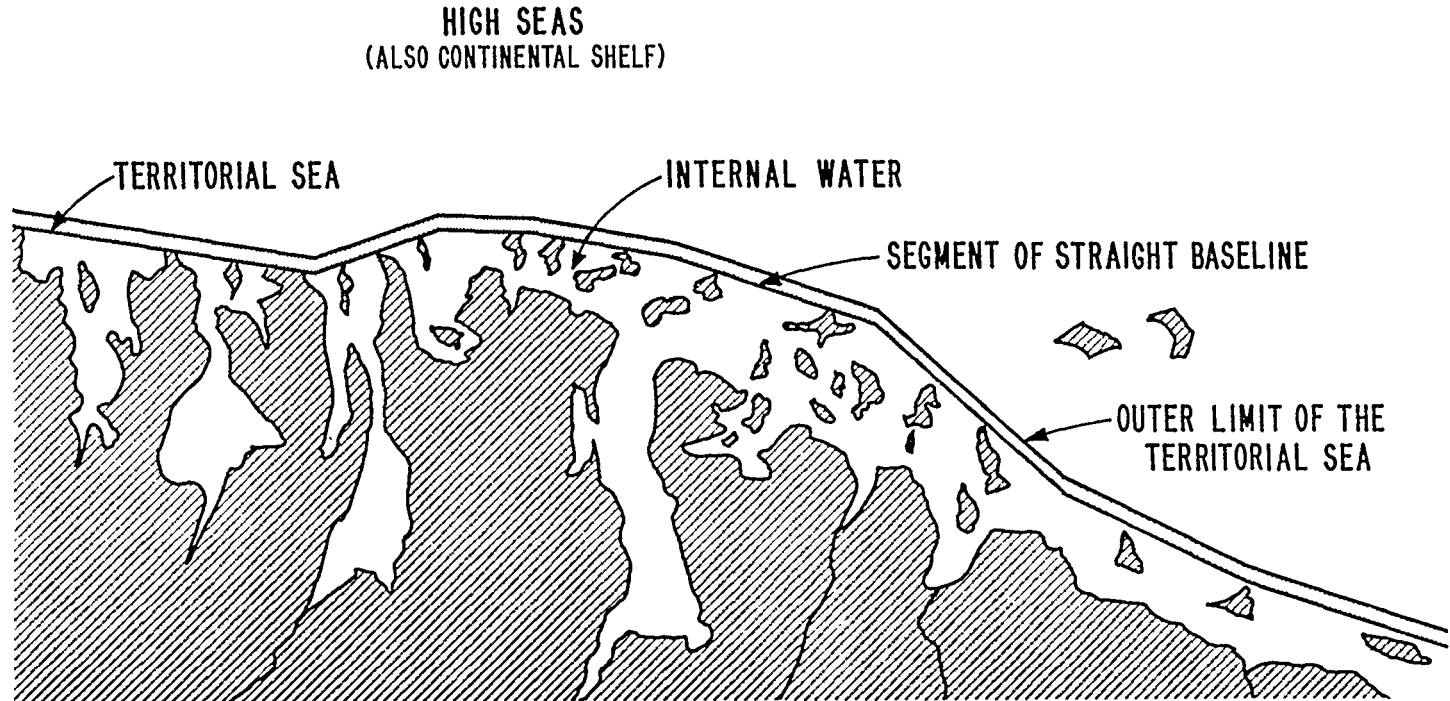


Figure 2

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.<sup>15</sup>

Nation-states claiming a competence to make unilateral determination of extensions of territorial seas are attempting to determine not only their own interests but also the interests of other states. They invade the historic rights of other states by unilateral extension of their claims. The plea of sovereignty cannot of itself give a country any right to appropriate waters which are not, according to law, its territorial waters any more than the plea of sovereignty can give a country a right to land which is not already its territory.

## II—HISTORIC CONCEPTS

**Internal Waters.** Coastal states make their most comprehensive claims to authority over certain immediately adjacent waters, called "internal waters" or "inland waters." It is to be particularly noted that Indonesia claims the waters within the Indonesian Archipelago to be internal waters. It is generally an accepted principle of international law that rights of coastal states in internal waters are as complete and absolute in matters concerning these waters as they are in matters concerning their land areas. Internal or inland waters consist of a state's harbors, ports, roadsteads, internal gulfs and bays, straits, lakes, and rivers. In these waters, apart from special conventions, foreign states cannot, as a matter of strict law, demand any rights for their vessels or subjects.

**Authority in Internal Waters.** Although not physically equivalent to each other, for purposes of law internal waters are put on the same level as land territory.<sup>16</sup> The exclusive claims which coastal states advance in this zone of

water are usually expressed in terms of sovereignty, independence, and jurisdiction. Their opponents, although conceding the comprehensive authority of the coastal state, propound another set of doctrines which purport to establish rules that derogate from the general principle; for example, with respect to entry, distress, and trade. Any accommodation of both sets of claims cannot overlook the fact that the practice of extensive state control over such internal waters has become firmly established now and is regarded as reasonable. This is understandable if it is taken into consideration that control of such waters, which because of their close connection with the coast are regarded as land territory proper, is a necessity for the protection and development of the territory and interests of the coastal state and for the protection of, access to, and exit from the territorial base. The only reservation which is made to this all-comprising right over internal waters is that the exclusive demands of the coastal state should not be exercised in an arbitrary and unreasonable manner.<sup>17</sup>

The Indonesian Archipelago declaration has been severely criticized for its transformation of extensive sea areas into internal waters. The unilateral declaration of the Indonesian Government has met with the disapproval of most of the maritime nations which have, throughout history, used these important and much traveled straits and waters around Indonesia. The United States response to the Indonesian claim appears in *The New York Times* of 18 January 1958.<sup>18</sup> Protests of some of the other countries, such as the United Kingdom, The Netherlands, Japan, Australia, France, and New Zealand, are noted in Syatauw's book, *Some Newly Established Asian States*.<sup>19</sup> Under accepted practice in internal waters, the coastal state, in the absence of agreement otherwise, controls all access of foreign vessels to internal waters what-

ever the character of the vessel, even to the extreme of arbitrary exclusion.<sup>20</sup> The only exception would be on the ground of "necessity" due to stress of weather, and even here the coastal state generally asserts control over the vessel.

**Territorial Seas.** No state or statesman will deny the fact that there is a territorial sea and that it extends along all coastlines of all countries. Such a zone of offshore water can be regarded quite logically as that margin of the sea where a state may without interference carry on littoral functions essential to national welfare. No less than 99 sovereign states have coastlines bordering the sea. Unfortunately, offshore claims vary from state to state.

Practically all coastal states characterize their claim over the territorial sea as one of sovereignty. However, the authority over the territorial sea is somewhat less comprehensive than that over internal waters in that there is a right to be free of interference in the passage of ships through the territorial sea, referred to as right of innocent passage. This right is particularly urged when the territorial sea includes a strait necessarily or conveniently used for navigation between waters outside the territorial belt.<sup>21</sup>

Indonesia declared on 13 December 1957 that all waters surrounding, between, and connecting the islands constituting the Indonesian State, regardless of their extension or breadth, are integral parts of the territory of the Indonesian State. The above statement was confirmed on 18 February 1960 in Act No. 4.

This Indonesian declaration asserting an archipelago concept of measurement of seas unilaterally attempts establishment of a regime in its waters which allows for little distinction between internal waters and territorial seas. Indonesian waters have been proclaimed internal waters. The exclusive sovereignty has been tempered slightly by a

statement which expressly accorded the right of innocent passage to foreign ships unless their behavior is detrimental to the security of the state. Since the right of innocent passage of warships is not completely settled in international law, the Indonesian declaration is of serious consequences to maritime nations.<sup>22</sup> Innocent passage is discussed in detail later in this chapter.

Thus, the authority which the Government of Indonesia has conferred upon itself is a far-reaching one. It would apparently imply that all internal waters, i.e., all waters between the islands of the archipelago, could be closed to foreign warships at any time and to merchant vessels if they are considered to endanger the security of the state. Syatauw states that this provision has understandably aroused much protest from other seafaring nations, but here, as it is so often the case, it is not the letter but the spirit of the regulation which is of importance. If the above stipulation is intended by the Indonesian Government to mean that it can close its internal waters to foreign men-of-war or even merchant vessels arbitrarily, then such an act would ignore the legitimate claims of other interested parties and disregard community practices which have been arrived at after a centuries-old process of balancing of claims and counter-claims. It has been suggested by writers such as McDougal and Bouchez that the particular configuration of Indonesia as an archipelago with innumerable islands, extensive waters, and enormous coast length might very well justify a quicker use of its sovereign authority to prevent any passage of a foreign ship than is allowed to countries with a solid land base.<sup>23</sup>

The test of legality with respect to Indonesia's exclusive claims cannot lie in the apparent meaning of a few prescriptions but in the question of whether her activities can stand the test of reasonableness. The result can be

arrived at only after a fair balancing of all relevant factors.<sup>24</sup>

**Right of Innocent Passage.** The International Law Commission in its 1956 draft took up the question of whether in waters which became internal waters when the straight baseline system is applied, the right of passage should not be granted in the same way as in the territorial sea. The Commission recognized that if a state wished to make a fresh delimitation of its territorial sea according to the straight baseline principle, thus including in its internal waters parts of the high seas or the territorial sea that had previously been waters through which international traffic passed, other nations could not be deprived of the right of passage in those waters. Article 5, paragraph 2, of the Convention on the Territorial Sea and the Contiguous Zone, adopted at the Geneva Conference on the Law of the Sea in 1958, provides:

Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in article 14 to 23, shall exist in those waters.<sup>25</sup>

Should the nations of the world acknowledge the claim of Indonesia to the archipelago waters, Indonesia has indicated by her actions that she would not follow the above provision except perhaps on terms strictly of her making and with no assurance of the right of innocent passage guaranteed to all. Specific incidents of Indonesian actions contrary to the above article are stated in detail on page 345. The Explanatory memorandum issued by Indonesia, quoted on page 347, states that "Indonesia may withdraw the facilities granted." It seems that a so-called grant of innocent passage by Indonesia in

internal waters is to stimulate commercial shipping and that the "concessions" are a matter of grace on the part of Indonesia and not a matter of right for any nation.<sup>26</sup>

Correspondence from the Office of the Legal Adviser, U.S. Department of State, had the following comment on the enjoyment of what is known as the right of innocent passage:

While [the territorial sovereign] may regulate at will matters pertaining to fisheries, the enjoyment of the underlying land, coastal trade, police and pilotage [as well as] the use of particular channels, it is not permitted to debar foreign merchant vessels from the enjoyment of what is known as the right of innocent passage, so long as the conduct of a vessel is not injurious to the safety and welfare of the littoral State.<sup>27</sup>

According to Jessup:

The right of innocent passage seems to be the result of an attempt to reconcile the freedom of ocean navigation with the theory of territorial waters. While recognizing the necessity of granting to littoral states a zone of water along the coast, the family of nations was unwilling to prejudice the newly gained freedom of the seas. As a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law.<sup>28</sup>

The Convention on the Territorial Sea and the Contiguous Zone, concluded in 1958 at the Conference on the Law of the Sea, included the following provisions on the right of innocent passage as article 14:

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.



2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.

6. Submarines are required to navigate on the surface and to show their flag.<sup>29</sup>

In defining what is "innocent passage," the Convention article 14, paragraph 4, departed from the text of the International Law Commission draft which provided that "passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State . . ." <sup>30</sup> In lieu thereof the Conference adopted in the Convention on the Territorial Sea and the Contiguous Zone the following definition: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state."

In placing emphasis on *passage*, as such, and not on the *acts committed*

during passage, the provision has broadened the rights of the coastal state and would seem to allow it to interfere with passage on such grounds as nature of the cargo or its ultimate destination.<sup>31</sup>

Eighteen states submitted comments on the International Law Commission draft of 1956 on the right of innocent passage. Twenty-five states commented on the 1955 draft. Of these, no state denied the right of innocent passage for ships *other than warships* as a general principle of international law.

The qualifications on the right of innocent passage flow from the basic proposition that "the sovereignty of a State extends . . . to a belt of sea adjacent to its coast, described as the territorial sea."<sup>32</sup> Ships exercising the right of innocent passage have never been deemed to enjoy more than a "qualified immunity" from the shore state's jurisdiction, to borrow a phrase from Jessup.

Sir Maurice Gwyer, a delegate of Great Britain at the Conference for the Progressive Codification of International Law held at The Hague in 1930, after giving recognition to "the right of foreign ships to navigate the territorial waters of the coastal state in the exercise of the right of innocent passage," added:

. . . it is not to be assumed for one moment that a ship which is exercising the right of innocent passage is outside the sovereignty or jurisdiction of the coastal State for all purposes. No coastal State could admit such a proposal and no maritime States whose ships are navigating the waters of a coastal State would endeavour to assert such a proposal.<sup>33</sup>

**Corfu Channel Case.** The right of innocent passage was liberally construed by the International Court of Justice in the Corfu Channel case (United Kingdom v. Albania).<sup>34</sup> Following the end of the Second World War, British vessels

cleared the Straits of Corfu of mines between the Greek island of Corfu and the mainland shore of Greece and Albania. Shortly thereafter, two British destroyers struck mines while traversing the Straits. Great Britain then sent minesweepers into the Straits, in accordance with a decision of the International Mine Sweeping Commission, and this action was protested by Albania on the grounds of invasion of Albanian territorial sovereignty. It was the opinion of the Court that the Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied. Further, the Court did not characterize those measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.

The right of innocent passage for warships was explicitly upheld by the Court in the following language:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.<sup>35</sup>

McDougal points out that it was clearly assumed as a basis of this decision that the character of a vessel does not necessarily determine whether passage through straits is innocent. The Court assimilated warships to merchant ships with respect to protection of a right of access to this part of the marginal belt.<sup>36</sup>

The right asserted in this case was directly connected with the use of the territorial sea although it involved

*passage through a strait.* The principles contained in this case may be highly significant should Indonesia try to close the many straits to warships on the basis of their transit not being innocent merely because of their status as warships.

There is no longer any significant dispute as to the right of innocent passage (subject to regulations of the coastal state) for merchant ships in the territorial sea, at least in the absence of a state of hostilities. However, there is some difference of opinion between nations as to the right of innocent passage of warships in these areas. Some countries contend that prior authorization is necessary from the coastal state; some contend that there should be prior notification from the warship to the coastal state; and some contend that none of these clearance procedures is necessary for passage. The 1958 Convention does not provide for either prior authorization or prior notification in the case of warships but does provide in article 14(6) that "submarines are required to navigate on the surface and to show their flag" when passing through territorial waters. The state of the law has been disputed by the Soviets, but all proposals at the first Conference which required either prior notification or authorization for passage of warships through the territorial sea were rejected, thus showing the intent not to include such provisions or limitations.<sup>37</sup>

Although the Convention as it now stands contains no special provision relating to the innocent passage of warships, and the text would warrant the conclusion that warships have the same rights in this respect as other ships, one cannot ignore the proceedings of the Conference. Particularly troublesome is the reservation made by Russia and other bloc countries reserving the right "to establish procedures for the authorization of the passage of foreign warships" through its territorial waters. There may be serious questions on this

point in the future, and any extension of territorial seas by Indonesia and the Philippines in those critical areas of the world may have dire effects on maritime traffic through those waters.

The above discussion related to innocent passage through territorial seas. As has been previously pointed out as a general rule, there is no right of innocent passage for any ship, merchant or warship, in internal waters under rules of international law. Should the claimed waters be determined internal waters instead of territorial seas, the legal restrictions under present concepts of international law would be even more severe. As has been pointed out Indonesia has indicated she would permit passage of vessels if their passage was not detrimental to the State. Such action would be a matter of grace and not a matter of right. This is a far cry from the centuries-old practice of passage through these strategic waters under the principles of high seas.

**U.S. Congressional Committee Studies Innocent Passage.** The question of innocent passage is a two-edged sword. Maritime nations look for as few restrictions for their ships as possible. Nations with long coastlines generally give some thought to adding restrictions to shipping and holding to the rights of the coastal state. In this connection extracts from hearings before a committee of our own Congress is in point. The House Committee on Armed Services conducted hearings on 9 and 10 July 1963 on the subject of Russian trawler traffic in U.S. territorial waters. The Committee report contained the following pertinent comments:

The Navy view on the presumption of innocence with respect to the passage of trawlers close to the U.S. shores was presented by Admiral Reed. It is a question, he said, of interpretation of what is prejudicial to security. Lacking evidence of any overt act which

could be considered a potential hazard to security—such as stopping, anchoring, or behaving in a suspicious manner—and in the light of a general pattern of ordinary navigation, he indicated that it is to the mutual interest of all nations that the right of innocent passage not be denied under circumstances such as those dealt with in this report.

It would seem that a more discriminating application of the doctrine of innocent passage to foreign shipping is in order. To the subcommittee there seems to be a distinction between a privately owned ship designed and operated for normal commercial or peaceful purposes and a Government-owned vessel which is equipped or operated in a manner as to cause a reasonable person to question the normalcy or peacefulness of its presence along our shores.<sup>38</sup>

**Airspace.** It is important to note that the right of innocent passage applies to ships and *not* to aircraft. Aircraft do not enjoy this right and may enter the airspace above the territorial sea only with the consent of the coastal state. Only above the high seas is there an absence of any restriction pertaining to sovereign rights. The complicated structure of international airways with their technical requirements must in all cases conform to the sovereign pattern of land and the marginal seas. Planes of one state may fly over the territorial sea of another state only by bilateral or multilateral agreements, and such accord is by no means always assured in the present-day world. Flight of military aircraft must adhere strictly to practices incorporated in the Law of the Sea Conventions.<sup>39</sup> The Soviet denial of freedom of flight to either commercial or private civil aircraft by treaty or

otherwise is emphasized by Soviet attempts to deny freedom of flight even over the high seas by repeated aggressive attacks upon foreign aircraft. An example of utter disregard for international law is shown in the Soviet attack on 1 July 1960 on a U.S. RB-47 reconnaissance aircraft over international waters. The Soviets attempted to force the plane off course into Soviet territory. They failed in this but did shoot the plane down over the high seas.<sup>40</sup> There have been dozens of such attacks over the years.<sup>41</sup>

### III—ARCHIPELAGO CONCEPT

**Archipelago Defined.** Archipelago is a Greek word that means "chief sea." The term now applies to any broad expanse of water that contains a number of islands, and often it is used for the islands themselves. The term "archipelago" may be defined as follows: "An archipelago is a formation of two or more islands (islets or rocks) which geographically may be considered as a whole."<sup>42</sup> In some archipelagoes the islands and islets are clustered together in a compact group, while others are spread out over great areas of water. Sometimes they consist of a string of islands, islets, and rocks forming a fence or rampart for the mainland against the ocean. In other cases, they protrude from the mainland out into the sea like a peninsula or a cape, like the Cuban Cays or the Keys of Florida.

Geographically these many variations may be termed archipelagoes. For this thesis two basic types of archipelagoes will be discussed: Coastal archipelagoes and outlying (or midocean) archipelagoes.

Coastal archipelagoes 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 territorial seas. A typical example is the coastline of Norway

forming a marked outer coastline. Finland, Greenland, Iceland, Sweden, and Yugoslavia, as well as certain stretches of the coasts of Alaska and Canada, are other areas with coastal archipelagoes.

Outlying (midocean) archipelagoes are groups of islands situated in the ocean at such a distance from the coasts of firm land as to be considered an independent whole rather than forming part of an outer coastline of the mainland. The Faeroes, Fiji Island, Galapagos, Hawaiian Islands, Indonesia, Japan, the Philippines, the Solomon Islands, and the Svalbard Archipelago are examples.

There are several basic principles of international law which must be constantly borne in mind in answering questions as to what rules of international law govern the concrete delimitation of the territorial waters of an archipelago. Some of these basic rules concern the straight baseline system governing heavily indented coastlines, the waters of isolated islands, the principle of the freedom of the seas, and rules governing bays and fjords.

The attempts to discover or reach a consensus respecting delimitation of the territorial sea in midocean archipelagoes began after the First World War. Of the scientific association, only the *Institute de Droit International* and the American Institute of International Law thought that the islands ought to be treated as a unit. The International Law Association included nothing on this problem in its 1926 Draft Convention. The 1929 *Harvard Research in International Law* suggested in its draft convention on territorial waters that each island should have its own territorial sea and that this was adequate also for archipelagoes.<sup>43</sup> The preparatory work for the 1930 conference indicated possible agreement along the lines of treating certain island groups as a whole, but the conference did not succeed in reaching any firm agreement. The Law of the Sea Conventions of 1958 and 1960 left the problem

for further study just as was done by the 1930 Convention. The following discussion covers opinions of writers on international law on the subject, the lack of codification by the various conventions, and finally a study of the U.S. position on this question.

**Concept of Writers on International Law.** Outlying midocean archipelagoes, including Indonesia and the Philippines, were distinguished from coastal archipelagoes in the preparatory study for the 1958 Conference on the Law of the Sea by Evensen of Norway who discussed "Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagoes."

Where authors on international law have considered the problems of archipelagoes they tend to look upon such formations generally as units. This concept therefore entails the legal implications on the delimitation of territorial waters of the archipelagoes. A few of the more noted writers have commented as follows.

Philip C. Jessup adopted the following rules: "In the case of archipelagoes the constituent islands are considered as forming a unit, and the extent of territorial waters is measured from the islands farthest from the center of the archipelagoes."<sup>44</sup> No maximum is proposed by Jessup as to the distance between the islands and islets of such archipelagoes.

Hyde seems to advocate the view that archipelagoes may juridically be considered a unit. He states:

Where, however, a group of islands forms a fringe or cluster around the ocean front of a maritime State it may be doubted whether there is evidence of any rule of international law that obliges such State invariably to limit or measure its claim to waters around them by the exact distance which separate the several units.<sup>45</sup>

Colombos writes as follows:

The generally recognized rule appears to be that a group of islands forming part of an archipelago shall be considered as a unit and the extent of territorial waters measured from the centre of the archipelago. In the case of isolated or widely scattered groups of islands, not constituting an archipelago, the better view seems to be that each island will have its own territorial waters, thus excluding a single belt for the whole group. Whether a group of islands forms or not an archipelago is determined by geographical conditions, but it also depends, in some cases, on historical or prescriptive grounds.<sup>46</sup>

Sir Gerald Fitzmaurice, the British jurist, who served on the International Court of Justice, has written:

The facts are that in the beginning, States applied the ordinary rule of a territorial belt around all the *individual* islands of a group, separately. If the islands were close enough, these waters *ipso facto* overlapped and made a zone. If not, there was a gap of high seas between them. No suggestion was made for treating groups as a *unit* for territorial waters purposes, with a belt of territorial sea round the unit as a whole, based on lines joining the individual islands, and with an interior zone of national waters within the islands and the baselines. At the next stage (i.e., about the period of the 1930 Conference), there was a movement in favour of baselines joining islands in a group, if sufficiently close, but many States still did not subscribe to the idea, while those that favoured it did so only on the basis that there was to be definite limit of twice the breadth of territorial waters, or of ten or

twelve miles, for such lines. Also, the waters inside the lines were to be territorial, not internal. However, nothing came of this at the 1930 Conference, and subsequent State practice was hardly altered at all in the direction even of drawing any lines between the islands of a group.<sup>47</sup>

Waldock, writing about the 1930 Conference, had the following to say concerning the reluctance of nations to take a position on the archipelago problem.

Unquestionably, there was a marked tendency in 1930 to favour the introduction of a special rule for archipelagoes, whether coastal or ocean, but subject to a limit of width between the islands and with a strong reservation by some states against the waters being treated as *inland waters*. Gidel, who was a member of Sub-Committee No. II, afterwards expressed the view that until a new rule was framed the general law of territorial waters applied.<sup>48</sup>

**Codification by Conferences Not Conclusive on Archipelagoes.** Arthur Dean points out in his article in the *American Journal of International Law* that The Hague Conference study in 1930 suggested as a possible compromise that all waters in the archipelago should be territorial waters. The study concluded that in the case of midocean archipelagoes "exorbitantly long base-lines, closing vast areas of the sea to free navigation and fishing, are contrary to international law." He further states that the study also concluded that whether the waters within the archipelago can be considered as internal waters depends upon "whether such water areas are so closely linked to the surrounding land domain of the archipelago as to be treated in much the same manner as the surrounding

land."<sup>49</sup> This apparently refers to coastal archipelagoes and would be in keeping with the reasoning in the Norwegian Fisheries Case of some 20 years later which directly related to the coastal islands or archipelagoes off Norway. The Hague Conference left for further study the general status of archipelagoes in international law.

It is to be specifically noted that article 4 of the *Convention on the Territorial Sea and Contiguous Zones of 1958* limits the enclosing of waters between islands as internal waters to the situation of the *coastal* archipelagoes.<sup>50</sup>

The new concept of historic title to a maritime area was presented at the second law of the sea conference by both the Philippine and Indonesian delegates. They claimed that their archipelagoes were historical units enclosing the claimed sea areas on the basis of historic as well as geographical right. They admitted, however, that their archipelago theory had not yet found general recognition in international law.<sup>51</sup> The Philippine delegate stated that the Philippines had been considered "from time immemorial" as a "single territorial unit," citing the Treaty of Paris of 1898 as an instance. The Indonesian Statute of 1960 similarly states that "since time immemorial the Indonesian Archipelago has constituted one entity." This philosophy met with little success at the conference.

The wide variety of rules and of state practice prevented the International Law Commission of 1955 from drafting specific articles concerning the extent and delimitation of the territorial waters of archipelagoes. As far as coastal archipelagoes are concerned, article 5 of the draft endeavored to embody the principles laid down by the International Court of Justice in its 1951 judgment in the Anglo-Norwegian Fisheries Case. Where outlying (midocean) archipelagoes are concerned, the draft articles of the International Law Commission do not give any specific guidance as

to the governing principles of international law.<sup>52</sup>

The text evolved by the International Law Commission with respect to islands, and contained in its 1956 and final report, together with its commentary thereon, read: "Article 10. Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark."

The more significant and pertinent statement contained in the commentary to the above article relating to archipelagoes reads as follows:

(3) The Commission had intended to follow-up this article with a provision concerning groups of islands. Like The Hague Conference of International Law of 1930, the Commission was unable to overcome the difficulties involved. The problem is singularly complicated by the different forms it takes in different archipelagoes. The Commission was prevented from stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject. It recognizes the importance of this question and hopes that if an international conference subsequently studies the proposed rules it will give attention to it.<sup>53</sup>

Thus, both the 1930 and the 1958-60 Conference failed to consider any attempt toward codification of principles on the treatment of archipelagoes. It is the opinion of the writer that if and when there is another law of the sea conference, the question of archipelagoes will be of top priority for consideration since their status not only is of importance to the owner nation but is of deep importance to every maritime nation.

**U.S. Position on Delimitation of Archipelagoes.** It is the traditional

position of the United States that its territorial sea is three nautical miles in breadth measured from low-water mark on its coasts. An island has its own territorial sea measured from the same baseline. As an example, it is the U.S. position that each of the islands of the Hawaiian Archipelago has its own territorial sea, three miles in breadth measured from low-water mark on the coast of the island. The waters seaward of these belts of territorial sea are high seas over which no State exercises sovereignty.<sup>54</sup>

The same position has been taken in connection with the Pacific Trust Territory Islands: The Marshalls, the Carolines, and Marianas. These unitary administered islands each have a band three miles wide around each individual island. Thus, the treatment of the islands and groups of islands, with respect to territorial waters, is approximately the same as the treatment of larger land masses such as continents.

G. Etzel Pearcy, Geographer, Department of State, has written:

Islands have their own territorial seas, which may or may not coalesce with the territorial sea of the mainland. Islands within 6 miles of each other have territorial seas which of necessity overlap and in steppingstone fashion may extend the sovereignty of the state over distances far beyond the mainland coast. This situation is true off the coast of Massachusetts, where the territorial sea of Martha's Vineyard coalesces with that of the mainland as well as with that of Nantucket Island. As a result territorial waters extend some 30 miles seaward from the Massachusetts coast opposite Martha's Vineyard.

In contrast, the channel islands, off the coast of southern California (Catalina, San Clemente, Santa Rosa), are too distant from

the coast for their territorial seas to merge with that of the mainland. Likewise, Block Island, off the coast of Rhode Island, is more than 6 miles from the nearest land along the New England coast.<sup>55</sup>

**Case of Civil Aeronautics Board v. Island Airlines, Inc.** The United States has followed the concept that every island of an archipelago has its own territorial sea and the waters (which do not overlap) interlacing the archipelago are high seas. This principle was thoroughly discussed in the 9th United States Circuit Court in 1964 in the case of *Civil Aeronautics Board v. Island Airlines, Inc.*<sup>56</sup> Additionally, this case considered in detail the principles involved in reference to historical waters. The latter principle was one of the bases of the Philippine claim to internal waters within the Archipelago of the Philippines. The United States judicial decision on both points will be examined here.

In the Spring of 1963, Island Airlines, Inc. (Island), commenced operations between several of the major islands of the State of Hawaii (State) under the authority of the Public Utilities Commission of the State of Hawaii (PUC), but without attempting first to obtain from the Civil Aeronautics Board (CAB) a certificate of public convenience and necessity as required. Shortly thereafter, on 24 May 1963, the CAB began an action against Island in the U.S. District Court for Hawaii, claiming that Island was an air carrier engaged in interstate air transportation. The CAB sought a declaratory judgment as to its exclusive jurisdiction and an injunction against operations by Island until it obtained from the CAB the certificate of public convenience and necessity called for by the Civil Aeronautics Act. Island answered that its flights between the major islands of Hawaii were intrastate flights.

The major islands making up the State of Hawaii are separated from each other by the waters of the North Pacific

Ocean, and the distances between the islands of Kauai and Oahu, Oahu and Molokai, Molokai and Maui, and Maui and Hawaii. The channels in between these islands vary from 7.5 to 62.9 nautical miles.

The Court expressed the view that air transportation over the high seas outside of the territorial limits of a state constitutes air transportation over a "place" outside of that state. It referred to the Geneva Convention on the High Seas of 1958, the U.S. precedents, and the legislative history of the Civil Aeronautics Act.

Island urged that the channels between the islands of the State of Hawaii are within the boundaries of the State and therefore that flights between the islands are flights over the territorial waters of Hawaii and not through the airspace over any place outside of the State. Island argued that straight baselines should run completely around the eastern perimeter of the Hawaiian Archipelago from island headland to island headland and on the western perimeter should run straight from Niihau's Kawaihoa Point to Hawaii's Ka Lae, thus including within its boundaries all of the open ocean between "the cord of the bow and the bow itself;" however, not even Kamehameha II ever made any such grandiose claim.

At least three factors must be taken into consideration in determining whether a state has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the state claiming the historic right; (2) a continuity of this exercise of authority; and (3) the attitude of foreign states. The authority which a state must continuously exercise over a maritime area in order to be able to claim it validly as historic waters is sovereignty. This means it must be claimed as a part of its national domain. In the absence of international approval of the claim, the activities carried on by the state in the area in question must be something far more objective than simply unilateral claims by local legisla-



tion. The sovereignty claimed must be effectively exercised. The intent of the state must be expressed by deed and not merely by proclamations. Also, the acts must have notoriety which is normal for acts of the state.

The burden of proving the open and notorious use of the area in question, said the Court, rests on the state's claiming that its historical waters possess a character inconsistent with the principle of the freedom of the high seas.

The United States never maintained either locally, nationally, or internationally that the channel waters were being claimed by the United States as historical waters, and thus internal waters of Hawaii.

Consistent with its international policy of freedom of the seas and a narrow territorial water, the various departments of the Government, in all hearings before Congress, insisted that the channel waters, beyond the three-mile limit, were high seas.

The Court concluded that "the boundaries of Hawaii were fixed at three nautical miles from the line of ordinary low water surrounding each and every one of the islands composing the State of Hawaii." In any event, the flight patterns for interisland travel were such that aircraft would have to fly over the high seas well beyond any area which might be claimed by Hawaii to be part of its territorial sea.

It was therefore the opinion of the Court that, whether Island flies over the channels or outside them, it is compelled to fly its passengers over places outside the State's boundaries in order to fulfill its obligations as an air carrier between the islands of Hawaii.

#### IV—UNILATERAL DECLARATIONS OF SERIOUS IMPORTANCE

**Indonesia.** The Philippines and Indonesia have each unilaterally adopted the so-called archipelago theory by which

they would draw a perimeter around their outermost island, to the east, west, north, and south. Then they claim all the waters lying within that perimeter as historic internal waters. These claims have not been recognized by the United States. Through such internal waters there would be no right of innocent passage except subject to unilateral control, no right of submerged navigation, and no right of aircraft overflight in the absence of express treaty provisions. Extending outward from these archipelago perimeters, these two countries would also have a belt of territorial seas, which Indonesia claims out to 12 miles and the Philippines claim at varying limits allegedly established by the 1898 and 1900 treaties between the United States and Spain ceding the Philippines.<sup>57</sup>

The great extent of such claims can be appreciated only by realizing that Indonesia extends over 3,000 miles east and west and over 1,300 miles north and south. Likewise, the Philippines, which consists of over 7,000 islands, extends roughly 600 miles east and west and 1,000 miles north and south. Many sealanes lie within these self-proclaimed internal waters.

Advocates of the archipelago theory claim that ships on peaceful missions can navigate the claimed internal waters, but the transitory nature of such rights is well exemplified by recent Indonesian regulations, effective as of August 1960, which forbid Dutch vessels to pick up or discharge passengers or cargo in Indonesian waters.<sup>58</sup> Thus, even though Dutch ships may sail upon the surface of these seas, they can have no hope of commercial operations.

One glance at the map of the Indonesian Archipelago is sufficient to prove the important place which the sea occupies in this area. The archipelago is comprised of five main islands of Sumatra, Java, Borneo, Celebes, and New Guinea, surrounded by a host of smaller islands. This is an area of more

than *three million* square miles with only about 700,000 square miles comprising land.

The strategic importance of Indonesia lies in its position as a bridge between the Asian and Australian continents and the fact that it is surrounded by most of the important waters of Asia. In the east it is bordered by the Pacific, in the west by the Indian Ocean. In the north it is separated from the Asian mainland by the Strait of Malacca and the South China Sea, and from the Philippines by the Sulu Sea, while in the south the Indian Ocean and the Arafura Sea separate it from Australia. The commercial and maritime importance of this area is enhanced by the many lines of world communication which pass through these waters, most of them being concentrated on a few important straits, such as Sunda Strait, Strait of Macassa, and Torres Strait.

On 14 December 1957, the Government of Indonesia, following a meeting of the Council of Ministers which took place on 13 December 1957, issued an "Announcement on the Territorial Waters of the Republic of Indonesia." It was stated, *inter alia*, in the announcement that:

Historically, the Indonesian Archipelago has been an entity since time immemorial.

In view of territorial entirety and of preserving the wealth of the Indonesian state, it is deemed necessary to consider all waters between the islands an entire entity.

On the ground of the above considerations, the Government states that all waters around, between and connecting, the islands or parts of islands belonging to the Indonesian archipelago irrespective of their width or dimension are natural appurtenances of its land territory and therefore an

integral part of the inland or national waters subject to the absolute sovereignty of Indonesia. The peaceful passage of foreign vessels through these waters is guaranteed as long and insofar as it is not contrary to the sovereignty of the Indonesian State or harmful to her security.

The delimitation of the territorial sea, with a width of 12 nautical miles, shall be measured from straight baselines connecting the outermost points of the islands of the Republic of Indonesia.<sup>59</sup>

The outstanding features of this declaration can be summarized as follows:

(1) Indonesia is an archipelago and must therefore be treated as one unit.

(2) All waters surrounding, between, and connecting the islands of the archipelago, regardless of breadth, are to be considered as internal waters.

(3) The breadth of Indonesian territorial sea is 12 miles, to be measured from baselines connecting outermost points of the islands at the fringe of the archipelago.

(4) Innocent passage is guaranteed as long as it neither prejudices nor violates the sovereignty and security of Indonesia—as determined by Indonesia.

As could be expected, the declaration evoked much comment from other members of the community of states. Their reaction can be divided into three categories. First, there was the group of states which strongly criticized the Indonesian actions as being contrary to the rules of international law. They were Australia, France, the United Kingdom, Japan, New Zealand, the United States, and The Netherlands. These objections came principally from the big maritime nations whose interests were directly affected by the restrictions imposed by the Indonesian decree. The great majority of states did not react in

any way. Russia unequivocally came out in favor of the Indonesian claims, which was considered by Russia to be fully in accord with the rules of international law.<sup>60</sup>

Indonesia has proceeded to implement the government declaration of 1957 by legislation of 18 February 1960 identified as Act No. 4. This legislation provides in part as follows:

#### Article 1

(1) The Indonesian waters consist of the territorial sea and the internal waters of Indonesia.

(2) The Indonesian territorial sea is a maritime belt of a width of 12 nautical miles, the outer limit of which is measured perpendicular to the baselines or points on the baselines which consist of straight lines connecting the outermost points on the low-water mark of the outermost islands or part of such islands comprising Indonesian territory with the provision that in case of straits of a width of not more than 24 nautical miles the outer limit of the Indonesian territorial sea shall be drawn at the middle of the strait.

(3) The Indonesian internal waters are all waters lying within the baselines mentioned in paragraph (2).

\* \* \* \* \*

#### Article 3

(1) Innocent passage through the internal waters of Indonesia is open to foreign vessels.

(2) *The innocent passage as mentioned in paragraph 1 shall be regulated by Government Ordinance* (emphasis added).<sup>61</sup>

The Government of Indonesia invoked three arguments in support of its claim: the geographical configuration, territorial integrity, and the fact that since time immemorial the Indonesian Archipelago has constituted one entity. As to the first two arguments, they can never justify a claim to parts of the sea contrary to the general rules of international law. The third factor could only be an argument if from time immemorial the claimed waters had been considered as an integral part of the archipelago state, and moreover the other interested states had acquiesced in such a situation.

The American Embassy at Djakarta, on 31 December 1957, acting under instructions, delivered a note of protest to the Indonesian Foreign Office with reference to the Indonesian announcement of 14 December 1957.<sup>62</sup>

The Australian Minister for External Affairs announced on 15 January 1958 that the Government of Australia had informed the Government of Indonesia that Australia would not recognize or be bound by Indonesia's announced claim to sovereignty over the Java Sea and its superjacent airspace.<sup>63</sup>

On 13 January 1958 the Japanese Vice Minister for Foreign Affairs, Katsumi Ohno, addressed a communication to the Indonesian Government reading as follows:

I have the honour to refer to Communiqué issued by the Government of the Republic of Indonesia on December 13, 1957, claiming that all waters around, between and connecting islands belonging to the Indonesian Archipelago irrespective of their width of dimension form integral parts of inland or national waters subject to the absolute sovereignty of the Republic of Indonesia and also that Indonesian territorial sea shall have a width of twelve nautical miles measured from straight baselines connecting

the outermost points of the islands of the Republic of Indonesia.

The Government of Japan considers that the claims of the Government of the Republic of Indonesia, regarding internal waters and territorial sea as stated in the said Communique can not be admitted under established international law. The Government of Japan, therefore, is unable to recognize the validity of such claims and will not deem them as binding upon its nationals, vessels and aircraft.<sup>64</sup>

The Indonesian argument of immemorial usage is without foundation since the government declaration dates only from 13 December 1957 and an immemorial claim could only have been based on prior claims of The Netherlands. However, the Dutch made no claim to internal waters. As a matter of fact the Indonesian declaration specifically revoked past claims of the Netherlands Indies territorial sea since it was no longer in accordance with the Indonesian declaration "as it [meaning The Netherlands] divides the land territory of Indonesia into separate sections, each with its own territorial waters."<sup>65</sup>

The International Law Commission in its study on the "Juridical Regime of Historic Waters," states that: "Usage, in terms of a continued and effective exercise of sovereignty over the area by the State claiming it, is then a necessary requirement for the establishment of a historic title to the area by that State."<sup>66</sup>

In view of the many protests to the unilateral declaration and in the absence of effective exercise of sovereignty over the area claimed, in the opinion of the writer, it cannot be said that the claimed national usage has developed into an international usage.

Describing the Indonesian concept of the inland waters and the right of

innocent passage or absence of such a right, the official explanation continues as follows:

The inland seas of Indonesia as referred to in this clause (Article 1. C1.3) are all waters situated in the inside of the baseline consisting of seas, bays, straits and canals.

Differing from its sovereignty over its territorial seas, the sovereignty of Indonesia over the inland seas is not restricted by the right of innocent passage, though Indonesia itself may make restriction of its own by providing certain facilities based on certain considerations.

It is necessary to guarantee sea traffic to foreign ships with a view to the importance of traffic by ships in the *inland sea* for our own interest as well as for the interest of the world community. Differing from innocent passage by foreign ships in territorial seas which is a right recognized by international law, *innocent passage in the inland seas is a facility purposely granted by Indonesia*. As a consequence of this difference, Indonesia may withdraw the facilities granted in the inland seas, whereas innocent passage in territorial seas basically cannot be harmed by a maritime state (emphasis added).<sup>67</sup>

It is clear from the above that it is not the intention of Indonesia to honor the provision of Indonesian Act No. 4 of 18 February 1960 concerning "innocent passage by foreign vessels through the internal waters" of Indonesia. It is clear from the Department of Information Bulletin quoted above that except in cases of specific approval the Republic of Indonesia intends to prohibit passage through the seas around the islands of Indonesia when she is physi-

cally capable of so doing. Her practices have also indicated this to be true.

Some examples of the actions of Indonesia evidencing this intent are as follows: (1) A decree of the Chief of Staff of the Navy of Indonesia, issued at Djakarta, 30 August 1958, effective that day, announced the closure of territorial waters of Halong Bay and part of the territorial waters of Ambon Bay. Excepted were local fishing vessels and vessels of the Indonesian Navy. (2) Effective 4 December 1958 it was announced that the territorial waters of West Kalimantan had by decree been closed. The Indonesian Navy gave "security and defense of the State" as the reason for the regulation. (3) The acting Chief of Staff of the Indonesian Navy on 21 September 1959 issued an order, effective 17 September 1959, prohibiting Dutch vessels from passing through Indonesian territorial waters excepting by a certain sea route unless special permission of the Indonesian Navy permitted passage. These incidents are discussed in Whiteman, *Digest of International Law*.<sup>68</sup> Ambassador Dean, in discussing this subject, stated: "Through such internal waters there would be no right of innocent passage except subject to unilateral control, no right of submerged navigation and no right of aircraft over-flight in the absence of express treaty provisions."<sup>69</sup>

**Philippines.** The Philippine position on unilateral declaration of the archipelago concept of waters is based partially on the geographic configuration of the Philippine Archipelago. The archipelago is constituted by a compact and closely knit group of islands. It is shaped in the form of a triangle, whose three angles are represented by the island of Luzon in the north, by the island of Palawan in the southwest, and by the island of Mindanao in the southeast. The islands are so situated that a straight baseline could be drawn from points in one outer island or islet to another without

traversing a large expanse of water as in the case of Indonesia. Inside this triangle are located several seas (the largest of which is the Sulu Sea with an area of 85,000 square miles of high seas). There are approximately 7,100 islands, islets, and shoals of different sizes and formations.

The geographic and historical concept which the Philippine Government has used in justification for its claim has been explained by Dr. Juan M. Arreglado, Legal Advisor to the Philippine Department of Foreign Affairs, as follows:

It is to be noted in this connection that when the Philippine Islands were ceded by Spain to the United States in accordance with the terms and conditions of the Treaty of Paris concluded between the two countries, the operative stipulation concerning the cession reads in part as follows:

Spain cedes to the United States the archipelago known as Philippine Islands, and comprehending the islands within certain lines drawn along specified degrees longitude East and latitude North. Article III, Treaty of Paris concluded between the United States and Spain on 10 December 1898.

This particular provision has been interpreted by some countries which are opposed to the Philippine claim of sovereignty over its inter-island waters to the effect that the waters comprehended within the imaginary lines mentioned in the Treaty were not included. In other words, they sustained the view that only the islands were transferred but not the intervening waters. Such inter-

pretation is wholly inaccurate for it fails to take into account the fact that the term "archipelago" as used in the treaty stipulation in question is essentially a geographical concept, more than anything else. So much so that the *Encyclopaedia Britannica* has defined an "archipelago" as an "island-studded sea."

\* \* \*

It follows from the foregoing that the term "archipelago" means not only the groups of islands composing it, but also the waters lying in, between, surrounding and connecting all its constituent islands; and that there cannot be an archipelago without its necessary appurtenances of water areas surrounding and connecting the islands composing the archipelago. If within the legal, as well as the physical, concept of an island the surrounding water forms as much a part of the island as its terrestrial territory, the more so in the case of an archipelago, which is composed of numerous islands and whose only geographical and physical link between and among them is the sea water. Hence, by their very physical nature, geographical location and close relationship with the islands surrounding them, the sea areas around, between and connecting the different islands of the Philippine Archipelago cannot be considered otherwise than as necessary appurtenances of its land domain. Obviously, the latitudes and longitudes described in Article III of the Treaty of Paris have particular reference to the identification of the islands located outside the periphery of the Philippine Archipelago but falling within the limits of those imaginary lines.<sup>70</sup>

According to the *notes verbal* presented by the Philippine authorities commenting on the draft articles of the International Law Commission, the Philippine Government seems to delimit the territorial waters of the country in a somewhat unique manner. In these notes it is stated, *inter alia*:

... all waters around, between and connecting different islands belonging to the Philippine Archipelago irrespective of their widths or dimensions, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines.<sup>71</sup>

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

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

All other water areas embraced within the lines described in the Treaty of Paris of 10 December 1898 are considered as maritime territorial waters of the Philippines for... purposes of protection of its fishing rights, conservation of its fishery resources, enforcement of its revenue and anti-smuggling as the Philippines may deem vital to its national welfare and security, of innocent passage over those waters.<sup>72</sup>

The lines here referred to are the boundaries of the Commonwealth of the Philippines as laid down in the various conventions mentioned above. They are drawn along certain degrees longitude east and latitude north. The present stand of the Philippine Govern-

ment seems to be that all the waters situated inside these international treaty limits are to be considered as the marginal seas of the Philippines.

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

Jorge R. Coquia, a Philippine writer on waters of archipelagoes, states in part:

Essentially, an archipelago is a body of water studded with islands, rather than islands with waters. In other words, the waters between and around them form part and parcel of the territory. The delimitation of their water areas is therefore entirely different from the territorial waters of continental coasts like the United States or Australia. Following the traditional rule of the delimitation of territorial waters of each island would in effect be disintegrating an archipelagic state itself for there would thus exist a regime of high seas in and around it. The continuity of the jurisdiction of the government would thus be disrupted, for even warships of other states can go about the islands, and the state would be powerless to drive them out.<sup>73</sup>

Coquia has written advocate positions for the Philippine Department of Justice in support of the Philippine Archipelago concept. However, he admits in his article in *Far Eastern Law Review*:

It was very apparent during the Conference at Geneva that most of the maritime powers would not agree to the use of straight baselines on archipelagoes on the ground that vast areas of the high seas which were formerly used

freely by ships of all states would be converted to territorial waters.<sup>74</sup>

Stating the position of the United States, Delegate Arthur Dean declared that if islands are lumped into an archipelago, and a straight baseline system is used connecting the outermost points of such islands, vast areas of the high seas formerly used for centuries by the ships of all countries are converted into territorial waters or possibly into internal waters.<sup>75</sup>

A note of 12 December 1955 received by the Secretary-General of the United Nations from the Ministry of Foreign Affairs of the Philippines read:

The official pronouncement of the Government of the Republic of the Philippines, as contained in its diplomatic notes to various countries, is as follows:

The position of the Philippine Government in the matter is that all waters around, between and connecting the different islands belonging to the Philippine Archipelago irrespective of their widths or dimensions, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines. All other water areas embraced in the imaginary lines described in the Treaty of Paris of December 10, 1898... are considered as maritime territorial waters of the Philippines...

It is the view of our Government that there is no rule of international law which defines or regulates the extent of the inland waters of a state.<sup>76</sup>

The *Digest of International Law*, prepared by and under the direction of

Marjorie M. Whiteman, Assistant Legal Advisor, Department of State, contains a statement concerning the United States position on the Philippine "historical claim" as follows:

The United States attitude with reference to the position of the Philippine Government was that the lines referred to in bilateral treaties between the United States and the United Kingdom and Spain merely delimited the area within which land areas belong to the Philippines and that they were not intended as boundary lines. The United States, in 1958, stated that it recognized only a 3-mile territorial sea for each island.<sup>77</sup>

Further statements on the United States position on the Philippine unilateral declaration were contained in telegram traffic between Washington and Manila. One such item, airgram No. G-195 of 4 May 1960 from State Department files, reads:

It was reported that Senator Arturo M. Tolentino, chief of the Philippine delegation to the Conference on the Law of the Sea held at Geneva in 1960, had informed a news reporter that no protest was registered by any of the countries represented at the Conference, including the United States, to the Philippine position and that this meant tacit recognition of the Philippine claimed geographical limits. However on April 25, 1960, during the course of his address at Conference, the United States delegate (Dean), as recorded in the Summary Record of the Plenary Meeting held at 9:15 P.M. on that day, stated:

On various occasions speakers had referred to treaties to which the United States was a Party, and had placed interpretations on

them at variance with the official United States position and with the facts. Other statements had been made with respect to matters not before the Conference which had been contrary to official United States views. The United States delegation had not considered it necessary or desirable from the standpoint of orderly debate to enter into a discussion of extraneous matters. It merely wished to say that its silence was not to be construed in any way as acquiescence in any views stated at the Conference which were inconsistent with the official position of the United States Government and already made known, in most instances, to the Governments concerned through the diplomatic channel.<sup>78</sup>

The Philippine historical approach to the archipelago concept is summarized as follows by Max Sorenson, a representative at the Law of the Sea Convention:

*It seems quite clear that these treaties refer to the islands, that is the land territory, and not the areas of the sea within the specified lines. This manner of defining the boundaries by longitudes and latitudes may have been the only practical method in view of the immense number of islands and could not be interpreted as revealing any intention to make provisions for the intervening waters outside what would otherwise be the ordinary limits of territorial waters.*

The Constitution of the Philippines, of February 8th, 1935, art.



1, defines the national territory by referring to these treaties and "all territory over which the present government of the Philippine Islands exercises jurisdiction." It is a matter of constitutional interpretation whether this article comprises the sea areas between the islands, but in whatever manner it is interpreted, the scope of the treaties should not give rise to any doubt.<sup>79</sup>

## V—NATION-STATE PRACTICE

**Practice Concerning Coastal Archipelagoes.** The so-called Norwegian system for the delimitation of territorial waters regards the coastal archipelago as the real outer coastline. This practice has been supported by the International Court of Justice in its Judgment of 18 December 1951 in the *Anglo-Norwegian Fisheries Case*. The special characteristics of the Norwegian coastline is of particular significance in this system of delimitation. The Norwegian coastal archipelago consists of some 120,000 islands, islets, and rocks and extends along most of the coast. It must clearly be kept in mind that the Norwegian case relates to coastal archipelagoes and not to outlying or midocean archipelagoes such as those of Indonesia and the Philippines. The main features of this straight baseline system of delimitation are as follows:

- (1) A continuous line of straight baselines is drawn all along the coast. The outermost points of the coastal archipelago, including dry-lying rocks, are used as base points.
- (2) There are no maximum lengths for such baselines. Each of them is dependent upon the geographical configuration of the coastline.
- (3) The baselines follow the general direction of the coast.

(4) There is no connection between the length of the baselines and the breadth of the marginal sea.

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

(6) The outer limits of the marginal sea are drawn outside and parallel to such baselines at the distance of four nautical miles in the case of Norway.

**Norwegian Fisheries Case—What it Means.** One of the main questions before the International Court of Justice in its judgment of 18 December 1951 in the *Anglo-Norwegian Fisheries Case* was the status of the waters of the coastal archipelagoes of Norway. Certain of the principles laid down in this case though relating to a coastal archipelago situation will undoubtedly eventually be applied to outlying (midocean) archipelagoes.

The Court rejected the British contention regarding the strict coastline rule "requiring the coastline to be followed in all its sinuosities." The Court further stated that the so-called arcs-of-circles method advocated by the United Kingdom "is not obligatory by law." The Court expressly rejected the British contention to the effect that under international law there existed a principle limiting the length of baselines to ten nautical miles.

The most significant part of the decision concerned the status of the water within the archipelagoes. It was held that inside the straight baselines, the area must be regarded as internal waters. The result may have been different if the passage between the islands had formed a strait.<sup>80</sup>

**State Practice in Archipelagoes in General.** The following survey is based in part on information contained in a study conducted by Jens Evensen on states' practices in connection with treatment of archipelagoes<sup>81</sup> and from Whiteman, *Digest of International Law*.<sup>82</sup> Evensen conducted his study for the United Nations in connection with the 1958 Conference on the Law of the Sea. He was at that time an Advocate at the Supreme Court of Norway.

**Coastal Archipelagoes.** A number of nations now follow the general principles contained in the Anglo-Norwegian Fisheries Case or some modification of these principles in connection with the delimitation of territorial waters of coastal archipelagoes. The following are examples.

**Norway.** By Royal Decrees of 12 July 1935 and 18 July 1952 the base-points and baselines have been fixed in detail all along the Norwegian coasts. There are a total of 123 baselines which have been drawn. The longest lines are 45.5 nautical miles, 44 nautical miles, 40 nautical miles, and 38.8 nautical miles. Fifty more baselines are ten nautical miles or more in length. The International Court of Justice has held that the drawing of these baselines is not contrary to international law.

**Iceland.** The straight baseline system for delimiting territorial waters has been applied by Iceland. Forty-seven consecutive baselines are drawn around the coasts of Iceland, enclosing the waters of its coastal archipelagoes, islands, and rocks within these lines. No maximum is stipulated for the lengths of baselines. They vary in length according to the particular geographic features. A four-mile zone of marginal seas is drawn outside and parallel to the baselines. The waters inside the baselines, including the waters inside or between

the islands and islets of coastal archipelagoes, are considered internal waters.

**Denmark.** The waters between and inside the Danish coastal archipelagoes are considered Danish internal waters. Denmark applies straight baselines for such delimitations and a ten-mile maximum for baselines is provided for in certain of her regulations and decrees. The three main passages to the Baltic formed in part or in whole by the Danish Archipelagoes are held to be international straits. They are open to navigation though these waters are situated between and inside the Danish Archipelagoes.

**Sweden.** Sweden applies the straight baseline system for the delimitation of its territorial waters, enclosing within the baselines the waters between the islands of a coastal archipelago and between the islands and the mainland. No maximum has been fixed for the length of such baselines. Various lines exceed ten nautical miles. However, none of these baselines are comparable in length to some of the longest lines in force along the coastal archipelago of Norway or Iceland. A four-mile limit of marginal seas is drawn outside and parallel to the baselines. The waters inside the baselines are internal waters.

**Finland.** Finland has one set of rules for coastal archipelagoes and one for islands too far out at sea to be included in the outer coastline. A straight baseline system is applied enclosing the waters of its numerous coastal archipelagoes. Finland has established maximum length of baselines of "twice the breadth of the marginal seas." The breadth of Finland's marginal seas is four nautical miles. Archipelagoes too far out at sea to be included in the coastal archipelagoes are also considered as a whole, but the baselines are limited to a length twice the breadth of marginal seas. As applied to the outlying

archipelagoes this is only three nautical miles. Consequently, the maximum length of baselines in these cases is six miles. The waters between and inside the islands or islets of Finnish Archipelagoes are considered as internal waters.

**Yugoslavia.** The coastal archipelagoes situated almost all along the outer coast of Yugoslavia are considered within its outer coastline by drawing of straight baselines.

The belt of marginal seas of six nautical miles is drawn outside and parallel to these baselines. No express maximum is given as to the length of baselines. The waters between the islands of a Yugoslav coastal archipelago and between the islands and the mainland are considered internal waters.

**Saudi Arabia.** Islands and coastal archipelagoes have been made part of the outer coastline of Saudi Arabia by drawing straight baselines. The maximum length of such baselines is 12 nautical miles. The waters lying between islands, islets and the mainland are internal waters.

**Egypt.** Egypt provides for straight baselines of a maximum length of 12 nautical miles drawn between the mainland and islands and from island to island, thus including coastal archipelagoes within the outer coastline. The waters inside such archipelagoes are internal waters.

**Cuba.** The Cuban Cays extending out into the ocean along the Cuban mainland are regarded as Cuba's outer coastline.

The straight baseline method of measurement for delimitation with regard to coastal archipelagoes has been used by the countries discussed above. The waters inside such baselines are considered internal waters. The countries therefore consider they have the right to close such waters for navigation

by foreign vessels unless the passage concerned is an international strait.

The United Kingdom, the United States, and Australia have taken a different view even as to coastal archipelagoes.

**United Kingdom.** The United Kingdom has always taken a very strict view concerning the archipelagoes question. She did not recognize the Norwegian claims to marginal seas following straight baselines drawn along the outermost points of coastal archipelagoes. This matter was decided against the United Kingdom in the Fisheries Case. Each island had, according to the English view, its own territorial waters. In a few exceptional cases the United Kingdom, in dealing with overseas territories, has treated groups of islands as a unit. Jamaica is a case in point, whereas British Honduras is a case where she has adhered to the old traditional concept.

**Australia.** During the Anglo-Norwegian Fisheries Case it was stated that the Barrier Reef—a coastal archipelago situated off Queensland—was separated from the mainland by high seas beyond the distance of three marine miles from low-water mark of the mainland and the islands respectively.

**United States.** The political, judicial, and legislative position of the United States has been consistent on this subject and is discussed in detail in other parts of this thesis. This country has been one of the staunchest advocates of the view that archipelagoes, including coastal archipelagoes, cannot be treated in any different way from isolated islands where the delimitation of territorial waters is concerned. For example, the waters of the archipelagoes situated outside the coasts of Alaska are delimited by each island of the archipelagoes being considered as having its own marginal sea of three nautical miles. Where islands are six miles or less apart

the marginal seas of such islands will intersect. Even in this case however, straight baselines are not applied for such delimitations.

**State Practice Concerning Outlying (Midocean) Archipelagoes.** Different views and approaches unilaterally applied in midocean archipelagoes have been discussed in connection with Indonesia and the Philippines. The following concepts are also indicated in various other midocean archipelagoes.

**The Faeroes.** This archipelago is situated in the North Atlantic and consists of 18 inhabited islands. Denmark and the United Kingdom made an exclusive fishery zones agreement of 22 April 1955. The Faeroes are treated as a unit and the outer limit of territorial waters is drawn by means of a mixed system of arcs and straight lines. Though the straight baseline system is not expressly applied, it appears that the agreement used the concept from the Anglo-Norwegian Fisheries Case; namely, that with heavily indented coastlines the outer limits of territorial waters need not necessarily follow all the sinuosities of the coast, but can be drawn in such a manner as to follow the general direction of the coast.

**The Svalbard Archipelago.** The coastline of this archipelago is heavily indented by fjords, bays, and sounds. Under the terms of the Spitzbergen Treaty of 9 February 1920 it is recognized that Norway has sovereignty over this archipelago but that the contracting parties to the treaty are to enjoy equal rights of fishing and have equal liberty of access and entry to the territorial waters of the archipelago. Norway has not yet laid down the limits of the territorial waters of Svalbard, but it is assumed that the Norwegian Government considers the archipelago as a unit.

**Iceland.** Iceland may be properly regarded as a midocean archipelago. Although Iceland has drawn a line of straight baselines all along the coast from the outermost points, she has not applied this approach to the extreme. Iceland has not included in this line islands lying far out at sea such as the islands of Grimsey, Kolbeinsey, and Geirfugladrangur. Each of these islands has been considered to have its own territorial waters.

**The Galapagos.** This archipelago comprises some 15 larger islands and a series of smaller islands. The Government of Ecuador considers this archipelago as a unit and delimits its territorial waters by drawing straight baselines between "the most salient points of the outermost islands forming the contour of the archipelago of Galapagos."

The above examples show a number of outlying archipelagoes that are treated by the respective national authorities as units with regard to the delimitation of their territorial waters. It is clear that the United States and the United Kingdom do not consider their insular possessions as units where the delimitation of the territorial waters is concerned. The Fiji Islands, Cook Islands, and Hawaiian Islands are examples.<sup>83</sup>

## VI—REFLECTIONS AND CONCLUSIONS

**Considerations Concerning Protest by Third States.** Unilateral claims which are not supported by international law, such as have been discussed in this thesis, must be protested by the maritime community of nations to assure that these "illegal" claims do not become "legal" ones. It is pointed out by Leo J. Bouchez that the first requirement for a protest is that it be made by the competent authorities of the protesting state. The purpose of a protest is the maintenance of rights; in other

words, a protest is frequently directed against the violation of a right. In this case the right is the right of use of the high seas. The failure to protest can later result in a successful plea of right by the claimant state.<sup>84</sup>

The special function of a protest with reference to the creation of territorial rights was pointed out by Charles Hyde when he stated:

Obviously, a State may actively challenge the encroachments of a neighbour upon its soil, and by so interrupting the continuity of the adverse claim, prevent the perfecting of a transfer of sovereignty that might otherwise result. It is believed that a diplomatic protest might suffice for that purpose, even though unsupported by the use of force.<sup>85</sup>

For the creation of a historic title, the peaceful and continuous exercise of rights is the most important element. Consequently, a protest is of great importance to prevent the establishment of a historic title. In support of this view the opinion of MacGibbon is of interest. He states: "Protest is generally accepted by writers as a means of preventing the maturing of a prescriptive or historic title."<sup>86</sup> He further described timely protest as follows:

It is submitted that a protest, if it is prompt, unequivocal and maintained, and if it is coupled with recourse by the protesting State to all other legitimate demonstrations of its will to preserve its rights, will suffice to counter effectively the continuity and the peaceful character of a nascent prescriptive claim and will prevent the creation of any general conviction that the condition of affairs is in conformity with international order.<sup>87</sup>

Another important question is the moment at which a state has to protest. If a state is acquainted with a claim, and it is its intention to protest, then it is

advisable to protest as soon as possible. A lasting silence can easily be interpreted as acquiescence in, or at least as indifference towards, a claim. It is in the interest of the state which disapproves of a certain claim to protest immediately after being aware of it, even if an effective realization of the claim has not yet taken place.

A protest can be made in writing or orally, in either case via diplomatic channels. Such a protest, especially when made only once, often has not more than a formal meaning. Such is surely the case when a state after a first protest does not show further interest in the claim. A diplomatic protest can also be made repeatedly; then possible rights will be sufficiently safeguarded.

In the opinion of Bouchez, in relation to the effectiveness of a protest, one has to distinguish between four situations:

- (1) a formal protest as such;
- (2) a formal protest followed by diplomatic negotiations;
- (3) a formal protest and conduct in accordance with the protest;
- (4) the absence of a formal protest, but the line of conduct of the protesting state clearly expresses a protest.<sup>88</sup>

Not only have there been formal protests immediately following the declarations of Indonesia and the Philippines, but also the lines of conduct of the protesting states clearly express objection to any inclusion of these vast areas of the high seas as internal waters or territorial seas of the claiming states. Certainly it cannot be said that there is an acquiescence of the community of states in this matter.

None of the generally accepted tests of international law relating to this matter have been established by either Indonesia or the Philippines. These tests were discussed in the case of *Civil Aeronautics Board v. Island Airlines, Inc.* (previously reviewed); namely, (1) the exercise of authority over the area by the state claiming the historic right;

(2) a continuity of this exercise of authority; and (3) that the attitude of foreign states be in conformity with the claim.

**Conclusions on Status of Archipelagoes.** It is clear that the prevailing opinion at the 1958 Conference favored continued customary development of prescriptions concerning archipelago states. Yugoslavia and the Philippines offered proposals, neither stipulating any specific limitations upon the method of delimitation that might be adopted in treating the group as a unit, but both were withdrawn. Denmark declared in favor of the use of the straight-line system where the lines were limited to 15 miles and the waters enclosed subject to a right of innocent passage; this was supported by Iceland. Nevertheless, it was decided, and with the apparent acquiescence of the archipelago, states, that the matter required "further study."

Professor McDougal points out in *The Public Order of the Oceans* that it is clear that no consensus has evolved for any particular system of delimiting the bounds of authority over the waters of archipelagic islands. This does not mean, however, that archipelago states are free to adopt whatever methods they may prefer. The declaration of the court in the Anglo-Norwegian Fisheries Case that "the delimitation of sea areas has always an international aspect" would seem applicable to this problem as well as to other delimitation issues.<sup>89</sup>

The Indonesian declaration of 13 December 1957 promised the elaboration of the national position on the laws of the sea at the Geneva Conference. This was indeed done, but with very moderate success.

The principal basis of the Indonesian claims, i.e., the special regime of an archipelago, was not adopted by any of the conventions. What is more, some deliberate attempts to include a provision to that effect had to be given up

for lack of support. On the other hand, no general denunciation of the archipelago concept can be found in the conventions. Therefore, this question, like the breadth of the territorial sea, constitutes one of the remaining problems of international law. Syatauw points out, however, that the fact that the Philippines are taking more or less the same position as Indonesia and that support was given by Yugoslavia, and in a sense also by Denmark, proves that there was at least some understanding for the Indonesian position.

It is clear from the above that no hard and fast rules exist as to the delimitation of the territorial waters of archipelagoes. In view of the great variety of geographical, historical, and economical factors involved, it would hardly be feasible, or even desirable, to try to lay down hard and fast rules in an international convention on archipelagoes. In the opinion of the writer it is not in the interest of the maritime nations to do so. Any changes will not be in their interest. This does not mean, however, that certain principles do not exist. Certainly the principles are clear as to coastal archipelagoes.

#### VII—RECOMMENDED UNITED STATES CONDUCT IN THE USE OF ARCHIPELAGIC WATERS

It has been pointed out above that the United States has made repeated diplomatic protests to both the Philippine and Indonesian Governments, opposing their unilateral actions of encroachments on the high seas contrary to the accepted principles of international law. In addition, due notice has been made at the international conferences on the law of the sea by the United States and other nations.

The United States and other nations must continue to operate as previously in and through the waters involved with both merchant and warships, always making certain never to request per-

mission to make the transit nor to notify the nations involved of our intent to transit the waters which we rightly contend are areas of the high seas. Use of these waters often by units of the Navy should be accomplished on every convenient occasion. If we should make requests for permission to transit the claimed area we would be acknowledging their claims.

The same procedure of transit through airspace (nonterritorial spaces) without notification or by request should be accomplished with frequent regularity.

Fortunately, no specific incidents have been found where any of the nations have requested permission from Indonesia or the Philippines to transit the unilaterally claimed waters.

There is little doubt that there is an international race for grabbing areas of the high seas and reducing the freedom of movement of navies and merchant fleets. This deeply affects the United States.

For many decades the United States produced more raw materials than it consumed. This is no longer true. It has changed from a raw material surplus nation to a raw material deficit nation. The United States annually spends about \$6 billion on imports of raw

material. With 60 percent of all its imports in the form of raw and unmanufactured material, the United States has become the world's greatest importer. America's imports in the area of raw materials are so vital to its productive capacity that without them its factories would be severely handicapped and its defense industries placed in dire straits.<sup>90</sup>

The United States is a maritime nation whose economy and very existence depends on the ocean highways of the world. Trade and merchant fleets have always been important in the greatness of this country. The future of the nation depends on the seaborne mobile bases that move across the oceanic free real estate of the world. The American nation is more dependent on the oceans of the world than ever before. It is strongly in our national interest to guard the right of unencumbered free transit through the highly strategic narrow waters of the world such as those of the Indonesian and Philippine Archipelagoes. The continued mobility of the American Navy and merchant fleet, unencumbered by national encroachment upon the ocean highways, is essential to the destiny of this nation, of its world leadership position, and the well-being of all the peoples of the earth.

## BIBLIOGRAPHY

- "Announcement on the Territorial Waters of the Republic of Indonesia." *Indonesian Law Journal "Hukum,"* 1958, pp. 5-6.
- Arreglado, Juan M. "The Legal Status of Philippine Territorial Waters." *Lyceum of the Philippines Law Review*, v. IV, 1959-1960, pp. 286-287.
- Baldwin, Hanson W. "United States Global Strategy." Lecture. U.S. Naval War College, Newport, R.I.: 11 June 1964.
- Bouchez, Leo J. *The Regime of Bays in International Law*. Leyden, Netherlands: Sythoff, 1964.
- "The Boundaries of the Territorial Waters of the Republic of Indonesia." *Bulletin, Department of Information—Republic of Indonesia*. Special Issue, 1963, p. 29.
- British Yearbook of International Law, 1951*. London: Oxford University Press, 1952.
- British Yearbook of International Law, 1953*. London: Oxford University Press, 1954.
- British Yearbook of International Law, 1954*. London: Oxford University Press, 1956.
- "Cold War: U.S. and Free World Views and Moscow Version." *The New York Times*, 17 July 1959, p. E5.
- Colombos, Constantine J. *The International Law of the Sea*. London: Longmans, 1959.
- Committee of American Steamship Lines. Facts about Our American Merchant Marine*. Washington: n.d.
- Coquia, Jorge R. "The Problem of the Territorial Waters of Archipelagoes." *Far Eastern Law Review*, v. VII, 1959, p. 435.
- Dean, Arthur H. "The Law of the Sea." *The Department of State Bulletin*, 7 April 1958, pp. 574-581.
- \_\_\_\_\_. "The Second Geneva Conference on the Law of the Sea." *The American Journal of International Law*, October 1960, pp. 751-789.
- Federal Supplement* (Minneapolis: West, n.d.) v. CCXXXV, p. 990.
- Fenwick, Charles G. *International Law*. New York: Appleton-Century-Croft, 1948.
- The Hague. International Court of Justice. *Reports of Judgments . . . 1947-1948*. The Hague: 1949.



The Hague. International Court of Justice. *Reports of Judgments . . . 1951*. The Hague, 1952.

Hearn, Wilfred A. "The Law of the Sea—the 1958 Geneva Conference." *The JAG Journal*, March-April 1960, pp. 3-6, 26-29.

Hyde, Charles C. *International Law, Chiefly as Interpreted and Applied by the United States*. 2d rev. ed. Boston: Little, Brown, 1945. v. I.

"Indonesia Ruling to Shut Java Line." *The New York Times*, 20 June 1960, p. 56.

"Jakarta Sea Plan Is Scored by U.S." *The New York Times*, 18 January 1958, p. 3:1.

Jessup, Philip C. *The Law of Territorial Waters and Maritime Jurisdiction*. New York: Jennings, 1927.

Letter from Secretary of State Dean Rusk to Attorney General Robert F. Kennedy. U.S. Dept. of State, 21 May 1964.

McDougal, Myres S. and Burke, William T. "Crisis in the Law of the Sea." *The Yale Law Review*, February 1958, p. 539.

\_\_\_\_\_. *The Public Order of the Oceans*. New Haven: Yale University Press, 1962.

Memorandum from Victor A. Wallace, Office of the Legal Adviser, U.S. Dept. of State, to Gerrance G. Leonhard, U.S. Bureau of Inter-American Affairs, 31 October 1956.

"Nationality Responsibility of States Territorial Waters." *The American Journal of International Law*, April 1929, special supp., pp. 243-380.

Oppenheim, Lassa F.L. *International Law*. 8th ed. London: Longmans, Green, 1955, v. I.

Pearcy, G. Etzel. "Measurements of the U.S. Territorial Sea." *The Department of State Bulletin*, 29 June 1959, pp. 963-971.

Sorensen, Max. "The Territorial Sea of Archipelagoes." *Varia Juris Gentium*. Leyden, Netherlands: 1959, p. 47.

Syatauw, J.J.G. *Some Newly Established Asian States and the Development of International Law*. The Hague: Nijhoff, 1961.

"Text of U.S. Address and Excerpts from Soviet and Others in UN on RB-47." *The New York Times*, 26 January 1960, p. 4.

United Nations. International Law Commission. *Report*. 11th Sess., Supp. 9 (A/3159). New York: 1956.

\_\_\_\_\_. \_\_\_\_\_ *Yearbook, 1950*. New York: 1957. v. II.

United Nations. International Law Commission. *Yearbook, 1956*. New York: 1957. v. II.

\_\_\_\_\_. Office of Legal Affairs. *Juridical Regime of Historic Waters, including Historic Bays*. Doc. A/CN. 4/143. New York: 1962.

\_\_\_\_\_. \_\_\_\_\_. *Laws and Regulations on the Regime of the Territorial Sea*. New York: 1957.

\_\_\_\_\_. Secretariat. *United Nations Conference on the Law of the Sea*. Preparatory Document No. 15, A/CONF. 13/18. New York: 29 November 1957.

United Nations Conference on the Law of the Sea. Geneva, 1958. *Official Records*. Geneva: 1958. v. II.

"U.N. Conference on the Law of the Sea." *The Department of State Bulletin*, 30 June 1958, p. 1111.

U.S. Congress. House. Committee on Armed Services. *Russian Trawler Traffic in United States Territorial Waters*. Report. Washington: U.S. Govt. Print. Off., 1963.

\_\_\_\_\_. Senate. Committee on Interior and Insular Affairs. *Submerged Lands*. Hearings. Washington: U.S. Govt. Print. Off., 1952.

U.S. Dept. of State. Office of the Geographer. *Sovereignty of the Sea*. Washington: U.S. Govt. Print. Off., 1965.

U.S. Office of Naval Operations. *U.S. Life Lines Imports of Essential Materials*. Washington: 1959.

*U.S. Treaties and Other International Agreements*. Washington: U.S. Govt. Print. Off., 1962. v. XIII, pt. 2.

Whiteman, Marjorie M. *Digest of International Law*. Washington: U.S. Dept. of State, 1965. v. IV.

## NOTES

1. Hanson W. Baldwin, "United States Global Strategy," Lecture, U.S. Naval War College, Newport, R.I.: 11 June 1964.
2. J.P.A. Francois, "Regime of the High Seas," United Nations, International Law Commission, *Yearbook, 1950* (New York: 1957), II, pp. 36-38.
3. Charles G. Fenwick, *International Law*, 3d ed. (New York: Appleton-Century-Croft, 1948), p. 418.
4. Constantine J. Colombos, *The International Law of the Sea*, 4th rev. ed. (London: Longmans, 1959).
5. Marjorie M. Whiteman, *Digest of International Law* (Washington: U.S. Dept. of State, 1965), IV, p. 14.
6. United Nations Conference on the Law of the Sea, Geneva, 1958, *Official Records* (Geneva: 1958), II, Doc. A/CONF. 13/L.29, p. 125.
7. "U.N. Conference on the Law of the Sea," *The Department of State Bulletin*, 30 June 1958, p. 1111.
8. U.S. Treaties, etc., *United States Treaties and Other International Agreements*, TIAS 5200 (Washington: U.S. Govt. Print. Off., 1962), XIII, pt. 2314.
9. U.S. Congress, Senate, Committee on Interior and Insular Affairs, *Submerged Lands*, Hearings (Washington: U.S. Govt. Print. Off., 1952), p. 135.
10. Myres S. McDougal and William T. Burke, "Crisis in the Law of the Sea," *The Yale Law Review*, February 1958, p. 539.
11. United Nations. Office of Legal Affairs, *Laws and Regulations on the Regime of the Territorial Sea* (New York: 1957), pp. 39-40.
12. United Nations, Office of Legal Affairs, *Addendum to Supplement to Laws and Regulations on the Regime of the Territorial Sea* (New York: 1960), pp. 3-4.
13. U.S. Dept. of State, Office of the Geographer, *Sovereignty of the Sea* (Washington: U.S. Govt. Print. Off., 1965), p. 10.
14. *Ibid.*, p. 12.
15. The Hague, International Court of Justice, *Reports of Judgments . . . 1951* (The Hague: 1952), p. 132.
16. Lassa F.L. Oppenheim, *International Law*, 8th ed. (London: Longmans, Green, 1955), I, p. 460.
17. J.J.G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (The Hague: Nijhoff, 1961), p. 180.
18. "Jakarta Sea Plan Is Scored by U.S.," *The New York Times*, 18 January 1958, p. 3:1.
19. Syatauw, pp. 174-175.
20. Charles C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2d rev. ed. (Boston: Little, Brown, 1945), I, pp. 581-582.
21. McDougal and Burke, p. 539.
22. *Ibid.*, p. 66.
23. McDougal and Burke, pp. 413-414; Leo J. Bouchez, *The Regime of Bays in International Law* (Leyden, Netherlands: Sythoff, 1964), p. 98.
24. Syatauw, p. 184.
25. United Nations Conference on the Law of the Sea, Geneva, 1958, *Official Records* (Geneva: 1958), II, Doc. A/CONF. 13/L.52, p. 133.
26. "The Boundaries of the Territorial Waters of the Republic of Indonesia," *Bulletin, Department of Information—Republic of Indonesia*, Special Issue-1963, pp. 7-9.
27. Memorandum from Victor A. Wallace, Office of the Legal Adviser, U.S. Dept. of State, to Terrance G. Leonhardy, U.S. Bureau of Inter-American Affairs, 31 October 1956.
28. Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York: Jennings, 1927), p. 120.
29. United Nations Conference on the Law of the Sea, II, Doc. A/CONF. 13/L.52, art. 14, pp. 133-134.
30. United Nations, International Law Commission, *Report*, 11th Sess., Supp. 9 (A/3159) (New York: 1956), p. 6.
31. Wilfred A. Hearn, "The Law of the Sea—the 1958 Geneva Conference," *The JAC Journal*, March-April 1960, p. 5.
32. United Nations Conference on the Law of the Sea, II, Doc. A/CONF. 13/L.52, art. 1, p. 132.
33. Jessup, p. 123.

34. The Hague, International Court of Justice, *Reports of Judgments . . . 1947-1948* (The Hague: 1948), pp. 4-31.
35. *Ibid.*, p. 28.
36. McDougal and Burke, p. 206.
37. Arthur H. Dean, "The Second Geneva Conference on the Law of the Sea," *The American Journal of International Law*, October 1960, p. 771.
38. U.S. Congress, House, Committee on Armed Services, *Russian Trawler Traffic in United States Territorial Waters*, Report (Washington: U.S. Govt. Print. Off., 1963), pp. 7-8.
39. U.S. Dept. of State, p. 8.
40. "Cold War: U.S. and Free World Views and Moscow Version," *The New York Times*, 17 July 1960, p. E5.
41. "Text of U.S. Address and Excerpts from Soviet and Others in UN or RB-47," *The New York Times*, 26 July 1960, p. 4.
42. Jens Evensen, "Certain Legal Aspects concerning the Delimitation of the Territorial Waters of Archipelagoes," *United Nations, Secretariat, United Nations Conference on the Law of the Sea*, Preparatory document No. 15, A/CONF. 13/18 (New York: 29 November 1957), p. 5.
43. "Nationality Responsibility of States Territorial Waters," *The American Journal of International Law*, April 1929, special supp., p. 276.
44. Jessup, pp. 457, 477.
45. Hyde, p. 485.
46. Colombos, pp. 103-104.
47. Sir Gerald Fitzmaurice, "The Law and Procedure on the International Court of Justice, 1951-54 Points of Substantive Law," *The British Yearbook of International Law*, 1954 (London: Oxford University Press, 1956), p. 417.
48. C.H.M. Waldock, "The Anglo-Norwegian Fisheries Case," *The British Yearbook of International Law*, 1951 (London: Oxford University Press, 1952), pp. 144-145.
49. Dean, p. 765, Footnote 54.
50. United Nations Conference on the Law of the Sea, II, Doc. A/CONF. 13/L.52, art. 1, p. 132.
51. Dean, p. 766.
52. United Nations, International Law Commission, *Yearbook 1956*, II, p. 270.
53. United Nations, International Law Commission, *Report*, pp. 16-17.
54. G. Etzel Percy, "Measurements of the U.S. Territorial Sea," *The Department of State Bulletin*, 29 June 1959, p. 963.
55. Letter from Secretary of State Dean Rusk to Attorney General Robert F. Kennedy, U.S. Dept. of State file Av 6 US/IA: 21 May 1964, p. 3.
56. "Civil Aeronautics Board v. Island Airlines, Inc.," *Federal Supplement* (Minneapolis: West, n.d.), CCXXXV, p. 990.
57. United Nations, Office of Legal Affairs, *Laws and Regulations on the Regime of the Territorial Sea* (New York: 1957), pp. 39-40; Addendum to Supplement to Laws and Regulations on the Regime of the Territorial Sea, pp. 3-4.
58. "Indonesia Ruling to Shut Java Line," *The New York Times*, 20 June 1960, p. 56.
59. "Announcement on the Territorial Waters of the Republic of Indonesia," *Indonesian Law Journal "Hukum"*, 1958, pp. 5-6.
60. Syatauw, p. 175.
61. *Ibid.*, pp. 175, 176.
62. Telegram from American Embassy, Djakarta, to U.S. Dept. of State, 31 December 1957.
63. Telegram from American Embassy, Canberra, to U.S. Dept. of State, 16 January 1958.
64. Japanese Vice Minister for Foreign Affairs Katsumi Ohno to the Indonesian Consul General at Tokyo, M. Iskandar Ishaq, 13 January 1958, *The Japanese Annual of International Law*, No. 2. (The Japan Branch of the International Law Association, 1958), pp. 219-220.
65. *Indonesian Law Journal "Hukum"*, 1958, p. 5.
66. United Nations, Office of Legal Affairs, *Judicial Regime of Historic Waters, including Historic Bays*, Doc. A/CN. 4/143 (New York: 1962), p. 45.
67. *Bulletin, Department of Information—Republic of Indonesia*, pp. 7-9.
68. Whiteman, pp. 385-386.
69. Dean, pp. 765-766.
70. Juan M. Arreglado, "The Legal Status of Philippine Territorial Waters," *Lyceum of the Philippines Law Review*, IV, 1959-60, pp. 286-287.
71. United Nations, International Law Commission, *Yearbook* (New York: 1956), II, pp. 69-70.
72. *Ibid.*

73. Jorge R. Coquia, "The Problem of the Territorial Waters of Archipelagoes," *Far Eastern Law Review*, v. VII, 1959, p. 443.
74. *Ibid.*, p. 447.
75. Arthur H. Dean, "The Law of the Sea," *The Department of State Bulletin*, 7 April 1958, p. 575.
76. United Nations, Office of Legal Affairs, *Laws and Regulations on the Regime of the Territorial Sea*, pp. 39-40.
77. Whiteman, p. 283.
78. *Ibid.*
79. Max Sorensen, "The Territorial Sea of Archipelagoes," *Varia Juris Gentium* (Leyden, Netherlands: 1959), p. 47.
80. The Hague, International Court of Justice, *Reports of Judgments . . . 1951* (The Hague: 1952), p. 132.
81. Evensen, pp. 20-26.
82. Whiteman, pp. 275-280.
83. Evensen, pp. 20-26.
84. Bouchez, p. 268.
85. Hyde, p. 387.
86. I.C. MacGibbon, "Some Observations on the Part of Protest in International Law," *British Yearbook of International Law 1953* (London: Oxford University Press, 1954), p. 307.
- 87: *Ibid.*, p. 319.
88. Bouchez, p. 272.
89. Myres S. McDougal and William T. Burke, *The Public Order of the Oceans* (New Haven: Yale University Press, 1962), p. 418.
90. Committee of American Steamship Lines, *Facts about Our American Merchant Marine* (Washington: n.d.), p. 21.
- U.S. Office of Naval Operations, *U.S. Lifelines, Imports of Essential Materials* (Washington: 1959), p. 428.