

**THE LEGAL STATUS OF MID-OCEAN ARCHIPELAGOS OF MAINLAND
STATES UNDER INTERNATIONAL LAW: THE CASE OF THE GALAPAGOS**

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Abstract: This *sui generis* case unmasks the deficiencies of a ‘constitution of the oceans’ that fails to provide an equal framework to support the single unity of archipelagos and therefore safeguard their economic, security and environmental interests. Certainly, archipelagos were not prominently featured in the traditional forums for Law of the Sea issues, as they were usually overshadowed by more ‘urgent’ matters. In light of the exclusion of mid-ocean archipelagos of mainland states from the archipelagic regime of UNCLOS, this article undertakes the challenge of providing a legal answer to justify the practice of the straight baseline method to enclose waters surrounding the Galapagos Islands. It evaluates the negotiation process of the archipelagic regime of UNCLOS, and suggests that the Ecuadorian claim cannot be sustained under Part IV. Article 7 UNCLOS and the *Fisheries Case* are both addressed as alternatives, since they provide a possible legal foundation for the claim. Nonetheless, it is the special circumstances surrounding the Galapagos that sustains the Ecuadorian claim; the immemorial exercise of jurisdiction over the waters of the archipelago, the tolerance of neighbouring states, and the countless declarations from international bodies which provide a basis for a valid historic title.

A. INTRODUCTION

The 1982 United Nations Law of the Sea Convention (‘UNCLOS’) succeeded in regulating historically controversial issues, in codifying unregulated matters, and in anticipating some of the challenges of the modern era, all under one framework which decades after its adoption shows a great degree of compliance.

Certainly, archipelagos were not prominently featured in the traditional forums to discuss the law of the sea, as they were usually overshadowed by more polemic matters at the time. This does not imply, however, that they were any less transcendental or free from debate. In fact, as they became one of the topics assigned for the attention of Sub Committee II,¹ state practice already had ascertained the use of straight baselines to enclose groups of islands into a single unity, as a means of safeguarding their economic, security and environmental interests while endorsing their political unity,² which were their major concerns.

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¹ Myron H Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol 2 (Martinus Nijhoff 1985) 4–8.

² Yoshifumi Tanaka, *The International Law of the Sea* (CUP 2012) 108.

In light of the unreasonable exclusion of mid-ocean archipelagos of mainland states from the archipelagic regime of the 1982 Convention, this work undertakes the challenge of providing an alternative legal solution for the regulation of mid-ocean archipelagos of mainland states, and more concretely to justify the practice surrounding the Galapagos Islands. It will address the rationale behind the archipelagic claims, their similarities and departures from the archipelagic scenarios that law has covered, with a special but not exclusive emphasis on UNCLOS, in contrast to the relevant rules of customary international law.

Section B aims to insert the reader into the negotiation process that preceded the archipelagic regime of UNCLOS and demonstrate that the debate (to the extent that any occurred) lacked technical and academic insight, and thus resulted in an only partial recognition of the archipelagic claim. It is followed by an analysis of Part IV of UNCLOS to resolve, in a first step, the applicability of this regime to dependent archipelagos.

In the search for a legal basis to justify the omission of UNCLOS, section C deals with the different types of archipelagos recognised by law from an analysis of the transversal features common in every regime: straight baselines and enclosed waters. A detailed analysis of their legal status and the manner in which dependent archipelagos have implemented these elements will show parallelisms in the sense that they all seem to find legal support beyond article 7 of UNCLOS itself, but also in the very origins of the baseline concept established in *the Fisheries Case*.³ Whether this practice is sufficiently uniform to consolidate into a customary rule demands a more detailed study. Nonetheless, it sets the basis for the Galapagos case, which will be addressed as a final discussion of this article.

Section D provides an overview of the very particular circumstances that surround the Ecuadorian claim and how the effective and immemorial exercise of jurisdiction over the waters of the Archipelago sets the basis for its validity in international customary law, in the absence of an express provision in the oft-praised ‘constitution of the oceans’; a great framework currently challenged by the need to evolve for the benefit of governance of the oceans.

B. ARCHIPELAGOS AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

1. The breaking point of traditional claims: a necessary background

³ *Fisheries Case (United Kingdom v Norway)* [1951] ICJ 116; Robin Rolf Churchill and Alan Vaughn Lowe, *The Law of the Sea* (3rd edn, MUP 1999) 118.

Although the claims for an archipelagic regime were manifest in the early meetings of the Sea-Bed Committee back in 1968,⁴ the proposal for a special status was far from unexpected since it had already been ascertained, in different degrees, by a number of entities. Among them, the Institut de Droit International, the International Law Association, the American Institute of International Law, the Harvard Research in International Law, the International Law Commission,⁵ and even the 1930 Hague Codification Conference and the 1958 Geneva Conference, where this topic was discussed, with no positive outcome.⁶

The wide scope of complex issues to be addressed in the Third Conference and the need to reach an effective legal agreement called for a unique and skillful deliberation process,⁷ from which Tanaka has identified five major characteristics: consensus, the package-deal approach, informal meetings, the single-text approach and the group approach; the latter of particular importance for this work.⁸

Unofficially, Member States of the United Nations have been categorised in Regional Groups, a system that often operates in international relations, diplomacy and multilateral forums, including the UNCLOS III.⁹ However, their influence in this Conference was limited to a secondary role due to the diversity of views and positions of its members over substantive matters, which naturally evolved in the emergence of the so-called New Special Interest Groups.¹⁰ The common denominator of a shared interest turned the Groups into a highly influential force that succeeded in developing a common agenda through a well-organised structure, and regular and often informal meetings.¹¹

The Group of Archipelagic States, integrated by Indonesia, the Philippines, Mauritius and Fiji, led the discussion in favor of a special regime. Their active participation was essential in the law-making process and in drafting Part IV of UNCLOS. In fact, they put forward a number of documents and informal working papers that set the basis for an intense negotiation process.

Among these contributions, the Draft Articles Relating to Archipelagic States is often mentioned as a well-accepted document that reconciled the views of navigating states with

⁴ Nordquist (n 1) 3.

⁵ Eward Duncan Brown, *The International Law of the Sea: Introductory Manual Volume I* (Dartmouth 1994) 102–103.

⁶ Churchill and Lowe (n 3) 118.

⁷ Tommy Koh and Shanmugam Jayakumar, ‘The Negotiating Process of the Third United Nations Conference on the Law of the Sea’ in Myron H Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary. vol I* (Martinus Nijhoff 1985) 31.

⁸ Tanaka (n 2) 27–29.

⁹ Nordquist (n 1) 68.

¹⁰ *ibid* 69.

¹¹ Nordquist (n 1) 68.

the sponsors' interests.¹² However, little is said about the amendments that this text included in comparison with a previous proposal presented to the Sea-Bed Committee.¹³

More specifically, the crucial replacement of the word 'mainly' for 'wholly' in article 1, which produced a provision in the following terms: 'An archipelagic State is a State constituted wholly by one or more archipelagos and may include other islands'. This small change with huge implications suggests an intention to deliberately exclude outlying dependent archipelagos from the envisaged archipelagic regime of the emerging UNCLOS, a view expressed by the Indonesian delegation.¹⁴

This amendment generated a parallel debate against a diverse group of states, which supported the indivisible nature of archipelagos and rightfully contended that the non-recognition of a similar reality would turn archipelagos belonging to a mixed State into a 'second class territory',¹⁵ unable to benefit from an adequate regime to protect their interests to the same extent that archipelagic states could.

In this context, Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway introduced a Working Paper¹⁶ that was broadly supported by a number of coastal and island states, like Portugal, Spain, Argentina, Honduras, Peru and certainly Ecuador, in defense of its position in respect of the Galapagos.¹⁷

This extensive set of draft articles included a well-balanced regime for the enclosed waters and reasonable guidelines for the drawing of straight baselines in an almost identical way as it is now reflected in the UNCLOS. However, it was the section applicable to 'archipelagos forming part of a coastal State' which provoked discontent and debate among the parties. The Official Records of the UNCLOS III evidence this disagreement; indeed, the different formulas proposed in the Working Paper of the Second Committee show that these approaches were as controversial as they were irreconcilable.¹⁸

¹² 'Fiji, Indonesia, Mauritius and Philippines: draft articles relating to archipelagic states' Third United Nations Conference on the Law of the Sea (9 August 1974) UN Doc A/CONF.62/C.2/L.49.

¹³ 'Summary records of meetings of the Second Committee, 36th meeting' Third United Nations Convention on the Law of the Sea (12 August 1974) UN Doc A/CONF.62/C.2/SR.36, intervention of Mr Djalal (Indonesia) 260.

¹⁴ *ibid.*

¹⁵ 'Summary records of meetings of the Second Committee, 37th meeting' Third United Nations Convention on the Law of the Sea (12 August 1974) UN Doc A/CONF.62/C.2/SR.37, intervention of Mr Limpo Serra (Portugal) 266.

¹⁶ 'Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway: working paper' Third United Nations Conference on the Law of the Sea (26 July 1974) UN Doc A/CONF.62/L.4.

¹⁷ Summary records (n 15).

¹⁸ 'Statement of activities of the Conference during its first and second sessions prepared by the Rapporteur-general: Mr. Kenneth O Rattray (Jamaica)' Third United Nations Conference on the Law of the Sea (17 October 1974) UN Doc A/CONF.62/L.8/Rev.1.

Section 2, entitled ‘Oceanic Archipelagos belonging to Continental States’, was eventually removed from the Informal Single Negotiating Text,¹⁹ and as a result left outside the Informal Composite Negotiating Text,²⁰ present day article 46.²¹ This suggests that further negotiations were held; unfortunately, these negotiations included only the group of archipelagic states and maritime powers.²² This lobbying created discomfort among other participants, to the point that President Amerasinghe had to appeal to the groups to have fewer of their private meetings and more inter-group reunions in order to accommodate other proposals.²³ These private negotiations sought to accelerate and secure the adoption of a special regime for archipelagic states by any means; ironically, a regime that was traditionally advocated by continental states with archipelagos as part of their territory and not by archipelagic states.²⁴ The latter started these claims once they gained independence from their colonial powers, whose attention was naturally focused in maintaining the freedom of navigation on the high seas

2. Part IV: the narrow aftermath of a magnificent Convention

For the purpose of determining an archipelagic regime, states needed to agree on a formula to define the term ‘archipelago’ and set the basis for the applicable rules. In the simplest form, they are a ‘group of islands’ or ‘a sea stretch of water containing many islands’ according to the Oxford Dictionary; no source provides further detail in respect of the nature of their elements, their size, number and other technical considerations.

Although the legal connotations of an archipelagic concept was not a priority in the early discussions of the law of the sea, it was a matter of study for a number of authors. Hodgson and Alexander, in their Occasional Paper for the Law of the Sea Institute, stated that archipelagos are ‘an example of special circumstances’.²⁵ In previous years, Evensen had already contributed with a groundbreaking piece of work that accurately described the different situations in which these formations could be found, and highlighted the complexities of constructing a geo-juridical definition.²⁶ In his contribution, he addressed a number of physical possibilities (number, size, position and shape of archipelagos, their

¹⁹ ‘Informal single negotiating text, part II’ Third United Nations Conference on the Law of the Sea (17 March to 9 May 1975) UN Doc A/CONF.62/WP.8/PartII.

²⁰ ‘Informal Composite Negotiating Text’ Third United Nations Conference on the Law of the Sea (15 July 1977) UN Doc A/CONF.62.WP.10.

²¹ Nordquist (n 1) 412.

²² *ibid* 402.

²³ Koh and Jayakumar (n 7) 85–86.

²⁴ Sophia Kopela, *Dependent Archipelagos in the Law of the Sea* (Martinus Nijhoff 2013) 24.

²⁵ Phiphat Tangsubkul and Daniel J Dzurek, ‘The Emerging Concept of Midocean Archipelagos’ (1982) 3(1) *Ocean YB* 386, 392.

²⁶ *ibid* 391.

islands and islets) and distinguished coastal and outlying archipelagos.²⁷ However, a more general formula was required in order to cover both types of archipelagos, and so he concluded in the basic construct of archipelagos as ‘a formation of two or more islands, islets or rocks, which geographically may be considered as a whole’.²⁸ Despite his efforts, his document was not considered in UNCLOS I.

Art 46(b) of the 1982 Convention, on the other hand, provides a more detailed provision and defines archipelagos as the following:

A group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.²⁹

Geographic unity implies adjacency among the elements of an archipelago, economic unity refers to the dependency link between the enclosed waters and the population, and political unity attributes the features of the archipelago to the sovereignty and jurisdiction of the same State.³⁰ Thus, UNCLOS departs from a merely geophysical formula and incorporates several non-tangible considerations in a fiction that still highlights the unity of archipelagos as their distinctive feature.³¹

Article 46(a) relies on this definition as a starting point to create the object of Part IV of the UNCLOS, and provides that an archipelagic State is ‘a State constituted wholly by one or more archipelagos and may include other islands’.

Considering that there are as many archipelagic realities as geographic features composing this group of islands, the task of arriving at a single definition to address all of them presents a highly complex challenge. However, one can affirm that geographically, archipelagos can be found under two scenarios: a) lying immediately close to the coast of a mainland State, also known as coastal archipelagos³² (eg the Norwegian Skjaergaard, and those by the coasts of Finland, Greenland, Sweden, Yugoslavia and certain stretches on the coasts of Canada and Alaska),³³ b) as an outlying distant group of islands that cannot possibly

²⁷ *ibid* 392.

²⁸ *ibid*.

²⁹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

³⁰ Sophia Kopela, ‘2007 Archipelagic Legislation of the Dominican Republic: An Assessment’ (2009) 24(3) *The Intl J of Marine & Coastal L* 504.

³¹ Tangsubkul and Dzurek (n 25) 393.

³² Tara Davenport, ‘The Archipelagic Regime’ in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 135.

³³ Mohamed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (Martinus Nijhoff 1995) 15.

be considered as bordering the coastline of the mainland State,³⁴ generally identified as mid-ocean archipelagos. The latter, subject to the juridical consideration of statehood, could form part of the territory of a continental State (the Faroe Islands in Denmark, the Andaman and Nicobar in India, the Azores in Portugal, and the Galapagos in Ecuador), or comprise by itself the entire territory of a State (eg Indonesia, the Philippines. Fiji).³⁵

As Part IV of the UNCLOS was approved under the heading ‘Archipelagic States’, it clearly ratifies that its applicability is limited to archipelagos that constitute a State on their own. Clearly, there is a fragmentation in the geographic, cultural and social reality, and the intention to come with a solution based on a political consideration; especially when archipelagos constitute a natural unity facing similar threats. These threats relate particularly to security and the prevention of illicit activities such as smuggling, illegal fishing, inter-island traffic and environmental concerns.³⁶ This limitation amounts to ‘an unnecessary and unreasonable restriction’.³⁷

In the early stages of negotiation, navigating states showed special concern in preventing an abusive application of archipelagic principles to include vast parts of the ocean as part of national territory.³⁸ Thus, they strongly defended a mathematical criterion over a qualitative approach (which allows for more permissible adjacency considerations) for the drawing of baselines. Article 47 cleverly incorporates these two objectives and aims to prevent potential arbitrariness in the application of straight baselines around a group of islands. Nonetheless, as Brown suggests, the clear tendency to favor a numerical approach is undeniable.

A joint analysis of articles 46 and 47 evidences that while there are no objective criteria to be followed by states to declare themselves as an Archipelagic State, they must comply with the strict numerical approach of article 47 (water-land ratio and maximum length of straight baselines) if they want to benefit from a straight baseline drawing. In other words, a mere declaration of status as an Archipelagic State does not give rise to an entitlement to apply the regime prescribed in Part IV.³⁹ As ascertained by Brown, this status is useless unless a State also satisfies the requirements in article 47 to draw archipelagic baselines, and thus profit from the archipelagic regime in respect of enclosed waters.

³⁴ Davenport (n 32) 135.

³⁵ *ibid* 135–136.

³⁶ Churchill and Lowe (n 3) 119.

³⁷ *ibid* 120.

³⁸ Nordquist (n 1) 401.

³⁹ Brown (n 5) 112.

The result is an international instrument that not only excludes a considerable number of dependent archipelagos from its provisions (eg the Canaries in Spain, the Faeroes in Denmark, Svalbard in Norway, the Tuamotu in France, the Azores in Portugal, Andaman and Nicobar in India, and the Galapagos in Ecuador); but also allows anomalous⁴⁰ situations to take place, even for State archipelagos which qualify as such under article 46. The homogenous nature of archipelagos is fragmented by the pressure to comply with the numerical requirements in article 47. UNCLOS prescribes for State archipelagos to be composed by ‘one or more archipelagos’; this means that an archipelagic State whose entire territory does not satisfy the quantitative requirements has the option to divide its group of islands into more than one archipelago, each with its own straight baselines regime. Although this enables it to benefit from the archipelagic regime of Part IV, the very elements of unity and integration of its territory are disregarded due to a strictly legal consideration.⁴¹

Since UNCLOS III followed a different pattern from its predecessors and did not rely on the previous work of the ILC,⁴² its outcome mainly responds to political rather than strictly academic considerations.⁴³ Regrettably, it missed the opportunity to legally cover all types of archipelagos under a single, coherent and clear regime as it does not make any express reference to mid-ocean or coastal archipelagos. The latter, although in practice covered by the provisions on straight baselines,⁴⁴ cannot be strictly equated to a ‘fringe of islands’ in the terms of article 7 of the UNCLOS, as stated by Kopela. This is mainly so because an archipelago implies a close interaction between the islands it comprises, while a fringe of islands is only required to have a close relation and vicinity with the nearby coast and its waters, as pointed out in the 1951 *Fisheries Case*.⁴⁵ Nonetheless, the main difference between coastal and mid-ocean archipelagos responds solely to geographic considerations, but both certainly share the same economic, political and historic identity inherent in archipelagos, which are compelling reasons why they ought to have been addressed equally in Part IV for the sake of a uniform system.

⁴⁰ *ibid* 109.

⁴¹ *ibid* 110.

⁴² Koh and Jayakumar (n 7) 29

⁴³ Summary records (n 13) intervention of Mr Tolentino (Philippines) 265.

⁴⁴ Churchill and Lowe (n 3) 120.

⁴⁵ *Fisheries Case (United Kingdom v Norway)* (n 3); Kopela (n 24) 71.

**C. COASTAL ARCHIPELAGOS, ARCHIPELAGIC STATES AND MID-OCEAN
ARCHIPELAGOS OF NON-ARCHIPELAGIC STATES: LEGAL STATUS OF
BASELINES AND ENCLOSED WATERS**

Despite a special archipelagic regime in UNCLOS, this instrument failed to address all types of archipelagos under a uniform system. While coastal archipelagos are legitimated on the basis of article 4(1) of the 1958 Geneva Convention and article 7(1) of the UNCLOS, archipelagic states find their legal support in Part IV of UNCLOS. On the contrary, the lack of a specific provision for mid-ocean dependent archipelagos has not impeded mainland states from proceeding with an analogous practice and connecting their insular features with straight baselines and claiming a special regime in the enclosed waters.

There are different types of archipelagos, each of which forms the subject of diverse and substantial State practice. However, the protection sought by states and the one provided by law can be simplified in the unification of the insular features by the use of straight baselines, over which enclosed waters the State exercises sovereignty. Precisely, baselines and enclosed waters are the elements that persuade states to identify a ‘fringe of islands along the coast in its immediate vicinity’ as a coastal archipelago, or to claim the status of archipelagic State. They are highly motivated by the exercise of sovereignty over the enclosed waters.

1. Baselines

Their importance is functional, as they constitute the starting point to measure the different maritime zones, to delimit overlapping areas with neighbouring states, and hence to determine the applicable regime and the extent of the rights and duties to be exercised by the coastal State over each maritime space.⁴⁶

As a reminder, international law has identified two types of baselines: the low-water line, referred in both the Geneva Convention and the UNCLOS as ‘normal baseline’; and the artificial straight baselines, for which the applicable provisions are comprised in article 4 of the Geneva Convention and article 7 of the UNCLOS.

The first method is the line that follows the sinuosities of the coast, a simple formula that has barely represented any conflict, misinterpretation or abuse by coastal states.⁴⁷ International law has granted a discretionary power to states regarding this matter, which are

⁴⁶ Coalter G Lathrop, ‘Baselines’ in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 70.

⁴⁷ *ibid* 79.

not required to deposit any chart of scales, geographical coordinates of points or geodetic datum before the UN Secretary-General, as required for straight baselines.⁴⁸

Moreover, under Part VIII of UNCLOS, islands have been recognised with the same maritime spaces applicable to land territory, and the normal baseline is implied to be the method to start measuring these zones. Before a Convention that has no express provision to address the situation of dependent archipelagos, this appears to be the only valid drawing in the eyes of states that oppose the inclusion of dependent archipelagos under the protection of a straight baseline system, such as the United States, which has implemented this system to delimit the Hawaiian Islands.

This is also supported by the fact that the normal baseline has long been argued to be the general rule, as it showed to be the preferred method in early codification forums such as the 1930 Hague Codification Conference, and its provision has remained intact in both the 1958 and the 1982 Conventions. Moreover, both instruments appear to favour the low-water line as the default mechanism for measuring the breadth of the territorial sea,⁴⁹ implied by the use of phrases such as ‘except where otherwise provided in these articles’ or ‘except where otherwise provided in this Convention’, respectively.

Straight baselines, on the other hand, are the artificial construct created for the purpose of facilitating the measurement of the breadth of the territorial sea where the coastline is significantly irregular or has the presence of certain features that require a special set of rules to ascertain a more precise starting point. They found their formal and legal recognition in the international scenario as a valid method to be implemented under certain circumstances in the *Anglo-Norwegian Fisheries Case*, in 1951.⁵⁰

In its pleadings, Norway repeatedly stressed the fact that its geographic peculiarities called for a different regime than the low-water mark. The ICJ responded positively to this claim by concluding that in these circumstances ‘the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities’.⁵¹ It added that such a rugged coast would require countless derogations that the rule would disappear. Hence, such a coast called for the application of a reasonable but different method, one that departs from the physical line of the coast.⁵²

⁴⁸ UNCLOS arts 16, 47(8)–(9).

⁴⁹ Lathrop (n 46) 74.

⁵⁰ Mohamed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (Martinus Nijhoff 1995) 69.

⁵¹ *Fisheries Case (United Kingdom v Norway)* (n 3).

⁵² *ibid* 129.

This judgment was incorporated near verbatim into the Geneva Convention on the Territorial Sea and the Contiguous Zone and UNCLOS. Although they do not refer explicitly to coastal archipelagos, a ‘fringe of islands along the coast in its immediate vicinity’⁵³ seems to be a widening of the language used by the ICJ in the *Fisheries Case* which,⁵⁴ Churchill agrees, seems to be enough to cover coastal archipelagos.⁵⁵

Once a number of geographical conditions have been satisfied, both Conventions require for ‘economic interests peculiar to the region concerned ... evidenced by a long usage’ to be considered,⁵⁶ which reinforces the ICJ’s view respecting the historic fishing and hunting rights of the local Norwegian population, without prejudice to other activities such as tourism, communication and mining that could also be framed under economic interests.⁵⁷

As for their legal status, the fact that the UNCLOS incorporated the text of the 1958 Convention in almost identical terms as the ICJ formulated its judgment in the *Fisheries Case*, leads to the conclusion that the rules governing straight baselines have become part of the body of customary international law. As Churchill and Lowe assert: ‘the provisions of UNCLOS have, to the extent that they differ from the rules of customary rule before 1958 [and only in respect of those provisions that have continued from the Geneva Convention to the LOSC] passed into customary law’.⁵⁸ Contrarily, based on the inconsistent State practice, this method can also be argued not to be customary international law.⁵⁹ Despite these contrasting opinions, this question seems to have lost relevance, considering the elevated number of states party to one or the other convention.⁶⁰ For the purpose of this study, the lack of univocal content of these norms constitutes a weakness in the system that could potentially uphold the application of straight baselines in mid-ocean archipelagos of mainland states.⁶¹

In contrast, article 47 displays a set of objective rules, two of them with a clear numerical approach (water-land ratio and maximum length of the baselines), that aim to prevent arbitrariness of archipelagic states.⁶²

Regarding the water-land ratio, article 47(1) has established that it shall be ‘between 1 to 1 and 9 to 1’. This provision prevents states such as the UK, Australia and Cuba from

⁵³ 1958 Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 2005 UNTS 516, art 4(1); UNCLOS art 7(1).

⁵⁴ Munavvar (n 50).

⁵⁵ Churchill and Lowe (n 3) 120.

⁵⁶ 1958 Geneva Convention art 4(4); UNCLOS art 7(5).

⁵⁷ Munavvar (n 50) 124–125.

⁵⁸ Churchill and Lowe (n 3) 53–54.

⁵⁹ Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing 2010) 51.

⁶⁰ Churchill and Lowe (n 3) 53.

⁶¹ Kopela (n 24) 148.

⁶² Lathrop (n 46) 88–89.

drawing archipelagic straight baselines, because the lower ratio excludes archipelagos ‘dominated by one or two large islands or islands that are connected only by comparatively small sea areas’.⁶³ However, they could consider their surrounding islands as though they were coastal archipelagos along a mainland coast, and therefore ‘tie them to the main island’ by straight baselines.⁶⁴ On the other hand, the upper ratio excludes archipelagos which are integrated by dispersed islands, such as Tuvalu and Kiribati.⁶⁵

As for their length, article 47(2) provides a maximum of 100 nautical miles and, exceptionally, 125 miles. This is clearly different than the provisions in article 4 of the Geneva Convention and 7 of UNCLOS, where no limit has been established. The qualitative provisions of paragraphs 3, 4 and 5 of article 47, on the other hand, are clear repetitions of the rules contained in both Conventions, which corroborates Munavvar’s description of article 47 as one that has included ‘something borrowed and something new’.⁶⁶

2. Enclosed waters

Their legal status and applicable regime varies according to the nature of the baselines surrounding them. In other words, under Part IV of UNCLOS, the archipelagic State has been granted sovereignty over the enclosed waters and its resources as a concession to secure a number of rights in favour of navigating states. Conversely, the waters on the landward side of the straight baselines drawn according to articles 4 of the Geneva Convention and 7 of UNCLOS, are internal waters, thus subject to less constraints than those recognised as archipelagic.⁶⁷

In the first scenario, states are allowed to exercise sovereignty over the waters enclosed by the archipelagic baselines, their bed, subsoil and corresponding air space⁶⁸ in a similar regime as that of the territorial sea, in the sense that there is recognition of navigational rights.⁶⁹ These rights comprise innocent passage for ships of all states, in accordance to the rules prescribed in Part II for the territorial sea; and archipelagic sea lanes passage. If an archipelagic state decides to implement these routes, due publicity must be given to the axis of the sea lanes and the respective traffic separation schemes to ensure the safe passage of ships.⁷⁰ However, archipelagic states are not obliged to establish such sea

⁶³ Tanaka (n 2) 111.

⁶⁴ Munavvar (n 50) 136.

⁶⁵ Tanaka (n 2) 111.

⁶⁶ Munavvar (n 50) 138.

⁶⁷ *ibid* 136.

⁶⁸ UNCLOS art 49(1)–(2).

⁶⁹ Munavvar (n 50) 155.

⁷⁰ UNCLOS art 53(7)–(10).

lanes,⁷¹ in which case the right to transit through the routes normally used for international navigation remains valid (article 53(12)). Likewise, it seems that there is no obligation for ships to use the designated sea lanes either, as Brown alleges; in which case, they will not benefit from this right as it allows, for example, navigation ‘in the normal mode’ (article 53(3)).⁷²

In relation to internal waters, they can result from the application of straight baselines to link coastal archipelagos to the mainland, according to Part II of UNCLOS, or under Part VII, when the archipelagic State delimits internal waters within its archipelagic waters. In both scenarios, sovereignty over this space is not subject to any obligations towards third states (contrary to the territorial sea regime). However, as a matter of customary international law, it might be argued that there is a right of access to ports,⁷³ as well as innocent passage where the straight baseline has enclosed waters that were not previously considered as such.⁷⁴

Although the regime of archipelagic waters shares some similarities with that of the territorial sea, it was included in UNCLOS as a *sui generis* category subject to a wider set of exceptions, in order to balance the interests of navigating and archipelagic states. As Morgan describes: ‘the archipelagic regime is more of a second cousin to the territorial sea than an identical twin’.⁷⁵ Without going any further, this essay requires a clear understanding of both regimes in order to sustain the Galapagos claim. For this reason, it will be briefly concluded that the enclosed waters of coastal archipelagos seem to be well established in international law as internal waters, through conventional and customary rules.⁷⁶ As for the legal status of archipelagic waters, they appear to have become part of customary international law, as well.⁷⁷ Despite the fact that the rules on passage through archipelagic waters were developed as part of an entirely new concept in UNCLOS, consensus, State practice, and the fact that the rules of passage through the territorial sea are well established as custom, have proved that this regime has indeed passed into the body of customary law.⁷⁸

3. *State practice*

⁷¹ Brown (n 5) 118.

⁷² *ibid* 120.

⁷³ Brown (n 5) 38.

⁷⁴ 1958 Geneva Convention art 5(2); UNCLOS art 8(2).

⁷⁵ A L Morgan, ‘The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action’ (1996) 27(1–2) *Ocean Dev & Intl L* 5, 15.

⁷⁶ Munavvar (n 50) 147.

⁷⁷ Churchill and Lowe (n 3) 129.

⁷⁸ Brown (n 5) 122.

Unofficially, the UN estimates that approximately 22 states have claimed archipelagic status on the basis of article 46 of the UNCLOS.⁷⁹ More than 20 years after the convention entered into force, the aftermath shows that the set of provisions of Part IV, especially the objective criteria of article 47, has been satisfactorily complied, with very few exceptions.⁸⁰

For instance Indonesia, despite being one of the states leading the archipelagic claims during UNCLOS III, surprisingly did not deposit a complete and revised set of its archipelagic baselines system until 2009.⁸¹ Similarly, the Philippines, after the continuous objections of Australia, Russia and the US, finally enacted Act No 9522 to define the baselines of the Philippine archipelago, in accordance with UNCLOS.⁸² Nonetheless, they did not refer to the legal status of the enclosed waters, which have traditionally held a category of internal waters under domestic legislation,⁸³ at least until a legislative decision is taken regarding the Philippines Archipelagic Sea Lanes Act.⁸⁴

In contrast to the mostly uniform compliance of Part IV, there is a considerable amount of practice of continental states with outlying archipelagos that entails a more problematic analysis. Kopela has interestingly synthesised this praxis into the following.

First, there is the group of states with ‘one [or two] large islands surrounded by smaller insular dependencies’⁸⁵ which have applied the provisions concerning coastal archipelagos,⁸⁶ and thus rely on a straight baseline system to connect the relatively close islands to the coast of the main islands. Such is the case of the Kerleguen Islands in France, the Svalbard Archipelago in Norway and the Sjaelland and Laeso Islands in Denmark,⁸⁷ to mention a few. This analogy is deemed to be valid under a more flexible interpretation of the norms prescribed for coastal archipelagos, especially when there is no specific rule regarding

⁷⁹ Table of Claims to Maritime Jurisdiction as at 15 July 2011 (United Nations Division for Ocean Affairs and the Law of the Sea).

<www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf> accessed 11 July 2017.

⁸⁰ Clive Schofield, ‘Departures from the Coast: Trends in the Application of Territorial Sea Baselines under the Law of the Sea Convention’ (2012) 27(4) IJMCL 723, 729.

⁸¹ Tara Davenport, ‘The Archipelagic Regime’ in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 146.

⁸² ED Brown, *The International Law of the Sea Documents, Cases and Tables Volume II* (Dartmouth 1994) 101.

⁸³ Philippines Republic Act No 3046 of 17 June 1961 (An Act to define the baselines of the territorial sea of the Philippines).

⁸⁴ Philippines Senate Bill No. 2738 Archipelagic Sea Lanes Act

<www.senate.gov.ph/lis/bill_res.aspx?congress=15&q=SBN-2738> accessed 11 July 2017.

⁸⁵ Kopela (n 24) 113.

⁸⁶ 1958 Geneva Convention art 4(1); UNCLOS art 7(1).

⁸⁷ Kopela (n 24) 117–121.

the adjacency, compactness and location of the islands in relation to the coast.⁸⁸ Indeed, it is the vague language in their writing that allows this wide breadth of claims.

On the other hand, Kopela has identified a parallel practice of non-archipelagic states, which islands cannot possibly be considered as fringing the coastline due to their distant location, such as the Galapagos.⁸⁹ Or the Houtman Abrolhos Islands in Australia, which despite being connected by short straight baselines, the coastal archipelago regime is inapplicable to them due to the absence of a main island to support the presence of the rest of the features as a fringe along its coastline.⁹⁰ Similar claims take place in the Faroe Islands in Denmark, the Azores and Madeira in Portugal, and the Canary and Balearic Islands in Spain,⁹¹ where not even the most generous interpretation of the provisions for coastal archipelagos could support these claims.

Finally, Kopela highlights the practice of states which do not consider their outlying dependent islands as a whole, thus each one of them is delimited by normal baselines. This practice, however, is not uniform; rather it responds to individual considerations of each State, which in some cases have preferred to draw straight baselines connecting their outlying islands, and in others they have opted for the normal baseline system.⁹² Such is the case of the UK, which uses a geometric construction in the Falkland Islands as opposing to normal baselines in the Virgin Islands and the Bermudas.⁹³ Likewise, Australia has a similar dual approach in respect to the Houtman and Abrolhos Islands, and the Cocos Islands.⁹⁴

There is also the uniform practice of the United States, which has traditionally been opposed to a special regime for dependent archipelagos, insisting that each island should be considered as an individual feature, subject to a normal baseline drawing only.⁹⁵ Quite coherent under the view that the US, despite not being a State party to the UNCLOS, has exercised a persistent objector role regarding maritime claims in different parts of the globe and their consistency with international law.⁹⁶

Considering this study, it is reasonable to conclude that UNCLOS (and its predecessor) fail to provide a solid ground to justify the claims of continental states in their

⁸⁸ Munavvar (n 50) 183.

⁸⁹ Kopela (n 24) 125.

⁹⁰ *ibid* 127.

⁹¹ *ibid* 126–132.

⁹² *ibid* 140.

⁹³ *ibid*.

⁹⁴ *ibid*.

⁹⁵ *ibid* 143.

⁹⁶ Limits in the Seas (US Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs) <www.state.gov/e/oes/ocns/opa/c16065.htm> accessed 11 July 2017.

dependent outlying archipelagos. Nonetheless, this does not seem to have been the intention behind these proclamations.⁹⁷ As many scholars agree, the lack of a specific provision to cover dependent archipelagos has not impeded states in connecting their insular features through straight baselines and enclosing them as a whole.⁹⁸ Indeed, leaving aside the statehood requirement of article 46(a), a great majority of mid-ocean dependent archipelagos comply with the definition of article 46(b).⁹⁹ Therefore, the practice of states with archipelagos suggests that, given the lacuna¹⁰⁰ in the archipelagic regime of UNCLOS, their claims could be legally justified on the basis of customary international law.¹⁰¹

D. THE GALAPAGOS ISLANDS: THE VALID CLAIM OF A *SUI GENERIS* CASE

1. Setting the basis

The islands are located at a distance of 972 km off the west of the Ecuadorian coast, in the Pacific Ocean. Also, known as Archipiélago de Colón, is one of the 24 provinces of the Republic of Ecuador, to which they appertain since 1832, when they were annexed by its first president.¹⁰²

The archipelago encompasses 5 main islands with an area that exceeds 500 km² (Isabela, Santa Cruz, Fernandina, San Salvador, and San Cristóbal), where also most of the population of the archipelago is concentrated (around 25,000 people, mostly of Ecuadorian origin), plus 8 smaller islands whose areas range from 14 to 173 km², 6 minor islands between 1 and 5 km², 42 islets with an area of less than 1 km² and 26 rocks, for a total of 8,010 km² of land.¹⁰³

This ‘living museum and showcase of evolution’, as remarked by UNESCO, is recognised worldwide for its outstandingly rich flora and fauna. The uniqueness of their species and their ability to adapt to the environment of each island caught the attention of the naturalist Charles Darwin back in 1835, who found in the Galapagos a great source of

⁹⁷ Kopela (n 24) 148.

⁹⁸ Munavvar (n 50) 184; Kopela (n 24) 147; Davenport (n 80) 155.

⁹⁹ Munavvar (n 50) 184.

¹⁰⁰ *ibid* 154.

¹⁰¹ Kopela (n 24) 148.

¹⁰² The Galapagos Islands, Geography and General Aspects (Oceanographic Institute of the Navy of the Republic of Ecuador) <www.inocar.mil.ec/docs/derrotero/derrotero_cap_VI.pdf> accessed 3 August 2015.

¹⁰³ *ibid*.

knowledge and an important contribution to his evolutionary theory of natural selection, reflected in *On the Origin of Species*.¹⁰⁴

Furthermore, the biodiversity of this scenario granted the Galapagos Islands the UNESCO World Heritage status in 1978,¹⁰⁵ under the following criteria:

- (vii) natural phenomena or beauty;
- (viii) major stages of earth's history;
- (ix) significant ecological and biological processes; and
- (x) significant natural habitat for biodiversity.¹⁰⁶

It also integrates the List of Biosphere Reserves for its outstanding universal value, since 1984.¹⁰⁷

However, it was not only one of the first properties to hold UNESCO recognition, but was also included in the List of World Heritage in Danger in 2007, due to the illegal industrial over-fishing, especially that related to shark finning motivated by the high demand in overseas market, the introduction of invasive alien species, population growth related to tourism and other factors which sadly lead to extinction.¹⁰⁸ This awakening prompted Ecuador to strengthen its response to protect the Galapagos and take a number of measures, including a constitutional amendment, which contributed to their removal from the list in 2010.¹⁰⁹

Nonetheless, the many risks threatening this particularly vulnerable area are latent and the Ecuadorian government has been called upon to implement a coherent set of policies, resource management and activity control over the basis of a strong legislation to mitigate the ongoing risk, and to preserve this environment and its population.

Indeed, it was under similar considerations, but certainly less serious threats, that Ecuador recognised the ecological value of the Galapagos and enacted domestic legislation

¹⁰⁴ Charles Darwin, *On the Origin of the Species* (Rep Anv edition, Signet 2003); Galapagos Islands (National Geographic Society) <www.travel.nationalgeographic.com/travel/world-heritage/galapagos-islands/> accessed 15 August 2015.

¹⁰⁵ UNESCO 'Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage Second Session Final Report' (9 October 1978) UN CC_78/CONF.010/10 Rev.

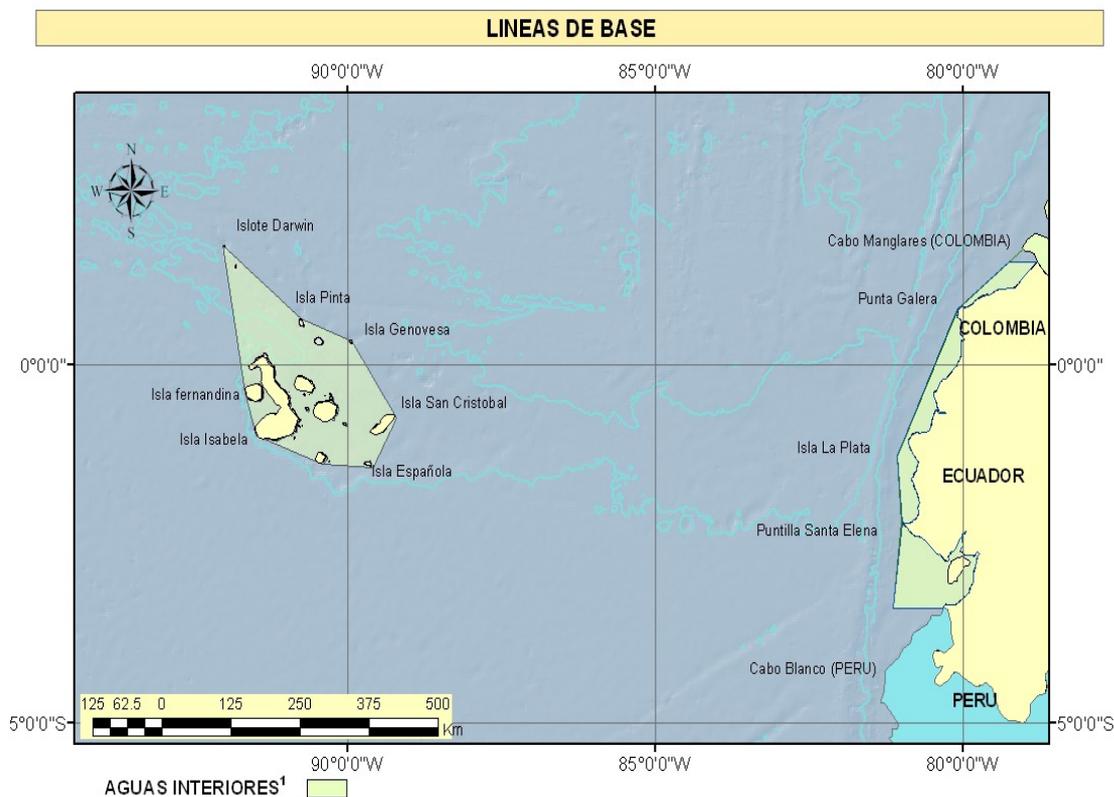
¹⁰⁶ UNESCO 'Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage Operational Guidelines for the Implementation of the World Heritage Convention' (July 2013) UN Doc. WHC.13/01.

¹⁰⁷ UNESCO List of biosphere reserves which are wholly or partially world heritage sites by 24 August 2009 <www.unesco.org/mab/doc/brs/brs_whc.pdf> accessed 15 August 2015.

¹⁰⁸ UNESCO (World Heritage Committee, 34th Session), 'Convention Concerning the Protection of the World Cultural and Natural Heritage, Summary Record' (25 July–3 August 2010) UN Doc WHC-10/34.COM/INF.20.

¹⁰⁹ *ibid.*

declaring the inviolability of its reserved areas in 1934 and 1936,¹¹⁰ signed the 1952 Declaration on the Maritime Zone along with Peru and Chile,¹¹¹ established the Galapagos National Park in 1959,¹¹² officially specified the straight baseline points from where the territorial sea would be measured in 1971,¹¹³ categorised the Islands as a Province in 1973,¹¹⁴ created the Marine Resources Reserve in 1986,¹¹⁵ requested from the IMO a special protective regime in 2005, declared a special governance regime to administer the Galapagos at a constitutional level,¹¹⁶ and now even potentially submits a project to extend its continental shelf beyond 200 miles before the UN Commission on the Limits of the Continental Shelf and so extend its sovereign rights over this area.



Straight Baselines in accordance with the Supreme Decree N 959-A.

Source: Oceanographic Institute of the Navy of the Republic of Ecuador.

¹¹⁰ Ecuador Presidential Decree N.697, Official Registry N.257 (21 August 1934); and Supreme Decree N.31, Official Registry N.189 (14 May 1936), Sofia Kopela, *Dependent Archipelagos in the Law of the Sea* (n 24) 200.

¹¹¹ Santiago Declaration (Ecuador, Peru and Chile) (adopted 18 August 1952, entered into force for Ecuador 7 February 1955) art IV.

¹¹² Ecuador Emergency Executive Decree N.17, Official Registry N.873 (20 July 1959).

¹¹³ Ecuador Supreme Decree N.959-A (28 July 1971).

¹¹⁴ Ecuador Supreme Decree N.164, Official Registry N.256 (28 February 1973).

¹¹⁵ Ecuador Decree N. 1810-A, Official Registry N.434 (13 May 1986).

¹¹⁶ Constitution of the Republic of Ecuador 2007.

Interestingly, all of these declarations have been made on the basis of the Galapagos as a single unity, bordered by territorial waters measured from the outermost points of the outermost islands. Thus, the rights of foreign vessels have been restricted in favour of Ecuador and its interests. Worthy of note so as to understand Ecuador's historical attitude towards this issue is that even more declarations have been made at a constitutional level, where the Galapagos have been expressly recognised as a whole, since 1835.¹¹⁷

2. *A shift from baselines to historic waters*

a) Baselines

The fact that a number of group of islands comply, in theory, with the archipelagic definition of article 46(b), does not entail the right to invoke an archipelagic State status when the very elements of statehood are missing.¹¹⁸ This goes beyond the aim of the UNCLOS rule, designed to exclude dependent archipelagos, or the Galapagos for this effect.

Considering that Ecuador officially enacted its straight archipelagic baseline system in 1971, when UNCLOS III was still in its early confirmation stages and an archipelagic State regime was completely non-existent in conventional international law, the Galapagos case cannot possibly be sustained under the legal basis of Part IV,¹¹⁹ which might also be considered to contravene the spirit of article 300 of UNCLOS as it could be viewed as an abuse of rights.

Nonetheless, while oceanic dependent archipelagos do not comply with the strict language of Part IV, it is not entirely incorrect to propose that they comply, on the other hand, with the more flexible approach of article 7; a set of provisions that have been drafted in a subjective manner and allow the coastal State a broader margin of interpretation in the drawing of straight baselines.¹²⁰

However, to analyse article 7 of UNCLOS is to go back to the Geneva Convention itself, especially if considering the 1971 Ecuadorian Decree in a context where the 1958 Convention was the rule governing the seas. Despite Ecuador not being a State party to the Geneva Convention, the fact that this instrument did not exactly prohibit the application of straight baselines to enclose a group of islands, suggests that it did not constitute an unlawful practice under general international law.¹²¹

¹¹⁷ Constitution of the Republic of Ecuador 1835, art 3.

¹¹⁸ Munavvar (n 50).

¹¹⁹ Robert W Smith, 'Global Maritime Claims' (1989) 20(1) *Ocean Dev & Intl L* 83, 90.

¹²⁰ Rothwell and Stephens (n 59) 44.

¹²¹ Kopela (n 24) 171.

Moreover, the provisions concerning straight baselines find their legal basis in the *Fisheries Case*. This judgment has not only influenced further State practice, but has found continuity in both the 1958 and 1982 Conventions, besides providing the very basis for the archipelagic states regime during the UNCOS III.¹²²

As such, the implementation of straight baselines to enclose mid-ocean dependent archipelagos has been suggested to be valid under international law if analogously applied to the ICJ Judgment.¹²³ Although an interesting contribution, I must argue that the dissimilarities between coastal and oceanic archipelagos outweigh any resemblance between these archipelagos and thus any potential attempt to apply these criteria to the Galapagos. Nevertheless, the *Fisheries Case* should not be entirely dismissed, as it brought an equally important element into consideration, one that could effectively sustain the Galapagos case: historic waters.

As for straight baselines, the ICJ Judgment is indeed broad in some of its content and provides a subjective approach to the matter by avoiding any mathematical guidance,¹²⁴ to the point that a significant number of states have relied on these criteria, despite a reiterative protest of vigilant states such as the US.¹²⁵ A superficial reading of this Judgment leads to the conclusion that as long as the coastal State reasonably complies with the ICJ considerations, the drawing of straight baselines are deemed to be valid under international law, regardless of their length.¹²⁶

This argument is partially correct, to the extent that it is applied around a fringe or group of islands at a relatively close distance from the coastline. As far as mid-ocean archipelagos are concerned, this analogy is challenging and hard to sustain, starting from the fact that the case submitted before the ICJ was not concerned with off-shore archipelagos in the first place.¹²⁷ Although there is no objective provision to determine the exact distance the islands must be located from the coastline, it must be recalled that the Court relied on the fact that that the Norwegian coast was fringed by these islands, in a manner that they bordered a majority of the coastline simulating a masking effect.¹²⁸ Evidently, this is not the case with the Galapagos in relation to the continental territory of Ecuador. Thus the application of

¹²² *ibid* 43.

¹²³ Brown (n 5) 124.

¹²⁴ Rothwell and Stephens (n 59) 44.

¹²⁵ Donat Pharand, 'The Arctic Waters and the Northwest Passage: A Final Revisit' (2007) 38(1-2) *Ocean Dev & Intl L* 3, 22-23.

¹²⁶ *ibid* 23.

¹²⁷ Munavvar (n 50) 70.

¹²⁸ Kopela (n 24) 62-63.

straight baselines in analogy to coastal archipelagos in the *Fisheries Case*, and in application of article 4(1) of the Geneva Convention and article 7(1) of UNCLOS, is not an appropriate option for Ecuador.

Finally, there is some quite interesting reasoning underpinning the ICJ Judgment, as it is the land domain that ‘confers upon the coastal State a right to the waters off its coasts’.¹²⁹ This is the key point that prevents mid-ocean archipelagos being equated to coastal archipelagos: the dominance of the coastline over the sea, the immediate distance that subordinates islands and waters to the land domain.¹³⁰ This differs from mid-ocean archipelagos, where there is no dominant coastline as a point of reference, but rather a water-based analysis;¹³¹ which arguably can sustain the Galapagos claim and which should focus on historic, immemorial, long-standing considerations of Ecuador over the waters that it has enclosed and use them as a starting point to explain the implementation of a straight baseline method as the only logical drawing method to safeguard their interests.

b) Historic title over waters

Ecuador has traditionally considered the enclosed waters of the Galapagos as internal, suggesting on a narrow first view that it does not comply with the rights accommodated for third states in Part IV of UNCLOS. While it is correct that any limitation to the sovereignty of a State has to clearly emanate from a rule of international law as it cannot be presumed, in accordance with the PCIJ decision in the *Lotus case*,¹³² it is also incorrect to affirm that Ecuador does not comply with international law on the basis of the UNCLOS framework, as this work argues that it has no intention to validate its practice under these provisions in the first place.

Likewise, ‘a State may not plead its municipal law as a defense to avoid its obligations under international law’,¹³³ thus the freedom of navigation and other related rights cannot be impeded in archipelagic waters through national legislation. Again, this is inapplicable to the Galapagos, because Ecuador does not base its claim in the terms of Part IV. Hence, it is not under an obligation to designate sea lanes passage and any other right prescribed in UNCLOS.

¹²⁹ *Fisheries Case (United Kingdom v Norway)* (n 3) [59].

¹³⁰ Dale Andrew, ‘Archipelagos and the Law of the Sea: Island straits states or island-studded sea space?’ (1978) 2(1) *Marine Policy* J 46, 52.

¹³¹ *ibid.*

¹³² Donald R Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and The New Law of the Sea* (Martinus Nijhoff 2000) 155.

¹³³ *ibid* 161.

The Ecuadorian practice must be validated from its immemorial and unequivocal consideration of the Galapagos as a single geographic, territorial and political unity, whose enclosed waters have traditionally been treated as internal.¹³⁴

In this regard, the specific scope and terms for the acquisition of historic waters have not been expressly prescribed in any of the law of the sea conventions. However, their nature has been recognised in customary international law through State practice¹³⁵ and judicial decisions,¹³⁶ where they have been acknowledged as an enlargement of the notion of historic bays on historic grounds.¹³⁷ Moreover, as a legal status that is not strictly limited to apply to bays, but one that can be equally extended to other maritime areas ‘where there is at least some evidence of geographical enclosure or connection with the adjacent landmass’; such is the case of archipelagos.¹³⁸

As the historic title constitutes the starting point for historic waters, which would not be considered as internal in the absence of it, it also constitutes a derogation of the rules of international law in force.¹³⁹ In other words, and leaving aside the fact that Ecuador does not justify its position under the archipelagic regime of UNCLOS, the sovereignty that it has exercised over the enclosed waters of the Galapagos does not contravene international law as it has relied on a historic title. Hence, it has complete sovereignty over this space and is under no legal obligation to concede navigational rights, whether it is innocent or archipelagic sea lanes passage,¹⁴⁰ or freedom of fishing and any other activity permitted in a high seas regime.

In this regard, it should be noted that the Ecuadorian practice constitutes a claim for historic waters, and not a plea to acquire jurisdictional historic rights over them. The natures of these claims, although interrelated, are significantly different.¹⁴¹ Applying Symmons’ criteria, Ecuador has not claimed to exercise any fishing rights in international waters, as it is usually the case of historic rights.¹⁴² In addition, the claim carries an erga omnes effect with it and gives Ecuador jurisdiction and sovereignty over this space, a territorial right over this zone; a zone that is most of all immediately adjacent to the land domain.¹⁴³

¹³⁴ Kopela (n 24) 205–206 ; Munavvar (n 50) 61.

¹³⁵ *Fisheries Case (United Kingdom v Norway)* (n 53); *Case Concerning Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening)* [1992] ICJ Rep 351.

¹³⁶ Clive Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Martinus Nijhoff 2008) 2.

¹³⁷ Pharand (n 125) 5.

¹³⁸ Symmons (n 136) 18.

¹³⁹ *Fisheries Case (United Kingdom v Norway)* (n 3).

¹⁴⁰ Pharand (n 125) 6.

¹⁴¹ Symmons (n 136) 6.

¹⁴² *ibid* 4.

¹⁴³ *ibid* 5–6.

Most importantly, Pharand argues, mere declarations of intention and enforcement measures through legislative acts are not enough.¹⁴⁴ This exercise should be effective in practice, where the degree of the authority of the State is measured in accordance with the nature of the threat in question.¹⁴⁵ Since the notion of unity is the base of archipelagic claims, states with archipelagos are not only expected, but required, to take all the adequate measures to protect their environment, especially the waters within the baselines that are highly vulnerable and where any contingency is a potential threat to the ecosystem and the population that depends on them.¹⁴⁶

In this regard, the early recognition of the Galapagos as a single unity in the Ecuadorian legislation has allowed it to extend all the State machinery to protect this area. Aware that the Galapagos could not possibly survive without the effective protection of the marine ecosystem that surrounds the islands, it enacted legislation according to which it is entitled to exercise full jurisdiction and sovereignty over the enclosed waters of the archipelago.¹⁴⁷

Despite the fact that the Galapagos held the status of National Park and a Marine Resources Reserve from several decades ago (1959 and 1986, respectively), the Ecuadorian government took a step further and established a Special Regime for the Conservation and Sustainable Development of the Province of Galapagos in 1998.¹⁴⁸ This extends the Galapagos Marine Resources Reserve to an area of 133,000km², which comprises 50,100km² of inland waters and 40 additional nautical miles measured from the baselines that connect the outermost points of the outermost islands. As such, it was recognised in 2001 as a World Heritage Site by UNESCO, by virtue of its great ecological value and the uniqueness of its species. In response to an Ecuadorian request, the Galapagos Marine Reserve was designated by the IMO as a Particularly Sensitive Sea Area,¹⁴⁹ thus it is covered under a special regime that aims to protect this space from any possible damage caused by international maritime activities. Additionally, it established an Area to be Avoided where ‘all ships carrying

¹⁴⁴ Pharand (n 125) 7.

¹⁴⁵ *ibid* 7.

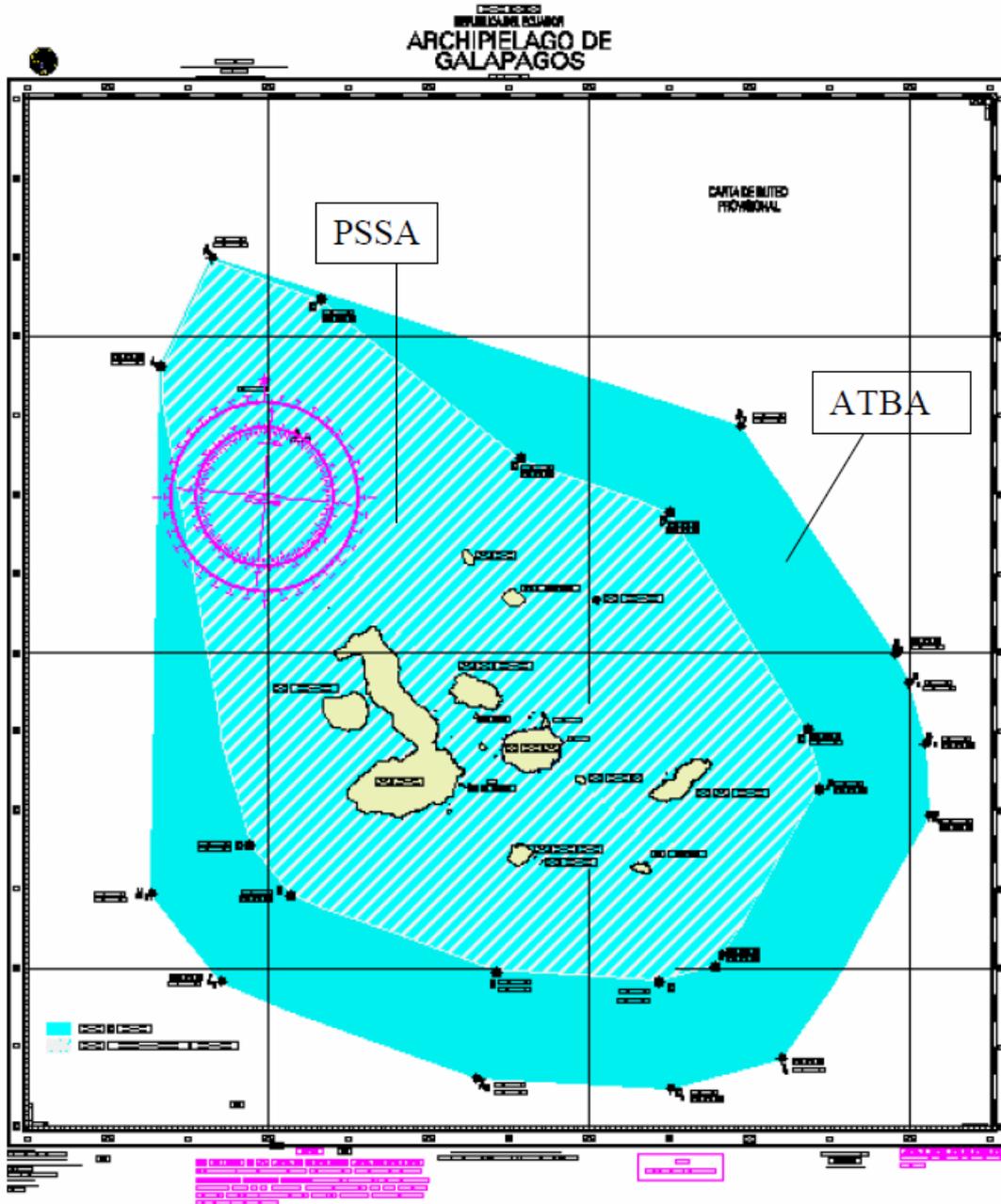
¹⁴⁶ Munavvar (n 50) 45.

¹⁴⁷ UNCLOS Declarations made upon signature, ratification, accession or succession or anytime thereafter: Government of Ecuador 24 September 2012 (Division for Ocean Affairs and the Law of the Sea) <www.un.org/depts/los/convention_agreements/convention_declarations.htm#Ecuador Upon ratification> accessed 11 July 2017.

¹⁴⁸ Ecuador Official Register N.278 (18 March 1998).

¹⁴⁹ International Maritime Organization (Marine Environment Protection Committee), ‘Designation of the Galapagos Archipelago as a Particularly Sensitive Sea Area’ (22 July 2005) MEPC 53/24/Add.1 Annex 23 1.

cargoes of oil or hazardous material, and of 500 gross tonnage and above should avoid transit'.¹⁵⁰



Galapagos Archipelago Particularly Sensitive Sea Area and Area to be Avoided Chart
 Source: IMO MEPC 53/24/Add.1 Annex 23

The number of domestic and international proclamations does not only demonstrate the commitment of the Ecuadorian State towards the conservation of the Galapagos, but it affirms that it has taken ‘whatever action was necessary to exercise its exclusive and effective

¹⁵⁰ ibid 6.

authority over the maritime area in question’,¹⁵¹ which Pharand claims constitutes one of the key elements to claim a historic waters title.¹⁵² A decisive element also emphasised by Symmons, who refers to interference with navigation and fishing not only as ‘the most important exercises of jurisdiction for historic internal waters status’,¹⁵³ but as a minimum requirement of assertions of this type. Certainly, there is a clear navigational restriction for foreign vessels in the Galapagos waters, which are not only required to have prior authorisation, but are completely banned to transit in the Area to be avoided.

As for the temporal requirement, the Ecuadorian practice has been continuous for an extended and uninterrupted period; and although it has demonstrated to be long (the 1934 Decree already considered the Islands as a single unity),¹⁵⁴ it has also been substantial in light of the enforcement measures taken to limit third states’ rights.¹⁵⁵

Publicity is often mentioned as an important feature of historic waters,¹⁵⁶ and in this respect the Ecuadorian practice is far from being hidden as it has been embodied in domestic legislation (from a wide set of decrees, special law and constitutional provisions) as well as in the international forum (through the many declarations of notorious international bodies and organisations). Thus, any third State objections asserting a lack of awareness of the existence of the enclosed waters regime of the Galapagos would be highly questionable.

In connection with this matter,¹⁵⁷ the response of third states is of great importance concerning the acknowledgement of the existence of a claim to internal waters, especially if this claim were to be contrary to international law when it was first asserted.¹⁵⁸

Recalling the main concerns expressed during the UNCLOS III, it was feared that the notion of an archipelagic regime would provoke discomfort among neighbouring states.¹⁵⁹ And in this regard, it is vital to distinguish the reaction of third states; moreover, since coastal states can only claim historic waters over areas close to their territory,¹⁶⁰ the protest (or lack of it) is more determinative if it emanates from a third State whose rights are directly affected

¹⁵¹ Pharand (n 125) 7.

¹⁵² Symmons (n 136) 117–128.

¹⁵³ *ibid* 108.

¹⁵⁴ Kopela (n 24) 201.

¹⁵⁵ Pharand (n 125) 7.

¹⁵⁶ Tullio Scovazzi, ‘Book Review Clive Symmons *Historic Waters in the Law of the Sea: A Modern Re-appraisal*’ (2010) 25(4) *IJMCL* 637, 639.

¹⁵⁷ Symmons (n 136) 213.

¹⁵⁸ *ibid* 62.

¹⁵⁹ Summary records (n 15) intervention of Mr Kharas (Pakistan) 270.

¹⁶⁰ Symmons (n 136) 6.

by it. Hence, the need to address this subject from an inter-state perspective, and their specific responses to it, either protest or acquiescence.¹⁶¹

Fortunately, the Galapagos' geographical position does not present an obstacle to international navigation in the Pacific Ocean.¹⁶² Likewise, their distance from the coasts of the continent makes the straight baseline delimitation and enclosed waters free from any possible delimitation conflict with neighbour continental states (Colombia and Peru).¹⁶³ Ecuador's claim has not only been clear from protests from states of the region (the straight baseline method to delimit a group of islands was recognised by Peru and Chile in the Santiago Declaration, supplemented by the Agreement Relating to a Special Maritime Frontier Zone), it was also openly accepted by a great variety of states during UNCLOS III (Argentina, Canada, Chile, Brazil, France, India, Peru, Spain among others).

A special remark has to be made at this point. Despite its recent signature of UNCLOS, Ecuador had traditionally claimed a territorial sea of 200 nm on the grounds of the 1952 Santiago Declaration, along with Peru and Chile. As it adhered to the 1982 Convention in 2012, it also agreed to 12 nm of territorial and 188 nm of EEZ. However, although the legal nature of a territorial sea and an EEZ differ, Ecuador has considered Costa Rica as its neighbor in respect of its insular territory for decades. Both states agreed to delimit their marine and submarine areas in 1985,¹⁶⁴ and once they ratified the UNCLOS they convened for a number of technical commissions to work in the precise coordinates, equidistant and base points from where the geodesic boundary line between the Galapagos and Cocos Island shall be drawn. This process successfully concluded in the signature of the Convention on Maritime Delimitation of the Pacific Ocean between the Republic of Ecuador and the Republic of Costa Rica in April 2014,¹⁶⁵ and in the exchange of the nautical charts by the presidents of both nations, in September 2016.

Despite the success of negotiations with neighbouring states, the Galapagos delimitation system has been protested by the US on different occasions, when it has mainly challenged the use of straight baselines to measure the territorial sea, instead of the low-water mark around each island.¹⁶⁶ Without any further discussion, this protest has lost relevance given the constant role of the US as a persistent objector to countless maritime claims, and

¹⁶¹ Scovazzi (n 156) 640.

¹⁶² Kopela (n 24) 204.

¹⁶³ *ibid* 205.

¹⁶⁴ Agreement Relating to the Delimitation of the Maritime Areas (Costa Rica-Ecuador) (adopted 12 March 1985, entered into force for Ecuador 3 April 1990) 1997 MZN 13.

¹⁶⁵ Agreement Relating to the Delimitation of the Maritime Areas (n 163).

¹⁶⁶ Limits in the Seas (n 96).

mostly because it has not effectively pursued its position.¹⁶⁷ This is understandable since the Galapagos do not constitute a threat to their rights.¹⁶⁸ Hence, the Galapagos case is nothing less than valid under customary international law,¹⁶⁹ since the international aspect of delimitation, as prescribed in the *Fisheries case*, has been successfully fulfilled.

Applying these considerations, the use of straight baselines to enclose the Galapagos is more than justified as the best available method to protect this exceptional environment. Simultaneously, it represents a valuable tool for Ecuador, through which it can regulate countless activities that could not be controlled if this area was under a high seas regime.¹⁷⁰ Furthermore, studies demonstrate that the difference between measuring the territorial sea from straight baselines around an archipelago and around each island individually, does not represent a considerable gain in terms of area.¹⁷¹ Therefore, the result of enclosing a group of islands under a straight baseline system versus the low-water mark is basically that the outer perimeter of the maritime zones is a geographic line instead of curves, which is also more convenient for navigational purposes because they are easier to ascertain in charts.¹⁷²

Again, there is no major impact to the sea area, but the gain is immense in terms of environmental protection and enhanced security, especially because pirates and smugglers do not differentiate an archipelagic State from a dependent archipelago to execute their illegal activities, and maritime accidents and vessel collisions are not planned in advance.

E. CONCLUSION

Whereas the archipelagic regime of UNCLOS may be considered unreasonable in light of its highly political negotiation, this in no way undermines the fact that it still constitutes a rule of law. To the extent that the 1982 Convention is a treaty, it is also one of the formal sources of rights and obligations in international law. The fact that it was envisioned to codify established rules of customary law and crystallise emergent norms does not mean that this framework has the last word in the law of the sea field either, or that it is not subject to evolve according to contemporary needs.¹⁷³

¹⁶⁷ Kopela (n 24) 204.

¹⁶⁸ Pharand (n 125) 8.

¹⁶⁹ Churchill and Lowe (n 3) 121.

¹⁷⁰ Sequoia Shannon, 'An Exercise in Maritime Delimitation for Archipelagic States' (1996) 12(1) *Ocean YB* 334, 357.

¹⁷¹ *ibid*; Churchill and Lowe (n 3) 130.

¹⁷² Summary records (n 13) intervention of Mr Nandan (Fiji) 263.

¹⁷³ James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 60.

Moreover, the great acceptance of the Convention does not necessarily imply that all of its provisions have equally become part of customary international law,¹⁷⁴ And in the case of outlying dependent archipelagos, that further State practice is banned from occurring in a parallel way, without being accused of unlawfulness.

This is certainly the case in regards mainland states and their practice of enclosing their outlying islands under a straight baseline system, over which enclosed waters they exercise jurisdiction and sovereignty. While a number of detailed studies suggest that this praxis is still far from being uniform and evolve into a norm of custom in international law,¹⁷⁵ it is also true that this possibility should not be entirely dismissed. Especially when the tension around these claims are -to say the least- expected when the rules governing baselines are manifestly vague in their content.

This work evidences how a singular case, allegedly not covered by the legal machinery of UNCLOS, can share the same spirit and urgency as those expressly protected by this instrument. It shows how an ‘illegal’ practice has not only been tolerated by a great number of states, but also protected by the international community under countless declarations and special regimes. This broad acceptance not only legitimises the Galapagos claim but it also unmasks the deficiencies of the modern law of the sea.

The 1982 Convention intended to limit the application of the archipelagic regime to State archipelagos on the grounds of statehood. Ironically, the international community now faces a greater challenge than the one of proliferation of claims that it feared during the UNCLOS III negotiations. The possible evolution of the practice of outlying dependent archipelagos into a norm of custom could create a bizarre parallel system, one even more beneficial than Part IV, one where navigational rights and similar concessions are not included for third parties.¹⁷⁶

As for the Galapagos, Ecuador has acted in the firm belief that its practice is coherent with international law, and there is enough material to demonstrate that it has been consistently performed for a long period of time.

However, the possession of a historic title over waters does not constitute a malicious appropriation of territory, but rather a legitimate claim that also entails a number of obligations for the Ecuadorian State, a small developing country which is also responsible of exercising effective control over the waters under its jurisdiction. Hence, the reading in the

¹⁷⁴ *ibid* 55.

¹⁷⁵ Kopela (n 24) 182.

¹⁷⁶ *ibid* 183.

Galapagos case (and archipelagos in general) should adopt a water-based approach, rather than one relying on a straight baseline method. To this end, if archipelagos consist of ‘a sea or stretch of water having many islands’, then the only viable method to enclose these features and preserve their unity is a straight baseline system. A drawing that has been traditionally stigmatised as it appears to carry expansionist intentions, a belief that the Galapagos case hopes to prove wrong.

Finally, archipelagos are generally vulnerable and demand to be protected under the law. Before a silent UNCLOS and a decentralised international law system, the logical response would be to allow State practice to continue taking its course and consolidate as a rule of international law. A rule that so far demonstrates to have no intention to modify the 1982 Convention or contravene its spirit, but rather complement its provisions now that time has evidenced them reasonable for modern needs.

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