Chapter One

The Development of the Archipelagic Concept in International Law of the Sea: From Straight Baselines to the Archipelagic Regime of the Law of the Sea Convention

1.1 Introduction

Theoretical preoccupations concerning the question of the delimitation of the territorial sea of archipelagos, both coastal and outlying, go back to the end of the nineteenth century. Various learned legal societies showed an interest in this issue in their attempts to codify the rules governing the law of the sea. The International Law Association, the American Institute of International Law and the Harvard Research in International Law discussed – albeit in a cursory way – the issue of applying a method different from the traditionally envisaged of the low-water mark for the delimitation of the territorial sea of groups of islands. The initial proposals endorsing the unitary approach referred to the application of straight baselines around groups of islands on the condition that the distance between the islands of the group would not exceed double the breadth of the territorial sea.¹

The issue of the delimitation of the territorial sea of groups of islands was included in the agendas of the 1930 Hague on the codification of international law and the 1958 Geneva Conference on the Law of the Sea. The solution suggested concerned the application of straight baselines joining the outermost points of the islands, and the internalisation or territorialisation of the enclosed waters. Nevertheless, no conclusion could be reached due to divergence in the positions of states as well as due to implications caused by the wide variety of the geographical particularities of archipelagos.

The Judgment of the International Court of Justice in the Fisheries case became a catalyst for developments concerning coastal archipelagos. The First UN Conference on the Law of the Sea (UNCLOS I) adopted Article 4 TSC which provided for the application of straight baselines in localities where there is a ‘fringe of

¹ The breadth of the territorial sea was also an issue of dispute among states and various proposals had been advanced ranging from 3 n.m. to 10 n.m.
islands along the coast in its immediate vicinity’. This was considered to provide a special regime for coastal archipelagos. A further shift in international law was realised during the Third UN Conference on the Law of the Sea (UNCLOS III), which adopted a special protective regime for archipelagic states.

This chapter examines the evolution of the archipelagic concept from its first inclusion in the agenda of international institutions to the consolidation of a special system for the delimitation of the territorial sea of coastal archipelagos, and finally to the adoption of Part IV of the LOSC on archipelagic states. In particular, the first part of the Chapter analyses proposals and negotiations which led to the adoption of article 4 TSC. The second part focuses on the travaux préparatoires of UNCLOS III with a view to highlighting the conflicting state interests and to identifying the reasons which led to the exclusion of dependent outlying archipelagos from the archipelagic regime prescribed in the LOSC. The objective of this chapter is to identify how the archipelagic concept has influenced developments in international law of the sea, and to assess to what extent the LOSC has satisfactorily dealt with the archipelagic problem.

1.2 Proposals and Evolution of the Archipelagic Concept Prior to the Third UN Conference on the Law of the Sea

A. Early Proposals Regarding the Treatment of Archipelagos in International Law

Archipelagos were not treated as a distinct matter but as part of the debate related to the measurement of the territorial sea in early attempts for the codification of the law of the sea. Learned societies and legal scholars were divided on whether a special system for the delimitation of the maritime zones of groups of islands was required. Some private institutions and legal scholars favoured the unitary concept in the treatment of archipelagos and suggested that the territorial sea was to be measured from straight baselines encircling the outermost islands of the group. The distance between the islands was an issue under discussion with

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2 The International Law Association and the Harvard Law School were reluctant to accept a special system; see ILA Report, 33th Conference 1924, Stockholm (London: Sweet & Maxwell, Ltd 1925), p. 259 et seq.; similarly ILA Report, 34th Conference 1926, Vienna (London: Sweet & Maxwell Ltd, 1927), p. 40 et seq. For the Harvard Law School approach see: 23 AJIL, Special Suppl., 1929, Draft Convention on Territorial Waters, pp. 287–288. However, the Draft Convention on Territorial Waters included a provision (article 11) titled ‘Assimilation of small areas to marginal sea that could be implemented in the case of a group of islands’; in particular, this article provided that if the delimitation of the marginal sea resulted in leaving a small area of high seas totally surrounded by the territorial sea of a single state, such area would be assimilated to its territorial sea. This provision could lead to the territorialisation of pockets of high seas located inside an archipelago without the use of straight baselines.