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THE LAW OF THE SEA

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SUMMARY

Historically, the principal division in the law of the sea was between the territorial seas, which formed a part of the territory of the State but within which other States enjoyed a number of restricted rights, and the high seas which were open to use by all. This has now changed, with the recognition and development of new zones of functional and resource-oriented jurisdiction, accompanied by complex realignments of jurisdictional competences which cut across—and, in the eyes of some, threaten to undermine—the traditional principles of governance at sea. This chapter traces these developments. It also provides an introduction to the basic rules concerning the principle zones of maritime jurisdiction, as well as looking at the rules concerning the construction of baselines—which is foundational to the entire subject—and to the problem of determining boundaries where claims to zones overlap.

I. INTRODUCTION

The law of the sea is regulated in a complex yet subtle manner and provides an interesting contrast to the rather absolutist approach to questions concerning sovereignty and jurisdiction which are still encountered in other areas of international law. Sovereignty and jurisdiction are, of course, of vital importance to the law of the sea: indeed, they provide the basis upon which all else is founded. Over time, they have, however, been moulded and melded in an extremely sophisticated manner in order to better to reflect the changing nature of the competing interests in the utilization of the seas.

For example, some of the earliest doctrinal debates concerning the law of the sea focused on whether the seas could be made subject to the exclusive sovereignty of a State. In the middle ages, before State-sponsored exploration of the oceans and the intensification of international trade by sea, this was hardly a question at all. When the question did emerge in the fifteenth and sixteenth centuries, writers who argued that seas should be 'closed' and subject to the jurisdiction of coastal States did so either for reasons of security (to keep threatening forces at a distance) or for reasons of trade (to operate profitable customs regimes and control navigation). The balance that finally emerged reflected both

concerns: whereas States were to enjoy full sovereignty over those waters proximate to their coasts, reflecting their interests in security and control, in the waters beyond, where trade and navigation issues assumed a greater significance, the principle of the freedom of the seas—famously argued for by Grotius in his work *Marem Liberum*—prevailed (Anand, 1993; O'Connell, 1982, pp 18–30).

This, then, established the basic division that dominated the law of the sea for some 350 years; between the territorial sea which was subject to the jurisdiction of the coastal State and the high seas beyond which were open to all. However, new issues emerged over time as economic and technological developments resulted in changed strategic interests and an increased demand for, and capacity to access and harvest, the resources of the sea. The challenges presented by these changes have been made more complex still by the rapid expansion of the international community, shifts in the political balance of power and the increasing awareness of the need not only to access and exploit the resources of the seas and the marine environment but also to conserve and protect them.

In the early years of the twentieth century ambitious plans were made to 'codify' much of international law in written form, including the law of the sea. Although the overall project made little headway one positive outcome was the 'Hague Codification Conference' held in 1930. This did not produce any finished text but it did provide useful experience which was extensively drawn on when, after the Second World War, the International Law Commission (ILC) decided to examine the subject. In 1956 the ILC produced a set of draft Articles which were considered at the First United Nations Conference on the Law of the Sea (UNCLOS I) held in Geneva in 1958. This conference produced four 'Geneva Conventions' on the Law of the Sea[1] which in part reflected customary international law but also contained much that was 'progressive development'.

Although impressive in their scope, the Geneva Conventions left some key issues open. The most significant of these concerned the vexed question of the breadth of the territorial sea and in 1960 a second UN Conference was convened in Geneva (UNCLOS II) to address this and other related questions but it ended without agreement. One reason for this failure was the mounting pressure for a more fundamental review of the law of the sea which would take account of the growing demands for access to resources and, in the process, erode the rigidity of the territorial sea/high seas dichotomy. Admittedly, the four 1958 Conventions themselves represented a limited break with this approach. Two of those Conventions reflected the traditional divisions, one dealing with the territorial sea (and contiguous zone) and another with the high seas. The other two 1958 Conventions reflected new concerns, these being the continental shelf and fisheries conservation and management. Although the fisheries convention did not gain much international support and elements of the continental shelf convention have since been jettisoned, adopting 'general' conventions on these 'functional' issues indicated that the way forward did not lie in changing the limits and further refining the concepts of the territorial sea and high seas, but would involve creating new zones and forms of jurisdictional competence that would co-exist alongside them. UNCLOS II had attempted to go down this path by suggesting that States be permitted to exercise exclusive jurisdiction over fishing in a belt outside of

[1] These being the Convention on the Territorial Sea and Contiguous Zone (TSC); Convention on the High Seas (HSC); Convention on the Continental Shelf (CSC); and the Convention on Fisheries and Conservation of the Living Resources of the High Seas (CFC).

their territorial sea rather than extend the territorial sea as far seawards as some would have liked. Moreover, this general approach found endorsement in the *North Sea*[2] and *Fisheries Jurisdiction*[3] cases, where the emergence of other forms of jurisdictional zones and competences was acknowledged and accepted by the ICJ.

However, an even more fundamental challenge was also being made to the ordering of the oceans. The basic idea underlying the distinction between the territorial seas and high seas was that it separated out those areas of maritime space over which jurisdiction and control was exercised by a single State from those over which no single State exercised jurisdiction or control and in which activities were 'free' from any form of control (other than that of the State whose nationality a person or vessel on the high seas carried and which it exercised in accordance with international law). In practice, therefore, the resources of the high seas were available for unilateral exploitation by anyone and everyone. As will be seen below, the extension of coastal State jurisdiction over resources located beyond the territorial sea was already having the effect of breaking down this clear distinction but the essence of the underlying approach remained intact. In 1967, however, a more fundamental challenge was made to this traditional approach when the Maltese ambassador to the UN, Arvid Pardo, claimed that the resources of the seabed beyond national jurisdiction should be considered to be the 'Common Heritage of Mankind' and be exploited for the benefit of the international community as a whole (Schmidt, 1989, pp 18–30).

There was, then, a complex matrix of unresolved issues and emerging agendas, and these were considered at the third UN Conference on the Law of the Sea (UNCLOS III) which met from 1974–82 and culminated in the adoption of the 1982 Convention on the Law of the Sea (LOSC). Negotiations at UNCLOS III were tortuous and the convention attempted to balance a myriad of competing interests in a 'package deal' that ultimately satisfied few. Although by the early 1990s the number of ratifications approached the 60 required by LOSC Article 308 for the convention to enter into force there was relatively little support from group of developed States, whose acceptance was critical to the success of the convention. This focused the minds of all concerned and, assisted by changes in the world political order at that time, a rather euphemistically entitled 'Implementation Agreement' was agreed in July 1994 which, in fact if not in name, amended Part XI of the convention (the provisions concerning the 'Common Heritage' and seabed mining in the area beyond national jurisdiction) in order to make it acceptable to a broader range of States (Anderson, 1993; 1995). The LOSC entered into force on 16 November 1994 and at the time of writing there are 160 States parties (including the European Union). The Implementation Agreement entered into force in July 1996 and currently has 138 States parties. However, Article 7 of the 1994 Agreement allowed for its provisional application pending its entry into force and so for those States party to both the 1982 Convention and the 1994 Agreement, the 'original' version of Part XI as set out in the 1982 Convention never became binding on them at all. Much of the 1982 Convention now reflects customary law and so is relevant to the increasingly small number of States which are not bound by it as a matter of treaty law. As a result, it provides the starting point for any presentation of the contemporary law of the sea. However, parts of the convention are of a 'framework' nature and it has been supplemented by a number of other major conventions addressing

[2] *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3.

[3] *Fisheries Jurisdiction (United Kingdom* v *Iceland), Merits, Judgment, ICJ Reports 1974*, p 3.

certain issues in greater detail. Developments in other areas of international law have also had an impact on the Convention framework and customary law continues to play an important role by further supplementing and amplifying its provisions (Boyle, 2005).

Since a chapter of this length cannot be comprehensive, it aims to give a flavour of the convention's approach and illustrate the manner in which competing interests are accommodated in some key areas.

II. CONSTRUCTING BASELINES

A. INTRODUCTION: THE NORMAL RULE

International law parcels the sea into various zones in which States enjoy a variety of jurisdictional competences. The general rule is that coastal States exercise the greatest degree of jurisdictional competence over those zones that lie closest to them. Logically enough, a State exercises full powers of territorial sovereignty within areas of water which are 'internal'. This obviously includes lakes and rivers but also includes harbours and other areas of water which are landward of 'baselines' from which the various zones of seawards jurisdiction are generally[4] measured. Determining baselines is, then, very important and a number of detailed rules were set out in the 1958 TSC and largely repeated in the 1982 LOSC. Most of these rules reflect customary law. Since the further seawards a coastal State is able to 'push' its baselines the further seawards its jurisdiction will extend, the practical application of these rules often gives rise to controversy. It should also be borne in mind that islands of all sizes also have baselines and generate maritime zones, although under LOSC Article 121(3) there is the important exception that 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'. The scope of this provision is uncertain, with neither the terms 'rock' nor 'economic life' expressly defined (Charney, 2000; Lavalle, 2004; Prescott and Schofield, 2005, pp 61–89). The ICJ has tended to avoid having to address the question when an opportunity to do so has presented itself[5] and it remains doubtful whether this provision reflects customary international law,[6] though obviously it is binding on States party to the convention.

Whether island or mainland territory, '...the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as shown by the appropriate symbols on charts officially recognized by the coastal state' (LOSC Article 5). Although relatively easy to apply, this method can produce unwieldy results when a coastline is not comparatively straight and/or there are a considerable number of islands in the vicinity of a mainland coast. Therefore, a number of rules have been devised which address some exceptional situations. States do not have to adopt one method of drawing baselines but may use those methods most appropriate for each portion of their coast (LOSC Article 14).

[4] The continental shelf is, in part, an exception to this. See below.

[5] See, for example, *Maritime Delimitation in the Black Sea (Romania* v *Ukraine), Judgment of 3 February 2009*, nyr, at para 187, concerning Serpents' Island, a 'natural feature' above water at high tide (and thus an island) with an area of 0.17 sq km and a circumference of some 2000m.

[6] Cf Brownlie, 2008, p 183 who is clear that Article 121(3) does not reflect customary law.

B. STRAIGHT BASELINES

In the *Anglo-Norwegian Fisheries* case[7] the UK challenged the right of Norway to claim a territorial sea drawn not from the low water line but from a series of artificial lines linking the outermost points of the 'skaergaard' (a fringe of rocks and islands) that lay off the Norwegian coast. The Court noted that it might be inconvenient to use the low water mark as the baseline in such geographically complicated circumstances and accepted the legitimacy of drawing 'straight baselines' under certain circumstances. The judgment was reflected in TSC Article 4, the essence of which was repeated in LOSC Article 7 (Reisman and Westerman, 1992).

Straight baselines may only be drawn if a coastline is 'deeply indented and cut into' or 'if there is a fringe of islands along the coast in its immediate vicinity' (LOSC Article 7(1)). If these criteria are not met the normal rule applies. Even if straight baselines *may* be drawn, there are limitations upon *how* they are to be drawn. These include restrictions on the use of Low Tide Elevations, that straight baselines 'must not depart to any appreciable extent from the general direction of the coast' and that 'the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters' (LOSC Article 7(4)). This latter, rather impressionistic, requirement is particularly important. Waters on the landward side of a straight baseline are by definition internal waters over which the coastal State enjoys full territorial jurisdiction and control (subject to an exception to be considered below) and straight baselines must not be used to bring into the territorial domain waters which lack an intrinsic nexus with the coast. That nexus might be established by non-geographic criteria: in keeping with the *Anglo-Norwegian Fisheries* case, LOSC Article 7(5) permits local and well-established economic interests to be taken into account when establishing particular baselines, but only in those situations where the geographical threshold criteria set out in Article 7(1) are met.

C. BAYS

A further exception to the 'normal' rule concerns bays and is addressed by LOSC Article 10, which is generally considered to reflect customary law (Westerman, 1987). The motivation for departing from the normal rule here is not so much based on convenience but to avoid situations in which the territorial sea—or even fingers of high seas—penetrate the mouths of bays and intrude into areas intrinsically connected with the land domain. The problem is greatest where entrances to bays are relatively narrow but open out into broader expanses of water. The aim is to differentiate areas of water which are essentially of an 'internal' nature from those which are not and this is achieved by drawing 'closing lines' across the mouth of bays and using that 'closing line' as the baseline from which the territorial sea and other zones of jurisdiction are measured.[8]

Once again, there are two stages to this process. First, the distance between the 'natural entrance points' of a bay is measured and a semi-circle is drawn along a line of that length. The area of this semi-circle is then compared to the area of water on the landward

[7] *Fisheries, Judgment, ICJ Reports 1951*, p 116.

[8] It is important to remember that a bay closing line and a straight baseline are legally speaking two very different types of line, though both have the same general function.

side of the closing line. If the area of the semi-circle is less than that of the area of water the indentation is, for the purposes of baseline construction, a bay; if the area of the semi-circle is greater than the area of the water on the landward side of the closing line, the indentation is not—for legal purposes—a bay. The second stage is to draw a closing line. If the distance between the natural entrance points used for the previous calculation is less than 24 nautical miles (n. miles), the closing line may be drawn between them. If that distance exceeds 24 n. miles, then a closing line of up to that length can be drawn 'within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length' (LOSC Article 10(6)). This seemingly simple provision is very complex to apply in practice, with the identification of the natural entry points being a particular problem, and the bay being a 'well marked indentation' another.[10]

It may be the case that the coastline of a bay belongs to more than one State. This poses an additional difficulty since the exceptional rule in LOSC Article 10 only applies to those bays whose coasts belong to a single State. However, in the *Land, Island and Maritime Frontier Dispute* the ICJ sought to identify a concept of a 'pluri-State' bay, where the coasts belong to a number of States yet a closing line might still be drawn.[11] Whilst such an approach might be appropriate if, as in that case, there is a particular historical justification, it is difficult to see how it could be used more generally, if only because the waters behind the closing line would be 'internal' to all of the States concerned and this would simply generate a further need to differentiate between them. It seems to create more problems than it solves and is not found in State practice. In any case, LOSC Article 10(6) expressly renders the convention regime inapplicable to 'historic bays', these being indentations claimed by the coastal State as a part of its internal waters on the basis of a long-standing claim, assertion of jurisdiction, and acquiescence by others' (O'Connell, 1982, Ch 11). This offers an alternative route for States wishing to make claims in respect of indentations which cannot fulfil the criteria set out in the convention. However, such claims are difficult to substantiate and will often meet with considerable protest, as is the case with the Libyan claim to the Gulf of Sirte, a 'bay' nearly 300 n. miles in extent (Ahnish, 1993, Ch 7).

D. ARCHIPELAGOES

The 1951 *Anglo-Norwegian Fisheries* case also addresses what might be called 'coastal archipelagoes'. But what of States comprised wholly or partly of groups of islands? Should the waters be enclosed and treated as internal? What of the navigational rights of third States? At UNCLOS III the interests of archipelagic States, such as Indonesia and the Philippines, and the concerns of adjacent maritime neighbours, such as Australia, combined to produce a particular regime, set out in Part IV of the convention, applicable to 'archipelagic states'. Rather self-referentially, LOSC Article 46 defines an archipelagic State as a State 'constituted wholly by one or more archipelagoes' and other islands, where an 'archipelago' is itself further defined as a group of islands, or parts of islands, and their

[9] See, eg, *Post Office* v *Estuary Radio* [1968] 2 QB 740. See also Marston, 2002.

[10] See, eg, the US Supreme Court judgment in *United States* v *Alaska* 545 US 17 (2005), pp 17–20.

[11] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua) Judgment of 11 September 1992, ICJ Reports 1992*, p 351, para 395. The entire concept was roundly criticized by Judge Oda in his Dissenting Opinion, ibid, p 732, paras 1–26.

interconnecting waters which are so closely interconnected as to form, or be regarded as forming, an intrinsic entity, or which have been historically regarded as such. Therefore Indonesia, the Philippines, Fiji, Japan, and the UK are archipelagic States for convention purposes and so are entitled to draw archipelagic baselines, whereas island groups such as the Azores (belonging to Spain) and the Galapagos (belonging to Ecuador) are not.

However, not all archipelagic States are able to construct archipelagic baselines since such baselines must conform to strict criteria, the principal elements of which are that they must link the main islands of the group; no baseline may be more than 100 n. miles long, except that 3% of the total may be up to 125 n. miles in length; they must follow the general configuration of the island grouping; and, most importantly, fulfil the requirement that the ratio of water to land within the baselines must be not less than 1:1 and not more than 9:1 (LOSC Article 47). The result is both that those archipelagic States which primarily consist of a few large islands (such as Japan and the UK) and those which are composed of very small and widely spaced islands (such as Kiribati) are unable to draw archipelagic baselines even though they fall within the definition of an archipelagic State. It is the latter category of small and scattered island States which stood to gain most from the concept but they were unable to influence the negotiations in their favour and the details of the regime found in the convention favour the interests of the larger archipelagic States. It may be that, in time, State practice and customary law might develop in a fashion which is somewhat less rigid than the convention regime.

The waters within archipelagic baselines are 'archipelagic waters' rather than internal waters and are subject to special rules concerning, *inter alia*, fishing and navigation which will be considered later (LOSC Articles 49–53). Once again, and whatever its shortcomings, the Archipelagic regime offers another example of the manner in which the convention sought to forge a new approach to the division of jurisdictional competences, and moved away from a strict approach based on the distinction between the territorial and high seas.

III. THE INTERNAL WATERS, TERRITORIAL SEA, AND CONTIGUOUS ZONE

A. INTRODUCTION

The idea that States are entitled to exercise authority over the waters beyond their land territory (and internal and archipelagic waters) is deeply entrenched in international legal thinking. Although it was once argued that the competences States enjoyed within waters off their coasts fell short of territorial sovereignty and had to be positively asserted,[12] it is now clear that this authority flows automatically from the sovereignty exercised over land territory and so all coastal States do in fact have a territorial sea.[13] Practically speaking, however, States need to make some form of pronouncement, if only to determine the extent of their jurisdiction.

[12] This view found reflection—somewhat unexpectedly—in *R* v *Keyn* (1876) 2 Ex D 63, the substance of which was subsequently reversed by the 1878 Territorial Waters Jurisdiction Act.

[13] A view expressed by Judge McNair in his Dissenting Opinion in *Fisheries, Judgment, ICJ Reports 1951*, p 116 at p 160.