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ISSUES AND PROBLEMS IN MEDITERRANEAN MARITIME BOUNDARY DELIMITATION:

A GEOGRAPHICAL ANALYSIS

VOLUME 1
of two volumes

Stephen Roy Langford
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Thesis submitted to the University of Durham for the degree of
Doctor of Philosophy, 1993.

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ISSUES AND PROBLEMS IN MEDITERRANEAN MARITIME BOUNDARY DELIMITATION:

A GEOGRAPHICAL ANALYSIS

Stephen Roy Langford

ABSTRACT

If each of the Mediterranean's coastal States claim 200 nautical mile offshore zones, the entire sea and seabed will be divided amongst them, as the sea's physical dimensions do not permit any coastal State to claim its full entitlement to a continental shelf or exclusive economic zone. Between 37 and 45 maritime boundaries will, therefore, be required to delimit neighbouring States' respective zones of national jurisdiction, a figure which represents approximately one-tenth of the potential number of world maritime boundaries. However, because maritime boundary delimitation in the Mediterranean is complicated by a combination of the Sea's political and geographical characteristics, allied to considerable uncertainty in the law governing delimitation, progress on boundary drawing has thus far been slow.

This thesis attempts to explain why so few maritime boundaries have been delimited in the Mediterranean by identifying the political, geographical and legal obstacles to their delimitation. In particular, consideration is given to the political relationships of neighbouring States, the Sea's physical dimensions (length, breadth and depth), the presence of islands, the claims of Mediterranean States to straight baselines and historic bays, and the effect of third State claims. The thesis concludes that bilateral delimitation of maritime boundaries is inappropriate for the Mediterranean and should be replaced by regional programmes for the conservation, management and allocation of the Sea's living resources, the protection and preservation of its marine environment, and the regulation of marine scientific research.

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- Dr. Hance D. Smith, Department of Maritime Studies, University of Wales College of Cardiff;
- Professor Louis de Vorsey, Department of Geography, University of Georgia.

PREFACE

This thesis is the result of research carried out at the University of Durham between October 1985 and September 1988. Regrettably subsequent work commitments have delayed its submission and, therefore, the thesis does not take account of the recent rapid political developments in Eastern Europe, in particular, the collapse of the Yugoslav Federation. It seems unlikely, however, that this will have any effect on the international maritime boundaries agreed between the former Federal Republic and Italy, as these will probably be inherited by the successor States.¹ The straight baselines proclaimed by the former Federal Republic are likely to be similarly inherited.

Of greater interest is the potential for maritime boundary delimitation between the independent republics, notably between Croatia and Yugoslavia (Montenegro and Serbia) in the Bay of Kotor, where the straight baseline across Žanjica Bay will need to be set aside to enable boundary delimitation to commence.²

Finally, readers should note that parts of Chapters 3, 4 and 8, concerning the claims of Mediterranean States to straight baselines and historic bays, have previously been published in the following:

G.H. Blake and R.N. Schofield (Eds.) Boundaries and State Territory in the Middle East and North Africa. (London and Sydney: Croom Helm, 1987)

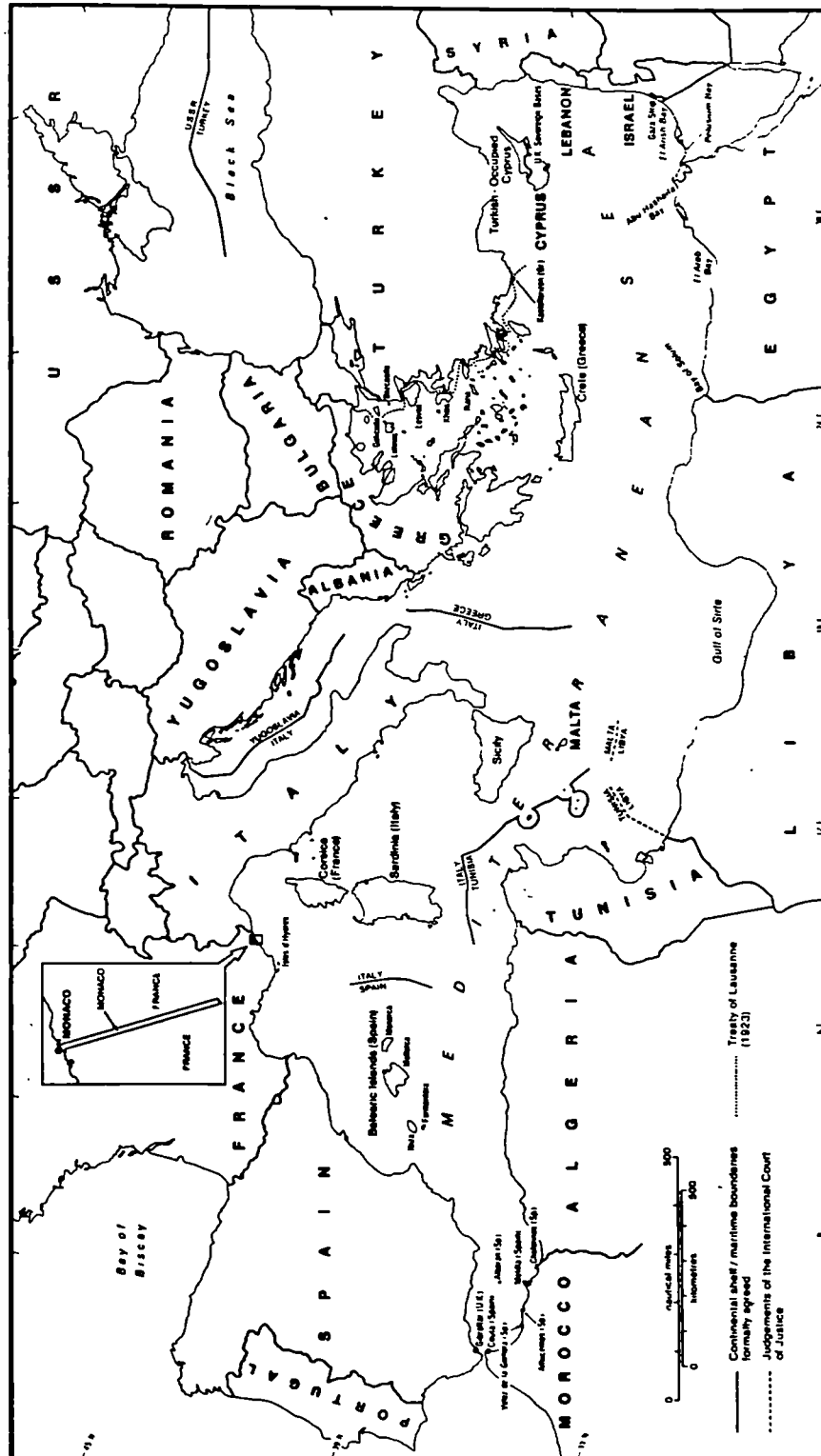
S.R. Langford Libya: The Gulf of Sirte Closing Line. International Boundaries Research Unit, Boundary Briefing Number 3. (Durham: Boundaries Research Press, 1990)

H.D. Smith and A. Vallega (Eds.) The Development of Integrated Sea-Use Management. (London: Routledge, 1991)

Notes:

1. Milivojević takes a contrary view and holds that the continental shelf boundary is now "effectively null and void:" M. Milivojević "The Croatian-Montenegrin (Yugoslav) Dispute over the Prevlaka Peninsula in the Bay of Kotor," p. 5. Paper presented to the Seminar "Boundaries and Territory in the Mediterranean Basin in an age of geopolitical change" held at the Foundation for International Studies, University of Malta, 24-27 September 1992.

2. The delimitation is further complicated by the presence of Mamula Island near the bay closing line: ibid., pp. 4-5.



PART I -
THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION:
THE CASE OF THE MEDITERRANEAN SEA



CHAPTER 1 - MARITIME BOUNDARY DELIMITATION IN THE MEDITERRANEAN SEA

1.1 Introduction

Geographers have long been interested in studying land boundaries. However, since 1945, maritime boundaries have merited more of their attention, as coastal States have progressively extended their jurisdiction offshore, in the main, to secure and safeguard the oceans' resources for their own exclusive use. The result has been the creation of a complex new world political map of ocean boundaries separating the territorial and functional zones of neighbouring coastal States. This political map of the oceans is fast evolving, but far from complete, although the degree of completion varies from region to region. For example, Prescott notes that at the end of March 1983 there were seventy-eight ratified boundary agreements, of which fifty-one were located in enclosed or semi-enclosed seas. He concluded from this, that the close proximity of *opposite* neighbours in these seas encouraged the delimitation of maritime boundaries by agreement.¹

This study looks at maritime boundary delimitation in one such semi-enclosed sea - the Mediterranean. It will be seen that in the Mediterranean, geographical proximity, far from inducing co-operative action, has twice led to recourse to the World Court to assist in the bilateral boundary delimitation process, and in the case of the maritime boundary problems between Greece and Turkey, has led almost to war. Several boundaries have been agreed in the Mediterranean, but the majority still await delimitation. Particular attention will be paid

to the motive forces for delimitation, with special consideration being given to those geographical, legal and political issues which present problems in respect of future boundary delimitations in the Mediterranean Sea.

1.2 The International Law of the Sea

Both the League of Nations and its present-day successor, the United Nations, recognised that the law of the sea was suitable for codification in a multilateral convention. The League of Nations Codification Conference, held in The Hague in 1930, agreed on draft articles regulating the legal régimes of internal waters and the territorial sea, but failed to establish a uniform breadth for the latter.

Subsequently, between 1951 and 1956, the law of the sea was considered by the International Law Commission (I.L.C.), a body of jurists appointed by the United Nations General Assembly. Its deliberations produced 73 draft articles, which were considered by the First United Nations Conference on the Law of the Sea (UNCLOS I), held in Geneva in 1958. This was attended by 86 States, and resulted in the adoption of four conventions, dealing respectively with the Territorial Sea and Contiguous Zone, the High Seas, the Continental Shelf, and Fishing and Conservation of the Living Resources of the High Seas. An Optional Protocol concerning the Compulsory Settlement of Disputes was also adopted. These entered into force between 1962 and 1966.

In 1960, the Second United Nations Conference on the Law of the Sea (UNCLOS II) was held in Geneva, where it was attended by 88 States. This Conference was convened for the purpose of considering the questions of the breadth of the territorial sea and of exclusive fishing limits, but it narrowly failed to secure agreement on these issues, left unresolved from 1958.

Between 1960 and 1970, a number of law of the sea issues came together to require the convening of the Third United Nations Conference on the Law of the Sea (UNCLOS III). This held eleven sessions between December 1973 and December 1982, where a succession of negotiating texts formed the basis for discussion. The deliberations at UNCLOS III eventually led to the adoption of a comprehensive Law of the Sea Convention on 30 April 1982. Only four States - amongst them the Mediterranean States of Israel and Turkey - voted against its adoption, although there were 17 abstentions, including Italy, Spain and the United Kingdom. 130 States voted in favour of the convention, including Algeria, Cyprus, Egypt, France, Greece, Lebanon, Libya, Malta, Monaco, Morocco, Syria, Tunisia and Yugoslavia. Albania did not vote.²

All four of the Geneva Conventions are in force for those States which have ratified or acceded to them. With the exception of the Fisheries Convention, the other Geneva Conventions are to a large extent codifications of existing rules of customary international law or reflect general principles of international law. This means that although many States are not parties to a certain convention,

nevertheless, certain rules or principles are binding upon them as customary rules or general principles. Much of the 1982 United Nations Convention on the Law of the Sea may also be regarded as codifying existing rules of customary international law. It will enter into force upon receipt of the sixtieth ratification: as of 31 October 1991, 51 States had ratified, or acceded to, the Convention.³

As far as Mediterranean States are concerned, adherence to the 1958 Conventions on the Territorial Sea and Continental Shelf, and to the 1982 Convention, is summarised in Tables 1-3. It can be seen that only five Mediterranean States, plus the United Kingdom for Gibraltar and the Sovereign Base Areas on Cyprus, are parties to the Territorial Sea Convention. Tunisia is not a party although it signed the Convention. Eight States, plus the United Kingdom, are parties to the Continental Shelf Convention. Of these, both France and Greece made reservations upon ratification. The French reservations do not pertain to the Mediterranean. The Greek reservation will be discussed later.

As far as the 1982 Convention is concerned, Albania, Israel, Syria, Turkey, and the United Kingdom are non-signatories.⁴ Although this would seem to evidence general support for the Convention amongst Mediterranean States, only four States have thus far ratified the Convention. Algeria, France, Greece, Italy, and Spain each made declarations at the time of their signature, as did Egypt, Tunisia and Yugoslavia upon ratification. Insofar as these declarations bear upon maritime boundary delimitation, they are considered in succeeding

Table 1 - Mediterranean States and Ratifications of the 1958 Geneva
Convention on the Territorial Sea and Contiguous Zone

STATES	DATE OF RATIFICATION
Albania	-
Algeria	-
Cyprus	-
Egypt	-
France	-
Greece	-
Israel	10/9/64
Italy	17/12/64
Lebanon	-
Libya	-
Malta	21/9/64
Monaco	-
Morocco	-
Spain	25/2/71
Syria	-
Tunisia	-
Turkey	-
United Kingdom	10/6/64
Yugoslavia	28/1/66

Source: R.W. Smith (Ed.) "National Claims to Maritime Jurisdictions"
Limits in the Seas No. 36 (5th Revision). (United States Department of
State, Bureau of Intelligence and Research, Office of the Geographer,
March 6, 1985).

Table 2 - Mediterranean States and Ratification of the 1958 Geneva
Convention on the Continental Shelf

STATES	DATE OF RATIFICATION
Albania	7/12/64
Algeria	-
Cyprus	11/4/74
Egypt	-
France	14/6/65
Greece	6/11/72
Israel	10/6/64
Italy	-
Lebanon	-
Libya	-
Malta	21/9/64
Monaco	-
Morocco	-
Spain	25/2/71
Syria	-
Tunisia	-
Turkey	-
United Kingdom	10/9/64
Yugoslavia	25/4/65

Source: R.W. Smith (Ed.) "National Claims to Maritime Jurisdictions"
Limits in the Seas No. 36 (5th Revision). (United States Department of
State, Bureau of Intelligence and Research, Office of the Geographer,
March 6, 1985).

Table 3 - The 1982 United Nations Law of the Sea Convention: Signatures
and Ratifications of Mediterranean States as of 31 October 1991

STATES	CONVENTION SIGNATURE	CONVENTION RATIFICATION
Albania	-	-
Algeria	10/12/82	-
Cyprus	10/12/82	12/12/88
Egypt	10/12/82	26/8/83
France	10/12/82	-
Greece	10/12/82	-
Israel	-	-
Italy	7/12/84	-
Lebanon	7/12/84	-
Libya	3/12/84	-
Malta	10/12/82	-
Monaco	10/12/84	-
Morocco	10/12/84	-
Spain	4/12/84	-
Syria	-	-
Tunisia	10/12/84	24/4/85
Turkey	-	-
United Kingdom	-	-
Yugoslavia	10/12/82	5/5/86

Source: Office for Ocean Affairs and the Law of the Sea Law of the Sea
Bulletin No. 19, pp. 1-7 (October 1991), No. 19, pp. 1-7.

chapters. Likewise in later discussion, the significance of adherence to a particular convention will become clear.

1.3 The Offshore Zones of National Jurisdiction

Each coastal State has its own legislation pertaining to its offshore jurisdiction and control. Under conventional international law, a coastal State may unilaterally make claims to internal waters (sometimes called inland or national waters), and up to four overlapping offshore jurisdictional zones, each measured from the baselines of the territorial sea. Proceeding seaward from the coast, these zones are: the territorial sea (or territorial waters), the contiguous zone, the exclusive economic zone (E.E.Z.), and the continental shelf (Fig. 1). In addition, several coastal States claim an exclusive fisheries zone (E.F.Z.). These zones can be categorised as either territorial or functional in character.

(a) Internal Waters

Internal waters and the territorial sea are territorial zones because, with limited exceptions, the coastal State has virtually complete sovereignty over the areas in question. Internal waters are created when baselines other than the low-water line along a coast are employed. International law provides for the use of straight baselines departing from the coast to close single features such as river mouths and certain bays.⁵ Of particular interest in the Mediterranean are the

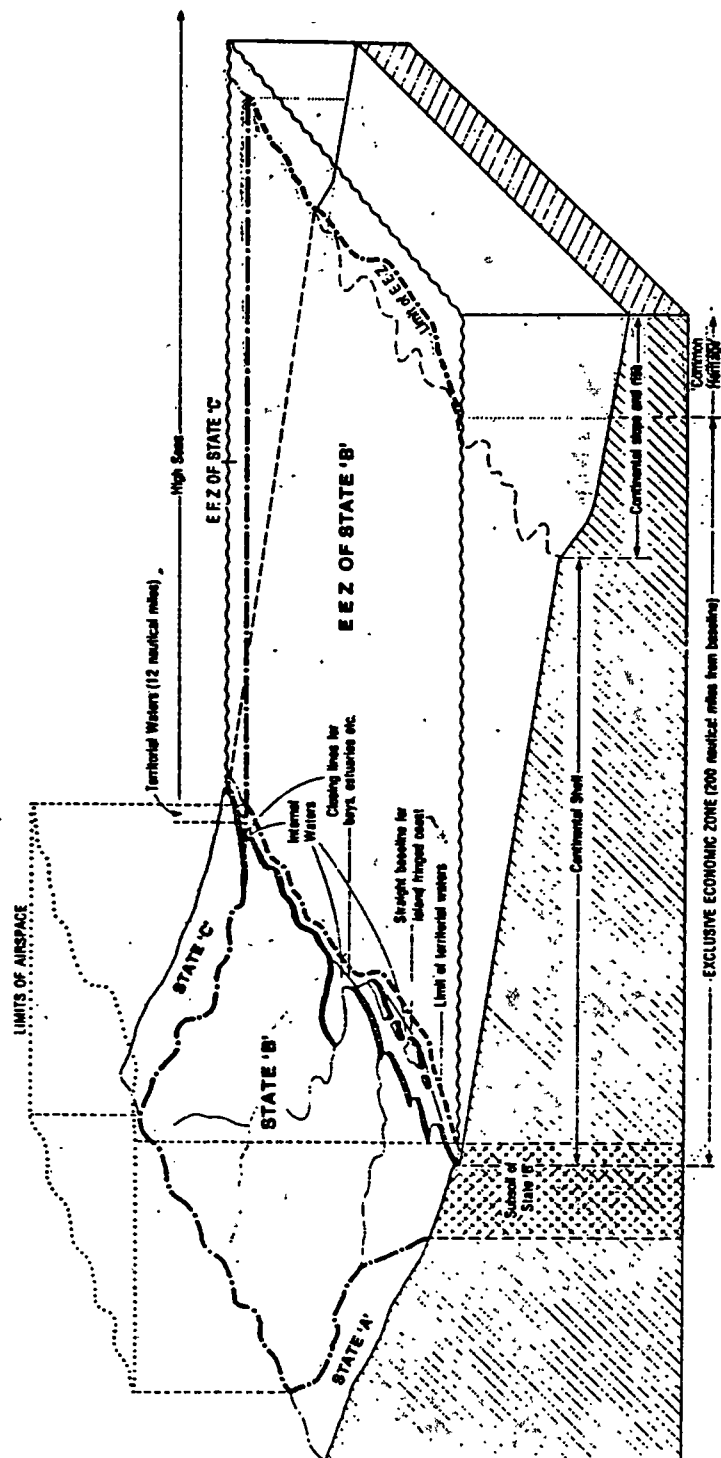


Figure 1 - The offshore zones of national jurisdiction.

Source: G.H. Blake "Offshore Political Geography: The Partitioning of the Oceans" in A.D. Drysdale and G.H. Blake A Political Geography of the Middle East and North Africa, pp. 109-146, at p. 110. (New York: Oxford University Press, 1985)

lines used to close so-called "historic bays," the effects of which are discussed in Chapter 3.

In addition, straight baseline systems may be drawn along coasts fulfilling certain geographical conditions, such as being deeply indented or fringed with islands.⁶ Twelve Mediterranean States have this type of straight baseline legislation, the content and effect of which is the subject of Chapter 4.

The only exception to a coastal State's absolute sovereignty over internal waters - seabed, subsoil and airspace included - is the provision that where the establishment of a straight baseline has the effect of enclosing as internal waters areas previously not considered as such, a right of innocent passage exists.⁷

(b) The Territorial Sea

The concept of the territorial sea is based on the idea that adjacent waters are a continuation of the territory of the coastal State, and that therefore sovereign territorial rights over the land should extend to the coastal waters. Thus, coastal States exercise full sovereignty over the waters, seabed, subsoil and airspace of the territorial sea, with the exception that ships of all States enjoy the right of innocent passage, (but not of overflight).

The right of innocent passage through the territorial sea is a somewhat narrower right than the freedom of navigation upon the high

seas. Under both the 1958 Territorial Sea Convention and the 1982 Convention, "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." Foreign ships, whether merchant vessels or warships, are enjoined to comply with the laws and regulations enacted by the coastal State in conformity with international law, in particular, under the 1958 Convention, with regard to transport and navigation. Article 21 of the 1982 Convention specifies those activities for which the coastal State may adopt laws and regulations. The coastal State is also permitted to establish sea lanes and traffic separation schemes in the territorial sea.

Under both the 1958 and 1982 Conventions, the coastal State may take the necessary steps to prevent non-innocent passage, and Article 19 of the 1982 Convention details eleven activities which would render passage "non-innocent." The coastal State may also, without discrimination against foreign ships, temporarily suspend passage in specified areas "if such suspension is essential for the protection of its security, including weapons exercises."

Unfortunately, neither the Territorial Sea Convention, nor the 1982 Convention, make it clear whether warships have the right to enter the territorial sea without the prior permission of the coastal State or at least notification thereto. Article 30 of the 1982 Convention follows Article 23 of the 1958 Convention in allowing a coastal State to require a warship to leave the territorial sea if it does not comply with coastal State regulations. However, under both Conventions,

foreign submarines passing through the territorial sea are required to navigate on the surface and to show their flag.

As to the breadth of a State's territorial waters, this has long been a matter of legal controversy; not until UNCLOS III, was the international community able to agree upon a definitive limit,⁹ as a consequence of which, under the 1982 Convention a coastal State is permitted to claim a territorial sea which does not exceed 12 nautical miles in breadth.

(c) The Contiguous Zone

Beyond the territorial sea, all other offshore zones are functional. Under the 1958 Territorial Sea Convention, the contiguous zone was limited to 12 miles, serving to limit the extent of the territorial sea, with the intention of providing protection for the legitimate interests of those coastal States in favour of wide territorial seas.⁹

At UNCLOS III, the contiguous zone received little attention, as many States, Lebanon included, thought the concept superfluous under the establishment of a 12 mile territorial sea and a 200 mile E.E.Z.¹⁰ Other States wished to retain the contiguous zone, arguing it was not inconsistent with the E.E.Z. concept, which related only to jurisdiction over resources.¹¹ The latter view prevailed, and thus under Article 33 of the 1982 Convention, a State may claim a contiguous zone which may not extend beyond 24 nautical miles from the baselines

of the territorial sea. Within the contiguous zone a coastal State may exercise the necessary control to "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea."

(d) The Continental Shelf

With the discovery of hydrocarbon resources in the continental shelf, there arose the question of coastal State jurisdiction over the adjacent seabed. In 1942, the United Kingdom (on behalf of Trinidad and Tobago) and Venezuela divided between themselves the submarine area beyond their territorial seas in the Gulf of Paria, but it was the 1945 Truman Proclamation on the Continental Shelf which established the concept of coastal State jurisdiction over the appurtenant continental shelf. The United States regarded the continental shelf as "an extension of the land-mass of the coastal nation," and under the Truman Proclamation it claimed "sovereign rights" to explore and exploit the resources of the seabed and subsoil adjacent to its territorial sea.

Many States followed the United States in claiming continental shelf jurisdiction, and the concept quickly gained recognition in international law. Under the 1958 Continental Shelf Convention, the coastal State was accorded exclusive sovereign rights to explore and exploit the natural resources of the continental shelf, which include all mineral and non-living resources of the seabed and subsoil, together with sedentary fish species. These rights do not depend on occupation, either effective or notional, or on any express

proclamation,¹² and do not affect the legal status of the superjacent waters as high seas, or that of the airspace above them. Thus the freedoms of navigation and overflight are maintained for foreign nationals. All of these rights have been confirmed by the 1982 Convention. In addition, the coastal State may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf, and under the 1982 Convention, all States are entitled to lay such pipelines and cables on the continental shelf.

With respect to the outer limit of the continental shelf, the I.L.C. initially chose the 200 metre isobath because it was regarded as defining the edge of the geological continental shelf, but at the same time recognised that future technical developments might make it possible for States to exploit the natural resources of the seabed beyond this isobathic limit. Subsequently, it wavered between what it perceived as the certainty or instability of adopting a fixed depth for the limit of the continental shelf, before, in 1956, adopting the compromise formula of depth-cum-exploitability recommended by the Latin American States in paragraph 1 of the "Resolution of Ciudad Trujillo" (1956). The compromise formula survived many amendments at the 1958 Geneva Conference, so that under the 1958 Continental Shelf Convention, the outer limit of a State's continental shelf was defined by the 200 metre isobath or, "beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources."¹³

However, between 1958 and 1970, the exploitability criterion in Article 1 of the Continental Shelf Convention became the focus of much discontent. In 1967, Arvid Pardo made his famous speech demanding that the resources of the international seabed area beyond the limits of national jurisdiction be regarded as "the common heritage of mankind," for as technology progressed enabling the recovery both of oil and gas from ever greater depths and of polymetallic nodules from the deep ocean floor, the fear grew that the world's oceans would be divided up between coastal States using the exploitability criterion.¹⁴ In 1970, the United Nations adopted resolutions accepting that there should be an international régime to regulate exploitation of the resources of the international seabed area, making it necessary to redefine the outer limits of offshore national jurisdiction.

At UNCLOS III, definition of the outer limit of the continental shelf became one of a number of so-called "hard-core" issues. With the acceptance of a 200 mile E.E.Z., it was the view of the landlocked and geographically disadvantaged States, the Arab States, and many African States, that 200 miles should also form the limit to continental shelf jurisdiction.¹⁵ However, those States favourably endowed with broad continental margins maintained their right under international law to establish their continental shelf limits beyond 200 miles, arguing that since the continental shelf was the natural prolongation of the land territory of a coastal State, its outer limits should extend up to the edge of the continental margin. Thus, although Article 76 of the 1982 Convention was successful in removing the problematic exploitability

critterion, in its place it put another compromise formula, namely, that:

"1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

From the point of view of the Mediterranean, the significant provision of this Article is the fact that it separates the legal concept of the continental shelf from the physical fact of the existence of a continental margin. Thus, although the Mediterranean is characterised by narrow continental shelves and deep seabed areas, so that virtually nowhere does a continental margin exceed 200 miles,¹⁶ under Article 76, the absence of a physical continental margin does not affect the entitlement of its coastal States to a juridical continental shelf of 200 miles.

(e) The Exclusive Economic Zone and the Exclusive Fishing Zone

The concept of the E.E.Z. grew out of a combination of claims to extended territorial seas and exclusive fishing zones.

Initially, many claims to territorial seas were made in order to protect fisheries resources. With the 1945 Truman Proclamation on Coastal Fisheries - by which the United States established conservation zones for the protection of fisheries in certain areas adjacent to the territorial sea where United States' fishermen might have fished exclusively or with the nationals of other States - interest was stimulated in coastal State jurisdiction over fisheries adjacent to the territorial sea.¹⁷ Subsequently, in the following decade, the I.L.C., in considering the breadth of the territorial sea, recognised that coastal States were seeking to extend their territorial seas in order to protect fisheries resources. In its 1954 Report to the U.N. General Assembly, the I.L.C. indicated that while States could not claim exclusive fishing rights beyond a 3 mile limit, they could prescribe regulations for the protection of fisheries in the territorial sea beyond 3 miles.¹⁸

At the 1958 Geneva Conference, several proposals were put forward concerning the breadth of the territorial sea and the limits of a fishing zone, but all were defeated.¹⁹ Nevertheless, by the time the two questions were addressed again at the 1960 Geneva Conference, it was clear that many States supported the concept of a fishing zone adjacent to the territorial sea. In the Plenary session of the 1960 Conference, a joint U.S.-Canada proposal for a 6 mile territorial sea plus a 6 mile fishing zone subject to traditional fishing rights for 10 years, with preferential fishing rights beyond the fishing zone, fell one vote short of the two-thirds majority needed for its adoption.²⁰

"

Following the 1960 Conference, there were two discernible trends in State practice. The first was to protect adjacent fisheries by extending the territorial sea to at least 12 miles, but in some cases beyond; the second, to claim a fishing zone adjacent to the territorial sea, at first limited to 12 miles, but later extended to 200 miles, after 12 miles became generally accepted as the standard width for the territorial sea. The latter created a distinction between a 12 mile territorial sea, in which the coastal State had exclusive fishery rights, and an exclusive fishery zone (or E.F.Z.) beyond the territorial sea, within which the coastal State had only preferential fishing rights.²¹

Many States followed the first course and extended their territorial seas to 12 miles, but others, notably Iceland, laid claim to a fishing zone adjacent to their territorial sea. In 1974, the U.K. challenged the legality of Iceland's 50 mile exclusive fishery zone before the International Court of Justice (I.C.J.), which ruled that both an E.F.Z. of 12 miles, and the concept of preferential fishing rights beyond 12 miles, had crystallised in customary international law. Thus, while Iceland was permitted to claim a fishery zone beyond 12 miles, it could only claim preferential, not exclusive fishing rights.

At UNCLOS III, the concept of an adjacent fisheries zone in which the coastal State had preferential fishing rights became linked with the claims of many developing States to 200 mile zones of national

jurisdiction, which included placing the living resources of adjacent waters under coastal State sovereignty.

Claims to 200 mile zones of national jurisdiction had originated off of the coasts of South American States in the late 1940s, as a direct result of the Truman Proclamation on the Continental Shelf. In 1947, Chile and Peru, having no continental shelf to speak of along their coasts, decided that such "geographical misfortune" should not prevent them from extending their national sovereignty over the resources beyond their territorial seas. Thus they proclaimed sovereignty over the adjacent waters and underlying seabed up to 200 miles offshore, a distance chosen because the rich fishing grounds associated with the Humboldt Current lie within 200 miles of their coasts.²² Both claims were confirmed by the Santiago Declaration on the Maritime Zone of August 1952, by which Chile, Ecuador and Peru each proclaimed "as a principle of their international maritime policy" that they possessed "sole sovereignty and jurisdiction" over the sea and seabed adjacent to their coasts to a distance of not less than 200 miles.²³

By claiming full sovereignty over 200 mile zones, with the exception of permitting innocent passage, these claims were more akin to claims for 200 mile territorial seas, based on a desire to preserve, conserve, develop and utilise the natural resources of both sea and seabed.²⁴ Nevertheless, as their objective was the protection of fisheries resources, in essence they were adjacent fishery zones.

The establishment of such a zone was not to interfere with the freedoms of navigation or overflight, or the freedom to lay submarine cables and pipelines.

The right of African States to an economic zone was affirmed by the Organisation for African Unity's Declaration on Issues of the Law of the Sea in 1973, which added that the width of the economic zone should be 200 miles. Within the economic zone the coastal State was to exercise "permanent sovereignty over all the living and mineral resources" and to manage the zone "without undue interference to other legitimate uses of the sea," namely the freedoms enunciated above.²⁷

The position taken by African States, although based on the patrimonial sea concept, therefore occupied a midway position between the claims of Latin American States to a quasi-territorial sea of 200 miles, and the position adopted by many developed States of preservation of complete freedom of the high seas. As such, it enabled agreement to be reached on the establishment of a *sui generis* zone, that reconciled the diverse claims of coastal States to national jurisdiction over the waters beyond the territorial sea.

Under the 1982 Convention, the coastal State has:

"... sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other

activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds."

It also has specified jurisdiction with respect to the establishment and use of artificial islands, installations and structures; over marine scientific research; and for the protection and preservation of the marine environment. Within the E.E.Z., all States, whether coastal or landlocked, enjoy the freedoms of navigation and overflight and of the laying of submarine cables and pipelines. However, there is no freedom of scientific research in the E.E.Z.; rather Article 246(1) makes marine scientific research in the E.E.Z. (and on the continental shelf) subject to coastal State consent.

As far as the utilisation of the living resources of the E.E.Z. is concerned, the coastal State is to determine the allowable catch within its E.E.Z. However, in order to promote the objective of optimum utilisation of its living resources, where the coastal State does not have the capacity to harvest its entire allowable catch, it is by agreements or other arrangements to give other States access to the surplus of such, taking into account *inter alia* "the need to minimise economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks." In particular, landlocked and geographically disadvantaged States, (i.e. those States whose geographical situation makes them dependent upon the exploitation of the fishery resources of the E.E.Z.s of other States, or coastal States

which cannot claim any E.E.Z. of their own), have the right, under specified circumstances, to participate, on an equitable basis, in exploiting the surplus fish stocks of the E.E.Z.s of coastal States of the same sub-region or region.²⁸

Thus, as O'Connell has noted, the concept of the E.E.Z. is built upon two notions that played a critical rôle in the evolution of adjacent fishery zones, namely:

(i) that the coastal State has preferential, but not exclusive fishing rights; and

(ii) that traditional rights of fishery by nationals of foreign States within the adjacent fishing zone should be respected.²⁹

Where a coastal State claims an E.E.Z., it also exercises jurisdiction over its adjacent seabed and subsoil up to 200 miles offshore, in accordance with the régime of the continental shelf described above.

Finally, it should be noted that in the period before acceptance of the E.E.Z., but in some cases after, many coastal States claimed 200 mile E.F.Z.s. Some States are likely to maintain, or prefer to proclaim, a 200 mile E.F.Z. rather than a 200 mile E.E.Z. Where this is the case, customary international law would appear to allow the coastal State only to claim preferential rather than exclusive fishing rights within such a zone.

1.4 The Legislation of Mediterranean States with respect to Claims to Offshore Jurisdiction

Although the unilateral legislation of Mediterranean States will be analysed in detail later, it is appropriate here to note that a feature of the Mediterranean is the general compliance with international law of its coastal States' claims to offshore zones of national jurisdiction. Mediterranean States are generally conservative in their claims, although exceptions do exist, most notably with respect to internal and territorial waters. Nevertheless, the euphemistically termed "creeping jurisdiction" that has characterised the post-World War II period has, to a certain extent, passed the Mediterranean by. Few States claim 200 mile E.E.Z.s, and legislation defining the outer limits of the continental shelf is, in the majority of cases, based on the definition of Article 1 of the 1958 Continental Shelf Convention, rather than on the wider 200 mile minimum prescribed by the 1982 Convention. Moreover, of those States claiming E.F.Z.s, none extend up to the accepted customary international law limit of 200 nautical miles.

This general reluctance on the part of Mediterranean States to extend their offshore jurisdiction to 200 miles is, in large part, explained by the Sea's geographical characteristics.

1.5 The Physical Geography of the Mediterranean Sea

The Lebanese geologist, Andrew Mantura, has shown that originally there was no Mediterranean Sea to separate the continents of Europe and Africa, but rather one continuous "super-continent." About 20-30 million years ago, Africa began to move away from the more stable Europe, resulting in the creation of the Mediterranean Sea, "an ocean intruded between two continents."³⁰ By contrast today, the African and European continents are moving closer together, thereby "squeezing" the Mediterranean and forcing the seabed into greater depths.³¹ The result is the narrow continental shelves which characterise the Mediterranean region. Indeed, the most striking characteristic of the Mediterranean Sea is its water depth.

The Mediterranean is a small sea compared with other ocean basins, with a surface area of about 2 511 000 square kilometres; it contains approximately 4.2 million cubic kilometres of water.³² Water depth exceeds 1 000 metres over 1.4 million square kilometres of sea area, and the 2 000 metre isobath encloses about a million square kilometres. The deepest point in the Mediterranean is 5 092 metres in the Hellenic Trough. Eighty per cent of the Mediterranean has a water depth of greater than 200 metres (Figure 2).³³

Structurally, the Mediterranean can be conveniently divided into two distinct basins: the Western and the Eastern. Most of the characteristics of these two basins result from geological movements during the mid-Tertiary period up to the present time, and tectonic

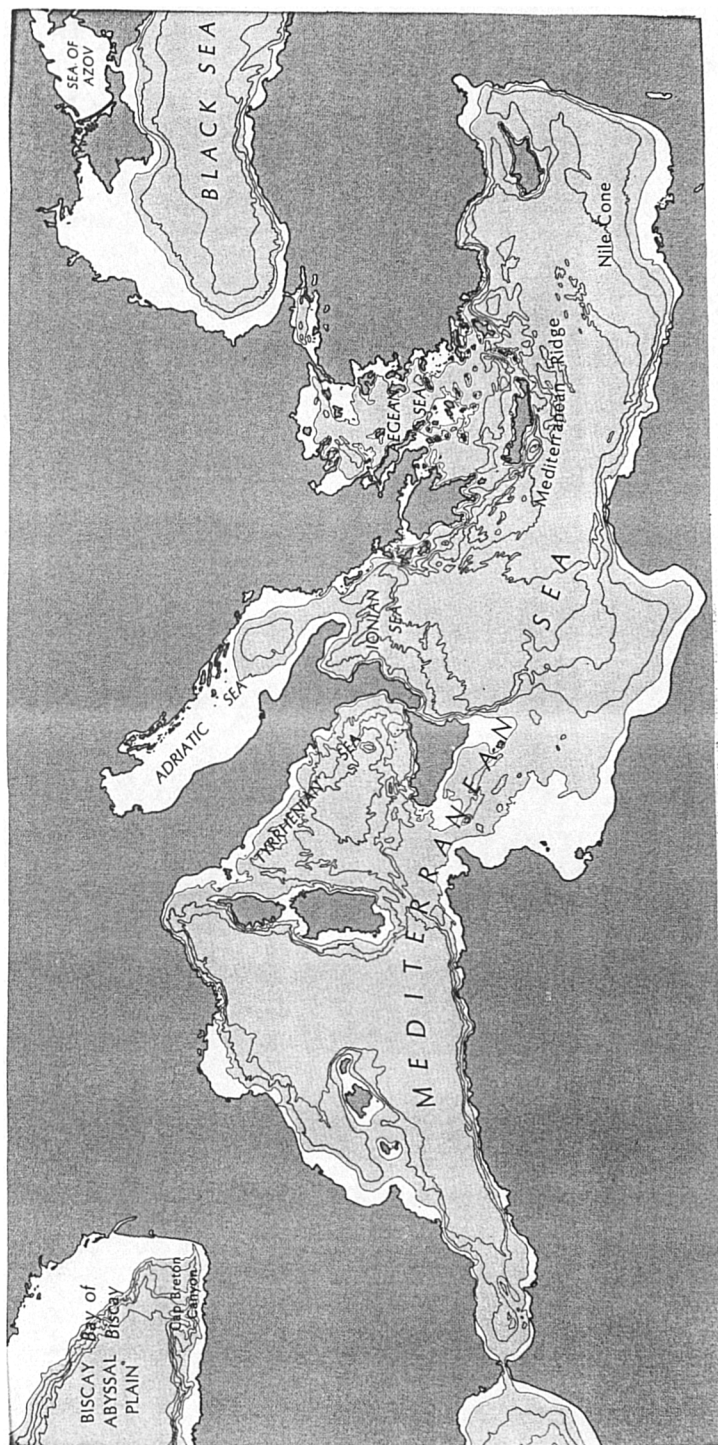


Figure 2 - Bathymetry of the Mediterranean Sea.

Source: A.D. Couper (Ed.) The Times Atlas of the Oceans, p. 17.
(London: Times Books, 1983)

The first contour is the 200 metre isobath (the edge of the continental shelf); thereafter depth contours are at 1 000 metre intervals.

activity along one of the world's principal earthquake belts attests to continued vertical and horizontal changes in the Sea's borders.³⁴ Continental shelf development in both basins is generally poor, with the only significantly wide shelves occurring in the central Mediterranean region between Sicily, Tunisia, Malta and Libya, and in the Adriatic Sea. It is, therefore, not without significance that these areas have witnessed extensive hydrocarbon exploration and exploitation activities, and, even more pertinently, have been the subject of maritime boundary agreements and disputes.

Continental shelves are also relatively extensive in the Aegean Sea, and in localities associated with the sediment outflows of major estuarine rivers such as the Rhône, the Po, the Ebro and the Nile.³⁵ These locations also have seen hydrocarbon exploration and exploitation.

(a) The Western Basin

The geological history of the Mediterranean Sea is complex enough to permit of further subdivision of the Western and Eastern basins into sub-basins, each of which is to some degree physically distinctive. The Western Basin has three sub-basins: the Alboran, Balearic, and Tyrrhenian.

The Alboran Basin, the most westerly in the Mediterranean, lies between Spain to the north, and Morocco and Algeria to the south. It covers an area of approximately 54 000 square kilometres, with a maximum depth of 1 500 metres. The continental shelves along both European and African coasts are very narrow, in some places off the latter, non-existent.³⁶

The Balearic Basin, (also known as the Algero-Provencal Basin), forms the main part of the western Mediterranean. Although noted for its extensive abyssal plains, (the most extensive in the Mediterranean Sea), continental shelves in this basin are generally extremely narrow and steeply sloping. The exceptions are those shelves developed off the Ebro river delta in the Gulf of Valencia (Spain), and off the Rhône river delta in the Gulf of Lyon (France). The River Ebro's high sediment load has created a shelf between 47 and 63 kilometres (29 and 39 miles) wide off the eastern coast of Spain. As one moves eastward, the shelf narrows to an average width of 18 kilometres (approximately 11 miles), before broadening gradually as it nears the mouth of the Rhône. In this part of the Gulf of Lyons, the continental shelf is at

its widest in the western Mediterranean, reaching a maximum extension of 72 kilometres (45 miles).³⁷

The largest physiographic province in the Western Basin is the Balearic Abyssal Plain. This covers a total area of approximately 240 000 square kilometres, and extends 600 kilometres (375 miles) from the French continental slope to within 20 kilometres (12 miles) of the African continental margin.

The Tyrrhenian Basin is the deepest³⁸ and most easterly part of the Western Basin. It covers an area of approximately 231 000 square kilometres, and is bounded by Corsica, Sardinia, Italy and Sicily.³⁹ In the southern section, continental shelves are comparatively wide; elsewhere the continental shelves are steep and narrow.⁴⁰

(b) The Eastern Basin

The Sicilian Strait represents the dividing line between the Western and Eastern basins. The Eastern Basin can be divided into two sub-basins: the Ionian Basin and the East Mediterranean Basin.

In general, eastern basins are deeper than their western counterparts, and continental shelf development is more extensive. This is particularly the case in the Gulf of Gabès (Tunisia), where the shelf widens gradually to 274 kilometres (170 miles). Off Port Said (Egypt), the shelf extends to 113 kilometres (70 miles), but the broadest shelf is in the Adriatic Sea, extending over 480 kilometres

(300 miles) along a north-west/south-east axis.⁴¹ A relatively extensive shelf also exists in the Gulf of Iskenderun (Turkey), and in parts of the Aegean, but throughout the rest of the Eastern Basin the continental shelf is very narrow. The deepest point in the Mediterranean is found in the Ionian Sea within the Hellenic Trough.

To the north of the Ionian Basin lies the Adriatic Sea, which covers an area of approximately 135 000 square kilometres. It has two distinctive regions. The northern and central Adriatic is relatively shallow, with continental shelves that extend the breadth of the Sea, whereas south of the mid-Adriatic depression the seabed is much deeper, at its maximum reaching a depth of 1 230 metres. Continental shelves are consequently narrower and of variable width, the best developed being those off the northern Albanian coast where widths range from 20 to 75 kilometres (12-50 miles).⁴²

To the north-east of the Ionian Sea lies the Aegean Basin, which lies beneath the greater part of the 181 000 square kilometre Aegean Sea separating Greece and Turkey. A series of north-east/south-west trending submarine troughs separate the thousands of Aegean islands, and the geology and geomorphology of the area is complex. The deeper parts of the basin are surrounded by relatively wide continental shelves, especially in the embayment areas. Off headlands shelves are much narrower.⁴³

The eastern Aegean is highly segmented between island shelves, banks and shallow depressions, with depths of over 400 metres. The

western Aegean has a large number of small troughs and fractures in the seafloor, although sections of the Turkish continental shelf extend to offshore islands. Aegean seabed depths gradually increase southwards as the Cretan Trough is approached, the Trough itself containing many small depressions which deepen eastwards. The depths of these depressions range from 800 to 2 510 metres.⁴⁴

In the extreme eastern Mediterranean, the Levantine Sea covers an area of about 332 000 square kilometres.⁴⁵ The width of the continental shelf varies, but is most extensive off the Nile Delta from Alexandria to El Arish.⁴⁶ The Nile Fan, created by millions of years of sedimentation, reaches its maximum width of 320 kilometres (200 miles), almost 160 kilometres (100 miles) from the shelf break, where depths vary between 1 600 and 2 800 metres.⁴⁷

1.6 Maritime Boundary Delimitation in the Mediterranean Sea

Delimitation, in the context of drawing boundaries in the sea or in the seabed and subsoil, has two distinct, though interrelated aspects. It involves firstly, the definition of particular limits to the various zones of national jurisdiction over seaspace. The second aspect derives from the first; namely, the determination of the limits of national jurisdictions *vis-à-vis* other States.

The Mediterranean is a long and narrow sea; it is almost completely enclosed by the twenty-two sovereign entities which border it, with the result that under a 200-mile régime for all its coastal

States, the Mediterranean's sea and seabed would fall completely under national jurisdiction. Depending upon the method of computation, this will require the delimitation of between 37 and 45 maritime boundaries to separate one State's area of national jurisdiction from another's,⁴⁸ a figure which represents approximately one-tenth of the potential number of world maritime boundaries, and which puts the Mediterranean among the world's top five regions in respect of the ratio of boundaries to sea area (Table 4).

Semi-enclosed seas with a large number of littoral States have the highest concentration of potential maritime boundaries, and in such seas, where seaspace and ocean resources are at a premium, boundary delimitation between States is likely to be a slow and competitive process. The Mediterranean Sea is a microcosm of the world's maritime boundary problems; and Bastianelli believes maritime boundary delimitation in the Mediterranean will turn out to be the most complex and delicate diplomatic operation in the history of the law of the sea.⁴⁹ This complexity is a result of the region's geographical and political characteristics.

(a) Geographical Obstacles to Mediterranean Maritime Boundary

Delimitation

Conflict over maritime limits is likely to be acute in the Mediterranean as a result of its geographical characteristics. Maritime boundary delimitation is complicated by the shape and

Table 4 - Ratio of boundaries to area for selected semi-enclosed seas

	<u>Area (km²)</u>	<u>Potential boundaries</u>	<u>Ratio</u>
Arabian/Persian Gulf	248 320	29	1: 8 562
Caribbean Sea	1 943 000	82	1:23 695
Red Sea	438 000	15	1:29 200
Baltic Sea	422 000	14	1:30 142
Mediterranean Sea	2 511 000	37	1:67 685

Source: Author's research.

dimensions of the basin, the presence of numerous peninsulas and islands, and the relative proximity of a large number of States in a geographically constricted area. For example, Libya, in its pleadings before the International Court of Justice (I.C.J.) in the Libya-Malta Continental Shelf Boundary Case, complained of the "geographic constraints" of being a coastal State in a Sea whose maximum breadth is only 600 miles, and where if one were to sail throughout its length and breadth, nowhere would one be farther than 184 miles from land.

The relative proximity of the many States and islands which abut onto this long, narrow and crowded sea, mean that a State's geographic location and its relationship to its maritime neighbours have a special significance when it comes to the equitable delimitation of so many boundaries in the Mediterranean's geographically confined space. Fortunately, the Mediterranean is neither rich in fish nor hydrocarbon resources, largely because of the generally narrow continental shelves and the characteristically deep waters, which inhibit the development of exploration and exploitation activities for both living and non-living resources. As a result, States are generally conservative in their offshore claims, although, as the disputes between Tunisia and Libya and Libya and Malta have shown, the absence of 200 mile claims provides no guarantee that boundary disputes will not arise where hydrocarbon resources are known or thought to exist in areas to which two or more States believe they may legitimately lay claim. Similarly, the absence of 200 mile claims has not prevented Mediterranean States from delimiting continental shelf boundaries with their maritime neighbours; consequently, there is no guarantee that not claiming one's

full entitlement will obviate the need for boundary delimitation.

Nevertheless, with maritime boundary delimitation in the Mediterranean being far from easy, States appear to wish to maintain a standoff position with respect to their offshore claims, in order not to initiate situations which might lead to boundary conflict. Hence the reluctance to embrace the now universal 200 mile limits.

(b) Political Obstacles to Mediterranean Maritime Boundary Delimitation

In addition to these geographical obstacles, Mediterranean maritime boundary delimitation is complicated by the complexity of political relations characterising the region.

The coastal States of the Mediterranean belong to the three continents of Europe, Asia and Africa, and the region is characterised by considerable ethnic, cultural and religious diversity. Economically the Mediterranean forms the frontier between First and Third Worlds. The North-South interface runs the length of the Mediterranean, and as a result the economic gap between the rich and poor nations is wide. The Mediterranean has also historically been the meeting point of East and West, and although it is diminishing, because of the region's strategic importance both the United States and the Soviet Union maintain a visible naval presence in the region.

The Mediterranean has always been a zone of instability and frequent international crises, and inter-State relations are complex.

"

It is bordered by States which belong to different international, economic and military organisations, among them the European Community, NATO, the League of Arab States, and the Organisation for African Unity. Its States also include traditional Non-Aligned countries like Yugoslavia, and politically isolated States such as Albania and Israel.

The region has not been politically united since the dissolution of the Roman Empire, and although all Mediterranean countries share at least parts of a common historical heritage, there is a predominance of segmentation and conflict at the political level:

"Thus, while the idea of a Mediterranean community has always been present and lively in the area, it is extremely dubious that the Mediterranean as such constitutes a meaningful subject for political and economic analysis."⁵⁰

However, all Mediterranean States have an interest in the Sea which they border. Maritime traffic, encouraged by well-equipped ports, is flourishing and is important for the economy of many States, as is fishing, whilst the Mediterranean is an important artery for oil transportation. Recent developments in ocean affairs have created both greater occasions and incentives for cooperation among Mediterranean States, and fresh danger of conflicts. With the post-World War II extension of national jurisdiction offshore to at least 200 miles, political relationships of States can no longer be regarded as an expression of the characteristics of *terra firma* alone. It is therefore important to examine the effect of the new ocean régime in a

semi-enclosed sea like the Mediterranean, where it has the greatest potential for inducing conflict or cooperation between States.

Poor political relations take various forms, and threaten to delay the agreement, or even to prevent the establishment, of many Mediterranean maritime boundaries. The non-recognition of Israel by Arab States makes it impossible for Israel to negotiate its maritime borders. Spain and Morocco are unlikely to conclude a maritime boundary agreement while Morocco disputes the sovereignty of the Spanish "plazas de soberania" on or just off its northern coast, while Spain itself questions British sovereignty over Gibraltar and refuses to recognise its territorial sea claim. Greece and Turkey's open hostility includes a dispute over the limits of their respective continental shelves in the Aegean, a dispute which is further exacerbated by the illegal Turkish occupation of northern Cyprus. This in turn prevents Cyprus from negotiating a maritime boundary with Syria, and makes the establishment of a boundary between Cyprus and Turkey out of the question. Cyprus and Lebanon are prevented from delimiting their maritime boundary by the unstable political situation in Lebanon, and the occupation of northern Lebanon by Syria makes the establishment of a maritime boundary between Lebanon and Syria unlikely.

Testy political relations also exist between Albania and Italy, Albania and Yugoslavia, Albania and Greece, Libya and Egypt, Algeria and Morocco, and Algeria and Tunisia, but they are less predictable in terms of their effect on maritime boundary delimitation. For example,

it is known that negotiations for a continental shelf boundary between Albania and Italy are in progress. In addition, the signing of a military protocol between Albania and Greece on 10 July 1985, calling for a redemarcation of their land boundary, may not only mark the official end of the state of war existing between the two States for over forty years,⁵¹ but also facilitate the delimitation of their maritime boundary.

However, as a rule of thumb, the existence of generally troubled relations between Mediterranean States is likely to make agreement on maritime boundaries difficult. Cremasco describes the Mediterranean as a region divided into a number of different "tension zones", derived from problems which are very diverse in terms of historical and ethnic roots, political and economic interests, and security needs.⁵² The extension of the territorial sea to 12 miles and the institution of 200 mile E.E.Z.s threatens either to multiply the number of tension zones through the creation of overlapping zones of jurisdiction between previously distant "neighbours", (and thereby establish new sources of conflict), or to exacerbate and accentuate already existing crises.

Participation in the same international organisations may be a premise for starting up constructive boundary negotiations,⁵³ but then the North African States of Morocco, Algeria, Tunisia and Libya, are all members of the O.A.U. and the Arab League, and yet they have continually acted as if "my neighbour is my enemy and my neighbour's neighbour is my friend."⁵⁴ However, such likemindedness does usually permit recourse to third-party arbitration where an impasse in

negotiations is reached,⁵⁵ e.g. Tunisia and Libya agreed to take their continental shelf boundary dispute to the I.C.J. against a backcloth of poor political relations between the two States.⁵⁶

1.7 Mediterranean Maritime Boundary Delimitation and Third State Claims

At present, however, most maritime boundary problems in the Mediterranean concern the unilateral legislation of individual States. In particular, these are related to the curtailment of the freedom of navigation, either through the establishment of territorial seas in excess of the 12 mile limit prescribed by the 1982 Convention, or through the illegal adoption of special measures restricting the passage of warships through the territorial sea. In addition, some States have debarred nationals from other countries from navigating in areas which are claimed to be historic waters, and thereby under the exclusive sovereignty of the coastal State making the claim; the most notorious of these claims being that of Libya to the Gulf of Sirte.

Nevertheless, the simmering dispute between Turkey and Greece over their continental shelf boundary in the Aegean, provides a potent reminder that many maritime boundaries between States will have to be delimited in the Mediterranean in future years. The division of the Mediterranean's sea and seabed between its littoral States promises to be a long and drawn out process not only for the political and geographical reasons outlined, but also because the number of agreements necessary to accomplish the task is likely well to exceed the number of boundaries needed. For while it is often stressed that

maritime boundary delimitation is a bilateral process, in the Mediterranean the establishment of the terminal points of many of the bilateral boundaries will involve the agreement of three, or possibly four, separate States. Where this is the case, bilateral boundary agreements will seek to avoid encroachment onto areas that might be subject to third State claim, thereby necessitating further agreements on the appropriate tripoints at a later date. For example, Article I(3) of the continental shelf boundary agreement between Greece and Italy provides for the extension of the delimited boundary north and south "to the points of intersection with the zones of the continental shelf belonging to the respective neighbouring countries."⁵⁷

Although at least two agreements establishing such tripoints do exist,⁵⁸ the chances of negotiated agreement in the situation of three- or four-Party boundary disputes are reduced. Instead, it is more likely that they will have to be referred to either the I.C.J. or an *ad hoc* tribunal for arbitration, where agreement on the *compromis* defining the dispute will be extremely difficult. Moreover, even if this problem is overcome, the Court will then be faced with the difficulty of dealing with pleadings from three, rather than two, States.⁵⁹ In such circumstances, not only will it be difficult to get three or four States even to agree jointly to submit their dispute to the I.C.J.,⁶⁰ but the Court, faced with potentially even greater divergence of legal opinion than in a bilateral dispute, will be prone to the danger of delimiting the boundary *ex aequo et bono*.⁶¹

In both of the Mediterranean Continental Shelf Cases, the I.C.J. had to consider potential delimitations with third States. In the Tunisia-Libya Case, the I.C.J., having refused Malta permission to intervene, respected Malta's interests in the delimitation area by not fixing a terminal point for its proposed boundary line, but instead indicating its direction by an arrow. In the Libya-Malta Case, the Court went further, and although not allowing Italy to intervene, took account of Italy's claims to areas to the east and west of Malta, by refusing to delimit the boundary between Libya and Malta in the areas claimed by Italy. The Italian claim to the area east of 15° 10' E longitude thus persuaded the Court that it was prevented from delimiting the Libya-Malta boundary across the Medina Bank, which was the principal area in dispute between Libya and Malta.

The principle that the Court will not deal with a dispute between two Parties in an area in which a third, non-party State has claims, will, as Bowett has noted, have profound implications for maritime boundary delimitations in any confined area with many coastal States. The Mediterranean is one such area, for which Bowett provides the following examples:

"How is Cyprus to delimit with either Turkey or Syria; or can Turkey delimit with Syria if Cyprus makes extensive claims? How far can a delimitation between Libya and Greece proceed, if Egypt is not involved, given that the Greek island of Crete lies opposite the Libyan/Egyptian frontier? Or how far can delimitation between Spain, Morocco and Algeria proceed, on a

purely bilateral basis, given the location of the Spanish islands of Chafarinas and Alboran, lying off the Algerian and Moroccan coasts?"⁶²

1.8 Conclusion

On the basis of the factors outlined, it would appear safe to suggest that the prospects for negotiated boundary agreements in the Mediterranean are poor. The politics and geography of the Mediterranean seem to present a multiplicity of situations in which boundary conflict would seem inevitable. The chapters which follow analyse whether this is really the case, what the problems really are, and what can be done to resolve them.

Notes

1. J.R.V. Prescott The Maritime Political Boundaries of the World, pp. 87-88. (London and New York: Methuen, 1985)
2. U.N. Chronicle, No. 6 (1982), p. 13.
3. Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 19 (October 1991), pp. 7,8.
4. Of these, Syria voted *in favour* of the Convention, whereas Israel and Turkey voted against. The U.K. abstained.
5. Articles 7 and 13 of the Geneva Convention on the Territorial Sea and Contiguous Zone (1958), and Articles 9 and 10 of the 1982 Convention.
6. Article 4 of the Territorial Sea Convention, Article 7 of the 1982 Convention.
7. Article 5(2) of the Territorial Sea Convention, Article 8(2) of the 1982 Convention.
8. See, for example: S.P. Jagota Maritime Boundary, pp. 12-16. (The Hague: Martinus Nijhoff, 1985)
9. A.A. El Hakim The Middle Eastern States and the Law of the Sea, p. 53. (Manchester: Manchester University Press, 1979)
10. ibid., p. 53 citing: Official Records, 2 (1974), pp. 121-123.
11. Morocco, for example, established its contiguous zone under the same Act as that which established its E.E.Z.: El Hakim op. cit., p. 53.
12. See: International Court of Justice "The North Sea Continental Shelf Cases" Reports of Judgements, Advisory Opinions and Orders, p. 33 (para. 43). (The Hague, 1969)
13. See: Jagota op. cit., pp. 19, 20, 22.
14. ibid., p. 28.
15. ibid., p. 36.
16. Tunisia believes that its continental margin exceeds 200 miles: N.S. Rembe Africa and The International Law of the Sea: A Study of the Contribution of African States to the Third United Nations Conference on the Law of the Sea, p. 108. (Alphen aan Rijn, The Netherlands; Germantown, Maryland: Sijthoff and Noordhoff, 1980)
17. Jagota op. cit., p. 6.

18. ibid., pp. 14-15 quoting Yearbook of the International Law Commission, 2 (1954), p. 153.
19. See: Jagota op. cit., pp. 20-22.
20. ibid., p. 27.
21. D.P. O'Connell The International Law of the Sea Vol. 1 (Ed. I.A. Shearer), pp. 530-531. (Oxford: Clarendon Press, 1982)
22. K. Hjertonsson The New Law of the Sea: Influence of the Latin American States on Recent Developments of the Law of the Sea, p. 22. (Leiden: A.W. Sijthoff; Stockholm: P.A. Norstedt and Söners Förlag, 1973). See also: O'Connell op. cit., pp. 553, 554.
23. ibid., p. 553; Jagota op. cit., pp. 12-13.
24. O'Connell op. cit., pp. 553, 557.
25. ibid., pp. 558, 559.
26. U.N. Doc. A/AC.138/79 quoted in: M.W. Janis "Roles of Regional Law of the Sea" San Diego Law Review, 12 (1974-1975), pp. 553-568, at p. 557.
27. U.N. Doc. A/AC.138/89 cited in: Janis op. cit., pp. 557-558.
28. These rights do not apply in the case of a coastal State whose economy is overwhelmingly dependent on the exploitation of the living resources of the economic zone (Article 71).
29. O'Connell op. cit., p. 563.
30. A. Mantura "A geologist's view - The Mediterranean enigma" The Middle East, No. 24 (October 1976), p. 52. See also: A.J. Mantura "The Mediterranean enigma; an ocean intruded between two continents" Oceans, 10 (1977), pp. 24-27.
31. G. Luciani "The Mediterranean and the Energy Picture" in G. Luciani (Ed.) The Mediterranean Region: Economic Interdependence and the Future of Society [sic.], pp. 1-40, at p. 2. (London and Canberra: Croom Helm; New York: St. Martin's Press, 1984).
32. S.C. Truver The Strait of Gibraltar and the Mediterranean, p. 14. (Alphen aan Rijn, The Netherlands; Germantown, Maryland: Sijthoff and Noordhoff, 1980)
33. "Mediterranean - Multi-faceted challenge to oil operators" Offshore Engineer, (May 1977), pp. 37-38, at p. 38.
34. The tectonic history of the Mediterranean is graphically illustrated in: R. Gore "The Mediterranean, sea of man's fate" National Geographical Magazine, 162 (1982), pp. 694-737, especially pp. 710-711.

35. Truver op. cit., p. 17.
36. ibid., p. 19.
37. ibid., p. 20.
38. 3 600 metres at its deepest point: ibid., p. 19.
39. ibid.
40. ibid., pp. 19-20.
41. ibid., p. 21.
42. ibid., p. 23.
43. ibid.
44. ibid., pp. 23-24.
45. ibid., p. 24.
46. Luciani op. cit., p. 2.
47. Truver op. cit., pp. 24-25.
48. The number of boundaries to be delimited depends upon whether the various micro-territories are entitled to claim zones of offshore jurisdiction.
49. F. Bastianelli "Border delimitation in the Mediterranean Sea" Lo Spettatore Internazionale, 17 (1982), pp. 319-338, at p. 321.
50. G. Luciani "Introduction" in Luciani op. cit., pp. i-xiv, at pp. vii, viii.
51. Geographic Notes, No. 1 (30 September 1985), p. 7.
52. M. Cremasco "The Military Presence of the Riparian Countries" in Luciani op. cit., pp. 206-238, at p. 207.
53. Bastianelli op. cit., pp. 334-335.
54. I.W. Zartmann "Mahgrebi Politics and Mediterranean Implications" in Luciani op. cit., pp. 149-178, at p. 159.
55. Bastianelli op. cit., p. 335. An exception is the Aegean dispute where Greece and Turkey although both members of NATO have not agreed to third-party resolution of their dispute.
56. Tunisia refused, however, to accept the Court's Judgement and, over an unconnected matter, broke off diplomatic relations with Libya soon after.

57. "Continental Shelf Boundary: Greece-Italy" Limits in the Seas, No. 96 (6 June 1982), p. 2. (Office of the Geographer, Bureau of Intelligence and Research, United States Department of State)

58. Indonesia-Malaysia-Thailand and Sri Lanka-India-Maldives: E.D. Brown Sea-bed Energy and Mineral Resources and the Law of the Sea: Volume 1: The Areas within National Jurisdiction, pp. I.9.10, I.9.11. (London: Graham and Trotman, 1984)

59. D.W. Bowett "Exploitation of Mineral Resources and Continental Shelf" in U. Leanza (Ed.) The International Legal Regime of the Mediterranean Sea, pp. 21-31, at pp. 28-29. (Milan: Giuffrè, 1987)

60. Disputes may not be submitted unilaterally, although Bowett notes that:

"... it may be said that it is high time that we devised techniques of tripartite or even quadripartite settlement, for maritime delimitation requires such techniques. Nevertheless, the fact is that, given the element of consent to all forms of international adjudication, those techniques are difficult to devise and are largely untested: our system generally presupposes two adversaries, not three or four:" ibid., p. 29.

61. I.e. without recourse to the appropriate rules of international law.

62. Bowett op. cit., p. 29.

PART II -
THE DELIMITATION OF INTERNAL WATERS

CHAPTER 2 - MEDITERRANEAN STATES AND BAY ENCLOSURE

2.1 Introduction

Baselines are important for two reasons. Firstly, they define the outer limits of a State's internal waters, over which the State exercises complete sovereignty; in other words, the water area is assimilated to land for sovereignty purposes. Secondly, all the zones of national jurisdiction offshore are measured from the baselines of the territorial sea.

(a) The "Normal Baseline"

Article 3 of the Territorial Sea Convention states that:

"Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognised by the coastal State."

This provision is repeated as Article 5 of the 1982 Convention, although the "normal baseline" is far from uniformly determined, with

the term "low-water line" having different meanings for different States.

At UNCLOS I, both France and Spain attempted to clarify a definition of what constituted the low-water line. France wished to add the words "or isobath zero with reference to the datum sounding line," and also proposed that the term "large-scale" be changed to nautical charts published or officially recognised by the coastal State, because "in practice, large-scale charts were issued only for harbours and certain special areas."¹ Spain proposed use of the term "lower-water line," which it held had the same meaning as the French proposal, but neither of these proposals were adopted,² partly because the term "isobath zero" had no English equivalent, thereby leading to a variety of interpretations of its meaning. Instead, UNCLOS I preferred to accept the term low-water line, which had been unanimously approved as the baseline for the territorial sea at The Hague.³ Although having a more general currency,⁴ this also is open to diverse interpretations.

However, the difficulty of establishing a universal "low-water line" is evidenced by the attempts of the International Hydrographic Conference to adopt an "international low-water." In 1919, this Conference adopted a resolution which stated that tidal datum should be the equivalent of chart datum, and should be a plane so low that the tide would not frequently fall below it. It also stated that a uniform datum should be adopted by all nations.⁵ However, upon its formation

in 1921, the International Hydrographic Bureau concluded that "international low-water" was "an erroneous conception," because:

(i) by that time each State's choice of datum was already firmly established;

(ii) the tidal régime in some areas may produce a situation where the lowest predictable tide may fall too far below the average to give a navigator a satisfactorily representative picture; and

(iii) there is no one formula which can be satisfactorily applied to all tidal régimes.⁶

Nevertheless, the concept was defended at the Second Hydrographical Conference in 1926, although it was accepted that it could not be computed at that point in time. Further attempts at a definition were made at the Sixth and Eighth Conferences, but without success.⁷

At UNCLOS III, the French proposal reappeared, but all proposals concerning the low-water line were rejected in order to avoid laying down an inflexible definition. The result is that in State practice, there are several low-water lines rather than one low-water line.⁸

The legislation of the majority of Mediterranean States follows the Territorial Sea and 1982 Conventions by referring to either the low-water line or the low-water mark (Table 5). Only in a few cases, (e.g. Turkey), is the low-water line more explicitly defined, although it is known, for example, that what France means by low-water line is low low water.⁹ Moreover, the situation is complicated by the fact

Table 5 - The "Normal Baseline" in the Legislation of Mediterranean

States

Albania	The basic shoreline
Algeria	Low-water line
Cyprus	Low-water mark
Egypt	Lowest low-water
France	Low-water line
Greece	Low-water line
Israel	Low-water mark
Italy	Low-water mark
Lebanon	Line of low tide
Libya	Low-water line
Malta	Low-water mark
Monaco	Low-tide mark
Morocco	Low-water line
Spain	Lowest low-water
Syria	Lowest level reached by the low tide
Tunisia	Low-water mark
Turkey	Lowest ebb tide
United Kingdom	Low-water line
(Gibraltar and the Sovereign Base Areas)	
Yugoslavia	Low-tide line

Source: Author's research.

that a State may show lines other than those of low-water on its official charts: for example, in the Mediterranean, mean sea level is used on the official charts of many States.¹⁰

Insofar as maritime boundary delimitation between States is concerned, the negotiating States need to come to early agreement on a common vertical datum, upon which to base their boundary negotiations. However, only in areas where the tidal range is considerable will the use of different datums have a marked effect upon a boundary, and then only if it is delimited by means of equidistance.¹¹

(b) Departures from the "Normal Baseline"

Article 3 of the Territorial Sea Convention, and Article 5 of the 1982 Convention, allow for the normal baseline - the low-water line on the coasts of mainland and islands - to be departed from in specific geographical circumstances.¹² Two sets of rules govern the use of straight baselines: firstly, to enclose single features, such as bays and rivers (Articles 7 and 13 of the Territorial Sea Convention, Articles 10 and 9 of the 1982 Convention); and secondly, to enclose multiple features along a State's coast (Article 4 of the Territorial Sea Convention, Article 7 of the 1982 Convention). Where single features are enclosed, the straight lines are more properly called "closing lines," to distinguish them from those straight lines which form a continuous baseline along a State's coast.¹³

Furthermore, by providing that:

"The coastal State may determine baselines in turn by any of the methods provided for ... [in the Convention's articles] to suit different conditions,"

Article 14 of the 1982 Convention makes clear, what was implicit in the 1958 Convention, namely that closing lines, straight baselines, and the low-water line, may all be employed as baselines along the same coastline. However, this Article also indicates that where the appropriate conditions do *not* exist for either straight baseline drawing or the enclosure of bays or rivers, then the baseline of the territorial sea should be the low-water line.

2.2 The Enclosure of Bays under International Law

Internal waters are most often created where closing lines are drawn across the mouths of rivers which flow directly into the sea, or across the mouths of bays. In both cases, the straight lines drawn form part of the coastal State's baselines from which the territorial sea and all other offshore zones of national jurisdiction are delimited, and as a result, may be important where the delimitation of maritime boundaries between States is dependent upon use of the respective States' baselines.

Article 13 of the Territorial Sea Convention states that:

"If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide of its banks."

This provision was repeated as Article 9 of the 1982 Convention, with the exception of a reference to the "low-water line" rather than the "low tide" line. Neither article places restrictions upon the length of closing line permissible, nor distinguishes between an estuary and a rivermouth, largely because at UNCLOS I lawyers and geographers were unable to agree upon a clear distinction between the two. As a result, the I.L.C.'s draft article on estuaries was deleted from the text of the Territorial Sea Convention. However, it would appear sensible to follow Bouchez, in suggesting that where a river flows into a coastal indentation, the rules governing claims to bays should be applied.¹⁴ This prevents large parts of the sea being claimed as internal waters through invocation of either Article 13 or 9, as there is no provision stipulating a maximum length of river closing line as there is for bays.¹⁵

With respect to bay closing lines themselves, both Article 7 of the Territorial Sea Convention, and Article 10 of the 1982 Convention set out specific rules for their employment.¹⁶ In legal terms, each Convention distinguishes a bay as "a well-marked indentation whose

penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast." However, in order for it to be permissible to draw a closing line across such an indentation, certain criteria must be met: (i) the coasts of the bay concerned must belong to a single State; and (ii) the area of the indentation must be as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of the indentation. Even where these conditions are fulfilled, no closing line may be drawn which exceeds 24 nautical miles in length: thus the only bays which may be completely enclosed as internal waters are those belonging to a single State, which fulfil the semi-circle test and where the distance between the low-water marks of the natural entrance points does not exceed 24 miles. In the case of an indentation meeting the criteria for acceptance as a juridical bay where the distance between the low-water marks of the natural entrance points exceeds 24 nautical miles, "a straight baseline of 24 nautical miles shall 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."

However, Articles 7(6) (Territorial Sea Convention) and 10(6) (1982 Convention) provide two exceptions to the application of these rules, namely:

"The foregoing provisions do not apply to so-called 'historic' bays, or in any case where the straight baseline system provided

for in article 4 [Territorial Sea Convention]/article 7 [1982 Convention] is applied."

With respect to Mediterranean State practice both of these exceptions have, as in other parts of the world, been used as a means for closing "bays" which either do not meet the semi-circle test, or which have closing lines exceeding the permitted 24 miles in length, or both. These claims are the subject of the two succeeding chapters.

(a) Bay Closing Lines

The closing off of bays for the exclusive use of the coastal State has a long history.¹⁷ For example, Venice and Genoa claimed control over their bays and gulfs from the 13th Century; and during the reign of King Edward II (1307-1327), the English authorities claimed as internal waters all bays where the limiting headlands could be seen from each other on a clear day.¹⁸ In 1604, this was taken further when a system of straight lines was drawn bounding Britain's neutral waters, and linking 27 headlands from Holy Island in the north-east to the Isle of Man in the west (the "King's Chambers").¹⁹ However, whilst it was generally recognised that bays fell under sovereign State control, it was not until the nineteenth century that the size of a bay under such control became an issue of any importance.²⁰

Two separate, but often confused, limiting criteria, derived from earlier State practice, became prominent. The first was the "headland-to-headland" doctrine, derived from the seventeenth century King's Chambers, by which the waters behind a straight line linking the headlands of a bay were regarded as national waters, as distinct from territorial waters. The second doctrine of *fauces terrae* was expressed in 1804 by President Jefferson of the United States, who stated that:

"The rule of common law is that wherever you can see from land to land all the waters within the line of sight is [sic] in the body of the adjacent country and within the common law jurisdiction."²¹

Thus, unlike the headland-to-headland doctrine, the *fauces terrae* doctrine aimed to place some limit upon the length of permissible closing line, although it was often superseded by the former, and variously interpreted and defined.²² As a result, when, in the late nineteenth century, jurists were seeking increasingly to constrict bays within precise mathematical limits, the *fauces terrae* doctrine came to be replaced by the application of a test by which the closing line of a bay could not be longer than twice the breadth of the territorial sea,²³ i.e. within the range of cannons placed on the bay's promontories.

The predominant trend throughout the nineteenth century, however, was for bays to be enclosed by straight lines linking headlands,

"wherever the geographical situation really withdrew the waters within them from the traffic of the nations."²⁴ This required that there must be some penetration of the coast by the sea which made the enclosed waters "landlocked," thereby excluding mere curvatures of the coast from enclosure. O'Connell reports that under both common law and international law, the dominant criterion appears to have been "the ratio of the penetration inland of an indentation to its scale, so that the length of the closing line was a factor of the size and shape of the indentation, and not an independent criterion for judging the juridical condition of the waters."²⁵ Hence, the lines linking the headlands were not limited in length, and certainly could extend beyond the range of vision.²⁶ However, when in the second half of the nineteenth century, jurists came to consider what criteria could be used to determine whether a bay might be enclosed as internal waters, State practice provided evidence of a desire to place a limit on the length of closing line, although there was still support for the headland-to-headland doctrine, often qualified by criteria based upon an indentation's relative dimensions and configuration.

One prominent view which emerged early in the nineteenth century, was that the closing line of a bay be related to the cannon-shot rule, thereby limiting its length to twice the territorial sea breadth.²⁷ This found considerable support in the deliberations of the Institut de Droit International during the 1890s. In its codification of 1894, it adopted a 6 mile territorial sea and a 12 mile bay closing line, despite

the fact that the Rapporteur, Barclay, argued that the enclosure of bays had nothing to do with the breadth of the territorial sea, and himself proposed a 10 mile limit.²⁸ Similarly, in the North Atlantic Coast Fisheries Arbitration (1910), the United States argued unsuccessfully that the term "bays" referred only to bays 6 miles or less in width,²⁹ but although there was some State practice supporting the 6 mile/twice the territorial sea breadth limit, it never attained the status of a rule of customary international law. Two reasons have been cited. Firstly, as the range of cannon increased, so there emerged a division of opinion between those who supported an actual limit of twice the territorial sea breadth, (which would yield a variety of limits depending upon the claims of individual States), and those who argued that the limit was fixed at 6 miles, based upon the 3 mile territorial sea.³⁰ Secondly, there was at the same time a considerable body of State practice which supported a 10 mile limit, and which precluded the 6 mile rule from becoming established.³¹

The 10 mile limit originated in the 1839 Anglo-French Fisheries Convention, and became more significant after its inclusion in the 1882 North Sea Fisheries Convention.³² It had merit in establishing a uniform closing line limit, and was supportable for a number of reasons, as Dr. Drago pointed out in his Dissent in the North Atlantic Coast Fisheries Arbitration.³³ Firstly, in most northern European waters, 10 miles represents the normal range of vision. A 10 mile closing line also eliminated inconvenient gaps of 4 miles or less in

bays slightly wider than 6 miles, where fishermen were afraid to fish for fear of transgressing into national waters; and lastly, the 10 mile line was convenient, simple, and compatible with existing navigational methods.³⁴

The 10 mile rule was also advocated by the Permanent Court of Arbitration in the North Atlantic Coast Fisheries Arbitration (1910), although it did so more as a guideline to settle disputes, rather than as a hard and fast rule. The Court concluded that although both the U.S. and Great Britain had accepted the 10 mile limit in their treaties and agreements with other nations, these circumstances were not sufficient to make the 10 mile limit a principle of international law.³⁵ Nevertheless, the Court's suggestion was influential, for the 10 mile limit was incorporated in the 1926 draft of the Japanese Branch of the International Law Association, the 1928 codification of the Institut de Droit International, and as Article 5 of the Harvard Research Draft of 1929.³⁶

Subsequently, despite the opposition of Norway and Sweden, Basis for Discussion No. 7 at The Hague Codification Conference in 1930 was modelled on the North Sea Fisheries Convention of 1882. This proposed a 10 mile closing line, although responding governments had made it evident that the normal closing line for bays was twice the breadth of the territorial sea, except in the case of historic bays or other exceptional geographical circumstances. At the Conference itself, the

perception that the length of a bay closing line was an issue closely connected with the breadth of the territorial sea, the limits of which were unlikely to be agreed upon, meant that discussion focussed on whether the 10 mile rule was established as a rule of law or simply a treaty limit, and was not treated further.³⁷ Even so, it was the failure to define recognised "bay" characteristics which prevented acceptance of a 10 mile closing line.³⁸

O'Connell notes that while there was extensive State practice utilising the 10 mile closing line, it found little academic support.³⁹ A notable exception was Gidel. Writing in 1933, he argued that the twice the territorial sea breadth rule created navigational difficulties, which the enclosure of bays was designed to eliminate. Moreover, given the lack of agreement upon the breadth of the territorial sea, a formula utilising that concept was unacceptable. On the other hand, straight lines linking all headlands would enclose waters which were not strictly bays, unless the length of line to be permitted were to be limited in length, so that it could not be drawn between all headlands. Thus, a fixed limit was necessary, and 10 miles was the only limit which commanded substantial support.⁴⁰ As such, therefore, the 10 mile limit became the only alternative to the headland-to-headland doctrine.

However, following the Judgement of the I.C.J. in the Anglo-Norwegian Fisheries Case, the headland-to-headland doctrine, as

circumscribed by relative dimensions and configuration, was left as the only standard to which customary international law had attained.⁴¹ In that case, the I.C.J. felt it necessary to point out that:

"... although the ten-mile rule has been adopted by certain States both in their national laws and in their treaties and conventions, and although certain arbitral decisions have applied it as between States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law."⁴²

As such, therefore, it could not be binding on Norway, which had always been opposed to it.⁴³

O'Connell makes it clear that this ruling was irrefutably correct, since not only had the 10 mile rule been confined in practice to treaty limits for fishery purposes, but also there was a large body of legal opinion that there was no general agreement upon the length of bay closing lines.⁴⁴ Nevertheless, when the question of bay closing lines came to be considered by the I.L.C., the I.C.J.'s rejection of any legal status the 10 mile rule might have attained posed a problem.

The question of the length of bay closing line was, however, but one part of the debate concerning the criteria by which juridical bays

might be determined. The Permanent Court of Arbitration in the North Atlantic Coast Fisheries Arbitration had stated that it was:

"... unable to understand the term 'bays' ... in other than its geographical sense, by which a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally."⁴⁵

Nevertheless, it found that although the width of an indentation was not crucial in determining what was a "bay", the coastal interest varied, "speaking generally, in proportion to the penetration inland of the bay," so that there was some relationship between the width of a bay and the depth of its penetration inland.⁴⁶ Thus, where the headland-to-headland doctrine was upheld, it came to be qualified by subjective rules relating to the relative dimensions and configuration of the indentation concerned.

Similarly, McDougal and Burke report that although the length of closing line was the major issue at the Hague Codification Conference, the main stumbling block concerned the lack of agreement upon what indentations could be characterised as "bays."⁴⁷ The Russo-Japanese Fisheries Convention of 15 July 1917, had excluded Japanese fishermen from "bays which cut into the continent a distance three times as great as the width of their entrances,"⁴⁸ and at The Hague, four proposals

were made concerning a mathematical solution to the issue of the relationship between the dimensions and configuration of bays. The French proposal was generally regarded as too complex and difficult to understand, whilst the German and British proposals were withdrawn in favour of the proposal by the United States, that:

"If the area enclosed within the straight line [i.e. between the headlands up to 10 miles long] and the envelope of the arcs of circles [i.e. of a radius of one quarter of the length of the closing line and drawn from basepoints in the bay in the same way as territorial waters] exceeds the area of a semi-circle whose diameter is equal to one half the length of a straight line across the bay or estuary, the waters of the bay or estuary inside of the straight line shall be regarded, for the purposes of this convention, as interior waters; otherwise they shall not be regarded."⁴⁹

The idea behind this formula was to make a comparison between the area of the semi-circle and the area of waters which would be high seas if the bay were not enclosed, and to formulate a ratio between the indentation's surface area and its closing line.⁵⁰ However, although this U.S. proposal was welcomed, it did not command sufficient support for its adoption, whilst Münch later demonstrated that it was too complicated for mariners to use, and was thus only practicable if

implemented by coastal authorities which indicated the enclosed bays on official charts.⁵¹

(b) The Work of the I.L.C. and UNCLOS I

O'Connell has noted that:

"Since customary international law had no precise standards for the enclosure of bays within internal waters, there was little secure foundation for a codification of the law of bays when the I.L.C. considered the question."⁵²

Nevertheless, Francois, the Special Rapporteur, proposed to the I.L.C. the 10 mile rule, discredited by the I.C.J., in order to see what support it might nevertheless attract.⁵³ He was backed by the Committee of Experts, which upheld the 10 mile rule, as representing "twice the range of vision to the horizon in clear weather, from the eye of the mariner at a height of 5 metres (which is the internationally accepted height for hydrographical purposes)."⁵⁴

This limit remained part of the I.L.C. draft until 1954, when, despite support from such notables as Fitzmaurice, Sandström and Scelle, it was dropped after criticism from various governments.⁵⁵ Instead, as a substitute for fixed limits, the expression "so as to contain land-locked waters" was taken from the Fisheries Case Judgement

of Judge McNair, much to the chagrin of Francois who sought to establish again a standard maximum length of closing line. In 1955, a 25 mile rule was proposed, based upon the fact this would be slightly longer than twice the proposed 12 mile territorial sea breadth, but this was widely criticised, Turkey and Israel being amongst those States issuing formal complaints.⁵⁶ As a consequence, the I.L.C.'s final draft of 1956 narrowly accepted a 15 mile closing line, as a compromise between amendments proposing 10 or 12 miles and the I.L.C.'s own 25 mile limit.⁵⁷ The effect of this preoccupation with fixed limits was, however, in O'Connell's view, to distract the I.L.C. from a careful examination of the semi-circle test or of the ambiguous term "landlocked."⁵⁸

The semi-circle test, put forward by the Committee of Experts in 1953, was linked to the length of the closing line, and survives as Article 7(2) of the Territorial Sea Convention and Article 10(2) of the 1982 Convention.⁵⁹ For O'Connell, it was a "fundamental modification" and unnecessary simplification of the U.S. proposal of 1930. The Committee simply stated that "a bay is a bay in the juridical sense, if its area is as large as, or larger than that of a semi-circle drawn on the entrance of that bay."⁶⁰ Given its task of defining a bay as opposed to a mere curvature of the coast, the Committee of Experts, had, therefore, in O'Connell's opinion, abandoned most of the U.S. proposal's intrinsic elements, so that although the 1930 proposal had some semblance of scientific validity the 1953 proposal had none.

Thus, he concluded that although the comparison of areas was useful in many situations, it did not take sufficient account of an indentation's geographical configuration or relative dimensions, and could not be regarded as a codification of customary international law,⁶¹ a view echoed by Hodgson and Alexander, who believed that a true semi-circular bay would not contain landlocked waters.⁶²

Nevertheless, the semi-circle test survived at UNCLOS I, where again the major preoccupation was with the maximum length of closing line.⁶³ Indeed, Strohl notes that with the "mystique inherent in the 10 mile rule" being swept away, the length of closing line, "became something of a legislative football in which various views were held."⁶⁴ The Geneva Conference ultimately settled upon a 24 mile maximum closing line, "through a cleverly conceived legislative artifice whereby the bay closing line was made a mathematical function of an unagreed upon width of the territorial sea,"⁶⁵ i.e. since the maximum breadth of territorial sea advocated by States was 12 miles, it was held that the length of bay closing line be twice that distance.⁶⁶ Proponents of the 24 mile rule further stated that it would "correspond to an established international practice, and would protect the vital interests of the States concerned," but as Strohl notes, "[n]o one challenged how these vital interests would be jeopardised by a 10 mile rule for bays."⁶⁷ Nevertheless, the 24 mile rule, an arbitrary limit "supported by no authority and representing perhaps the most

significant variation from state practice codified by the [Territorial Sea] Convention," was adopted by 31 votes to 27 with 13 abstentions.⁶⁸

(c) UNCLOS III

Although Article 7's rules could not be regarded as a codification of customary international law, by the time of UNCLOS III, it is generally accepted that they themselves had attained customary status. At UNCLOS III, no proposals were made to revise Article 7, and indeed it was Greece which proposed its readoption.⁶⁹ Consequently, Article 10 of the 1982 Convention repeats the Territorial Sea Convention's provisions almost verbatim, with no effect on their content.

2.3 State Practice

Article 4(6) of the Territorial Sea Convention requires States to "clearly indicate straight baselines on charts, to which due publicity must be given," but there is no corresponding provision with respect to either bays or rivermouths (Articles 7 and 13). Indeed, the Convention places no obligation upon States:

- (i) to enclose bays with mouths less than 24 miles wide;
- (ii) to draw closing lines of 24 miles where the distance between the natural entrance points exceeds 24 miles; or
- (iii) perhaps most importantly, to declare which bays have been enclosed.⁷⁰

In 1972, Alexander and Hodgson stressed that there was a need for coastal States both to legislate for the enclosure of bays into their internal waters *and* for the closing lines they recognised to be published on their official charts, so as to enable a mariner to determine the extent of a coastal State's territorial sea for navigation purposes.⁷¹ Their concern appears to have been rewarded by Article 16 of the 1982 Convention, which requires that States must plot their territorial sea baselines:

"... as determined in accordance with articles 7 [straight baselines], 9 [rivermouths] and 10 [bays] .. on charts of a scale or scales adequate for ascertaining their position. Alternatively, a list of geographical co-ordinates of points, specifying their geodetic datum, may be substituted."

These charts or coordinates must be given due publicity and a copy deposited with the Secretary-General of the U.N.

Nevertheless, until the 1982 Convention enters into force, or more significantly, Article 16 becomes established as part of customary international law, navigational doubts will remain. As a result, the following analysis of Mediterranean State practice with respect to bay enclosure is based upon published information, with some indication being given where States have not enclosed indentations which conform to the conventional legal rules for such enclosure.

2.4 Mediterranean State Practice

Of those Mediterranean States which have legislation pertaining to bays, there is no uniform practice.

(a) Spain

In its fisheries' treaties with Portugal of 2 October 1885 and 27 March 1893, Spain stipulated a 10 mile limit for baselines in bays, but its neutrality decrees of 27 May 1910 and 13 October 1913, implied that a 12 mile limit should be applied.⁷² Spanish ratification of the Territorial Sea Convention in 1971, would appear to indicate, however, the acceptance of a 24 mile closing line.

Several bays, including the Gulfs of Almeria, Cartegena, Alicante and San Jorge, which are not juridical bays, were enclosed by Spanish Royal Decree No. 2510/1977 of 5 August 1977, by which Spain issued corrections to its straight baseline system. As such, it must be presumed that the right of innocent passage is operative in their waters as under Article 5(2) of the Territorial Sea Convention.

(b) France

The same problem attends those gulfs and bays enclosed by France's straight baseline legislation of 19 October 1967. Historically, France

enumerated all those bays which it had enclosed,⁷³ but this practice lapsed with its 1967 legislation. Although some of the bays enclosed by these straight baselines do not fulfil the criteria set down in Article 7, many do, and indeed, several were enclosed as long ago as 1888.

After initial resistance to the enclosure of bays, France signed and ratified the North Sea Fisheries Convention of 1882, in accordance with which, by an Act of 1 March 1888, it prohibited foreign fishermen from fishing in the French territorial sea, (including that of Algeria), as measured from bay closing lines corresponding to a 10 mile limit. Subsequently, three Presidential Decrees of 9 July 1888 were published in execution of this Act, the first referring to a number of "bays" on France's Mediterranean and Corsican coasts, which were considered to be under French sovereignty (Table 6). In fact, many of the straight lines drawn under this Decree enclosed not bays but curvatures of the coast, and in some cases, straits between offshore islands and the mainland coast.⁷⁴

(c) Algeria

A further French Decree of 9 July 1888, enclosed a number of Algerian bays (Table 7).⁷⁵

De Guttry notes that many of the closing lines drawn do not join the natural entrance points,⁷⁶ thereby providing an early example of the closing line being drawn *within* the bay where the distance between the natural entrance points exceeds the specified closing limit, in this case 10 miles.⁷⁷ Whether or not this Decree can be regarded as still operative appears immaterial, given that the Algerian straight baselines decreed on 4 August 1984 have accounted for those Algerian bays enclosed in 1888.⁷⁸ However, innocent passage must be presumed through those French and Algerian bays not previously closed by the French decrees of 1888 under Article 5(2) of the Territorial Sea Convention.

(d) Italy

Historically, Italy did not specify the limits of its closing lines for bays, although in both the Treaty of 6-17 January 1787 between the Kingdom of the two Sicilies and Russia concerning neutrality in gulfs, and in the Edict of the Republic of Genoa of 1 July 1779 concerning commerce and navigation in time of war, the gulfs to which these regulations pertained were considered national waters.

At the end of the nineteenth century, the Italian Fisheries Commission recommended a 10 mile closing line, based upon the 1882 North Sea Fisheries Convention, but the Government did not approve the

Table 6 - French "Bays" on the Mediterranean Sea Enclosed by

Presidential Decree of 9 July 1888

<u>Mediterranean mainland coast</u>	<u>Width in miles</u>
Golfe d'Aigues-Mortes	9.5
Golfe des Saintes-Maries	8.0
Golfe de Fos	7.0
Golfe de Marseille (3 entrances)	8.0, 6.0, and 9.0
Baie de la Ciotat, Bandol et Saint-Nazaire	8.0
Baie de l'entrée de Toulon	10.0
Rade des Iles d'Hyères (4 entrances)	3.0, 8.0, 1.9 and 8.0.
Anse de Pampelune and Golfe de Saint-Tropez	9.0 -
Golfe de Fréjus et rade d'Agay	9.0
Golfe du Napoule	8.2
Golfe Juan	4.0
Baie des Anges	10.0
Baie de Saint-Hospice et de Monaco	7.0
<u>Corsican coast</u>	
Golfe de Sainte-Florent	7.0
Golfe de Calin	7.5
Golfe de Porto	5.6
Golfe de Sagone	9.7
Golfe d'Ajaccio	8.7
Golfe de Valinco	8.4
Baie Ventilage et port de Figari	7.7

Sources: (i) United Nations Laws and Regulations on the Regime of the Territorial Sea, United Nations Legislative Series ST/LEG/SER/B/6, pp. 15-16. (New York, 1957); (ii) L.J. Bouchez The Regime of Bays in International Law, at p. 55. (Leiden: A.W. Sythoff, 1964.)

Table 7 - Algerian Bays Enclosed by French Presidential Decree
of 9 July 1888

	<u>Width in miles</u>
Golfe de Bône	10.0
Baie de Sidi-Merouan	10.0
Baie de Philippeville	8.2
Baie de Collo	8.6
Baie des Monts Tahard	6.8
Baie de Djidjelli	4.0
Baie de Bougie	10.0
Baie d'Algérie	10.0
Baie de Tripaza	8.0
Baie de Sidi-Ferruch	3.5
Baie d'Arzeu	7.5
Baie d'Oran	7.5
Baie de l'Oued-Ouedi (2 entrances)	4.5 and 3.0
Passage entre les îles Habibas et la côte (2 entrances)	8.8 and 9.2
Abords de la Tafna (2 entrances)	7.7 and 4.5

Sources: (i) United Nations Laws and Regulations on the Regime of the Territorial Sea, United Nations Legislative Series ST/LEG/SER/B/6, pp. 16-17. (New York, 1957); (ii) L.J. Bouchez The Regime of Bays in International Law, at p. 55. (Leiden: A.W. Sythoff, 1964.)

proposal.⁷⁹ It does appear, however, that Italy did observe the rule of twice the width of the territorial sea, as measured by the range of cannon. This was enshrined in Act No. 612 of 16 June 1912, governing the passage and presence of merchant ships through or in Italian waters. Article 1(2) prescribed a 20 mile bay closing line, related to its 10 mile territorial sea claim, this being regarded as within the (then) range of modern artillery. Italy subsequently proposed the 20 mile limit as a general rule for bays in its Reply to the Hague Codification Conference, and finally enshrined this limit for all purposes in its Navigation Code of 30 March 1942.⁸⁰ In 1964, Italy became a party to the Territorial Sea Convention, and by Law No. 359 of 14 August 1974 it amended the Navigation Code to provide for 24 mile bay baselines.

However, many non-juridical bays became Italian internal waters as a result of Presidential Decree No. 816 of 9 February 1977, by which Italy proclaimed straight baselines. Italian bay legislation makes no mention of the semi-circle test, despite the fact that Italy is a party to the Territorial Sea Convention, but it does prescribe for 24 mile closing lines; thus, it could be assumed that innocent passage is debarred in those Italian bays with mouths less than 24 miles wide, but permitted in those where the distance between the natural entrance points is in excess of this distance. However, it could also be argued that as Article 1 of the Presidential Decree simply provides that:

"... the straight baselines and lines closing natural *or historic* bays for calculating the Italian territorial sea shall be drawn as follows ... ,"

those bays with mouths greater than 24 miles are the subject of historic title which, if accepted, denies the right of innocent passage. Hence the need to state explicitly under which rules bays are being enclosed.

(e) Yugoslavia

By Act of 1 December 1948, Yugoslavia established a 6 mile territorial sea, Article 3 of the same Act stipulating both those bays which it considered to be inland waters (Table 8) and including as internal waters:

"All other bays and estuaries the width of which, measured from the shortest point of junction to the opposite shore in the direction of the mainland shore does not exceed twelve nautical miles."^{e1}

These included the Bays of Tar and Medulin, where, by the fisheries agreements of 13 April 1949 and 20 November 1958, Italian fishermen were allowed to fish under certain conditions.^{e2} Yugoslavia subsequently proposed a 12 mile limit to the I.L.C., based on the view

Table 8 - Yugoslavian Bays Expressly Enclosed by Act of 1 December 1948
Concerning the Coastal Waters of the Federal People's Republic
of Yugoslavia

	<u>Width in kilometres</u>
Bay of Budva	11.72
Bay of Traste	9.30
Boka Kotorska	7.50
Bay of Pulj (two entrances)	3.50 and 5.50

Sources: (i) Laws and Regulations on the Regime of the Territorial Sea, United Nations Legislative Series ST/LEG/SER/B/6, pp. 313-314. (New York: United Nations, 1957); (ii) L.J. Bouchez The Regime of Bays in International Law, p. 62. (Leiden: A.W. Sythoff, 1964.)

that the length of a bay closing line should be equal to twice the breadth of the territorial sea, rather than some "arbitrary" figure of 10 miles.⁸³

More recently, Article 11 of the amended Yugoslav Law on the Coastal Sea Zone and Epicontinental Belt (1979), provided for three different baselines along the coast of Yugoslavia: the low-water line, straight baselines, and bay baselines. According to Article 3(2), a "bay" was:

"... a distinctly limited inlet recessed into the land and of a sea area equal to or larger than the area of the semi-circle with a diameter equal to the length of the straight line closing the entrance into the inlet."⁸⁴

No length of bay closing line was specified, although it may be assumed that Yugoslavia's ratification of the Territorial Sea Convention indicates adherence to a 24 mile rule.

The most recent "Act Concerning the Continental Shelf" (23 July 1987) continues this practice, defining a "bay" in Article 3 as "a well-marked indentation in the coast which has surface area as large as, or larger than, that of a semicircle whose diameter is a line drawn across the mouth of that indentation."⁸⁵

However, straight baselines have been drawn along the Yugoslavian coast as far south as Zarubaca Point, and these account for all previous bays enclosed under the 1948 legislation, with the exception of Boka Kotorska. In addition, Yugoslavia has drawn a straight baseline joining Cape Platamuni to Cape Mendra which is not considered to have been established by the 1979 Law.⁸⁶ This baseline can be viewed neither as part of Yugoslavia's straight baseline system, (because of its detachment from the other baselines drawn along the Yugoslav coast), nor as the closing line of a juridical bay, since it is over 24 miles long, and encloses a body of water which does not fulfil the semi-circle test set down in both conventional law and Yugoslavia's domestic legislation.⁸⁷

(f) Morocco

Article 2 of the Moroccan Dahir of 31 March 1919, relating to fishing, read:

"In the case of bays, the radius of six miles shall be measured from a straight line drawn across the bay, in the part nearest to the entrance, at the first point where the opening does not exceed twelve miles."⁸⁸

This remained the limit observed by Morocco under the Dahir of 30 June 1962, although what precisely constituted a bay was left undefined.

De Guttry has observed that the regularity of the Moroccan Mediterranean coast means that only Athucemas Bay was not a juridical bay,⁸⁹ but this seems irrelevant given that by Decree No. 2-75-311 of 21 July 1975, Morocco has drawn straight baselines along its entire Mediterranean coast.

(g) Greece

By Presidential Decree 6/18 of 6 September 1936, the Greek territorial sea is measured from the coast and makes no mention of bay closing lines. However, Bouchez interprets both the Decree of 14 March 1834, relating to sardine fishing in the Bay of Patros and the Gulf of Korinthos, and Act No. 652 of 27 February 1915, regulating fishing in Greek coastal waters, as implying that Greece's bays were to be considered as inland waters, because they stipulated that the same rights and conditions would apply to Greek and foreign citizens alike.⁹⁰ Even so, no limit for bay baselines was mentioned in this legislation.

However, under Law No. 4141 of 26 March 1913, (by which, in time of war, the passage and sojourn of merchant vessels, Greek or foreign, could be prohibited at any time and in any area of the Greek seas, whether closed or open, whenever the interests of national defence required it), Greek seas were defined as extending 10 miles offshore, measured in the case of bays whose closing lines did not exceed 20

miles in length.⁹¹ Even so, at UNCLOS I, Greece proposed a 10 mile closing line limit.⁹²

It does not appear, however, that Greece has enclosed any of its bays, whether by closing lines of 10 miles or otherwise, although its signature of the 1982 Convention may be taken as approval of the 24 mile rule and semi-circle test.⁹³

(h) Syria

Under Article 1(b) of Legislative Decree No. 304 of 28 December 1963, Syria has defined a bay as a:

"... pronounced curve which has a depth in relation to the width of its mouth so as to encompass water surrounded by land. Curve is not considered a curve unless its area should be equal or more than half a circle circumscribed within the mouth of that curve."

No length of permissible closing line is specified; rather Article 5(2) of the Decree states that bay closing lines are to be drawn "at one point of the land from the entry of the bay to the other point."⁹⁴ However, it is difficult to see why Syria has this legislation, given that there are no bays along the Syrian coast which correspond to its bay definition.⁹⁵

(i) Albania

Albania has preferred to enclose its bays and gulfs within a straight baseline system, despite the fact that many of the bays concerned are juridical.⁹⁶ Although this means that its offshore jurisdiction is pushed further seaward than if it had enclosed each of these bays individually, this policy has been at the sacrifice of exclusive authority, given that Article 5(2) of the Territorial Sea Convention permitting innocent passage is as a consequence applicable to these bays' waters.

(j) Libya, Egypt and Tunisia

Libya enclosed the Gulf of Sirte as part of its national territory in 1973, and in 1951, Egypt made each of its Mediterranean bays and gulfs part of its inland waters. Similarly, in 1973, Tunisia enclosed both the Gulf of Tunis and Gulf of Gabès. All of these enclosures appear to be based on the rules for historic bays, and are thus discussed in the following chapter.

(k) Monaco, Israel, Cyprus and Lebanon

Monaco, Israel, Cyprus and Lebanon, make no legislative provisions concerning bays. There are various reasons why this might be so: the coast of Monaco is too short and regular for bay closing lines to be

necessary; the Mediterranean coast of Israel is relatively straight and unindented; many of Cyprus's bays do not fulfil Article 7's rules for bay enclosure;²⁷ and the Lebanese coast is too straight and uncomplicated to require legislative provisions concerning bays. Thus, for each of these States, the baseline in the case of bays is the low-water line.

(1) Malta

Malta is a party to the Territorial Sea Convention, under which, in the absence of any domestic legislation, it could enclose several bays along its coasts, e.g. Mellieha Bay, St. Paul's Bay, Salina Bay, St. George's Bay and St. Julian's Bay.²⁸ However, Malta has preferred to draw straight baselines around its islands, rather than to enclose individual bays. As these were drawn under Article 4 of the Territorial Sea Convention, innocent passage should be permissible under Article 5(2) of that Convention.

Interestingly, if Malta had proclaimed *archipelagic* baselines, as provided for by Article 47 of the 1982 Convention, then Article 50 would also be applicable. This provides that:

"Within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with articles 9, 10 and 11."

Thus, those Maltese bays which fulfil the 24 mile rule and semi-circle test could still have been enclosed as juridical bays, wherein the right of innocent passage through archipelagic waters provided for in Article 52 would be inoperative.

(m) Turkey

Turkey has no specific provisions with respect to bays, nor is it a party to the Territorial Sea Convention. Even so, it has enclosed two bays along its southern Mediterranean coast, one of which is the large Bay of Iskenderun. This bay has a closing line of 23.5 miles and fulfils the semi-circle test.⁹⁹

2.5 Conclusions

Mediterranean States have paid relatively little attention to the legal provisions concerning bay enclosure, and much of the national legislation which exists appears to have been superseded by subsequent straight baseline or historic bay claims. As a consequence, the enclosure of bays by Mediterranean States is largely uncontroversial except where non-juridical bays have been claimed as historic or included within a State's straight baselines. It is therefore to these claims that we now turn.

Notes:

1. I. Aurrocoechea and I. Pethick "The Coastline and its Physical and Legal Definition" International Journal of Estuarine and Coastal Law, 1 (1986), pp. 29-42, at p. 36.
2. ibid.
3. D.P. O'Connell The International Law of the Sea Vol. 1 (Ed. I.A. Shearer), p. 172. (Oxford: Clarendon Press, 1982)
4. J.R.V. Prescott The Political Geography of the Oceans, p. 59. (New York: John Wiley and Sons; Newton Abbot, London, Vancouver: David and Charles, 1975)
5. O'Connell op. cit., p. 176.
6. P.B. Beazley Maritime Limits and Baselines: A guide to their delineation (Second Edition), p. 5. (The Hydrographic Society, Special Publication No. 2, August 1978)
7. O'Connell op. cit., pp. 176-177.
8. A. De Guttry "The delimitation of territorial waters in the Mediterranean Sea" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 377-415, at p. 386.
9. This is the lower of the two low waters of any tidal day: L.M. Alexander Offshore Geography of Northwestern Europe: The Political and Economic Problems of Delimitation and Control, p. 26. (Chicago: Rand McNally and Company; London: John Murray, 1963)
10. L.M. Alexander "Baseline Delimitations and Maritime Boundaries" Virginia Journal of International Law, 23 (1983), pp. 503-536, at p. 510.
11. L.M. Alexander "The Identification of Technical Issues of Maritime Boundary Delimitation Within the Law of the Sea Convention Context" in E.D. Brown and R.R. Churchill (Eds.) The U.N. Convention on the Law of the Sea: Impact and Implementation, pp. 272-287, at p. 273. (Honolulu: Law of the Sea Institute, William S. Richardson School of Law, University of Hawaii, 1987)
12. It has been suggested that these circumstances are so numerous that "it is doubtful whether in practice the low-water mark is the normal baseline for most States:" R.R. Churchill and A.V. Lowe The Law of the Sea, p. 27. (Manchester: Manchester University Press, 1983)

13. The exception is the reference in Article 7(5) to a "straight baseline" being drawn within a bay with a mouth greater than 24 miles wide.

14. L.J. Bouchez The Regime of Bays in International Law, p. 22. (Leyden: A.W. Sijthoff, 1964). Hodgson and Alexander suggest, however, that as no maximum width is specified for straight lines closing rivers, they could exceed the limit prescribed for bay closing lines: R.D. Hodgson and L.M. Alexander Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos, p. 3. Law of the Sea Institute Occasional Paper No. 13. (Kingston, Rhode Island: Law of the Sea Institute, University of Rhode Island, 1972)

15. ibid.

16. These Articles are almost identically worded.

17. See especially: G.S. Westerman The Juridical Bay, pp. 32-74. (New York: Oxford University Press; Oxford: Clarendon Press, 1987)

18. Prescott op. cit., pp. 45-46. For earlier examples, see: Westerman op. cit., pp. 33-36.

19. ibid., p. 46; O'Connell op. cit., pp. 339-341.

20. See, for example: M.S. McDougal and W.T. Burke The Public Order of the Oceans: A Contemporary Law of the Sea, pp. 341-342. (New Haven and London: Yale University Press, 1962)

21. See: Westerman op. cit., pp. 27, 47; Bouchez op. cit., p. 111; and the seventeenth century views of Lord Hale quoted in: G.T. Yates III "International Law and the Delimitation of Bays" North Carolina Law Review, 49 (1971), pp. 943-963, at p. 945.

22. O'Connell op. cit., p. 352. For a general discussion, see: ibid., pp. 341-352, especially pp. 341-344.

23. ibid., p. 349.

24. ibid., pp. 344-345. See also: Bouchez op. cit., pp. 103-104.

25. O'Connell op. cit., p. 353.

26. ibid., p. 355.

27. See, for example: P.C. Jessup The Law of Territorial Waters and Maritime Jurisdiction, pp. 355-357. (New York, 1927)

28. O'Connell op. cit., pp. 378-379; McDougal and Burke op. cit., p. 351; Bouchez op. cit., p. 107. Strohl suggests that the 12 mile limit was not purely in relation to the breadth of the territorial sea: M.P. Strohl The International Law of Bays, p. 196. (The Hague: Martinus Nijhoff, 1963)
29. I.e. twice the territorial sea breadth: McDougal and Burke op. cit., pp. 343, 352.
30. O'Connell op. cit., p. 381. See also: Bouchez op. cit., pp. 104-105; Yates op. cit., p. 946.
31. ibid., p. 950
32. O'Connell op. cit., pp. 353, 382-383; McDougal and Burke op. cit., p. 351. The 10 mile limit was also adopted by the International Law Association in 1895: Strohl op. cit., p. 196.
33. McDougal and Burke op. cit., p. 344; O'Connell op. cit., pp. 361, 383
34. ibid., pp. 359, 382; McDougal and Burke op. cit., p. 351.
35. Yates op. cit., p. 959; Strohl op. cit., p. 203.
36. O'Connell op. cit., p. 379; Bouchez op. cit., p. 107.
37. O'Connell op. cit., p. 380; Strohl op. cit., pp. 205-206.
38. McDougal and Burke op. cit., p. 354.
39. O'Connell op. cit., p. 384. See also: Bouchez op. cit., p. 106.
40. O'Connell op. cit., pp. 383-384.
41. ibid., p. 384.
42. International Court of Justice "Fisheries Case (United Kingdom v Norway), Judgment of December 18th, 1951" Reports of Judgements, Advisory Opinions and Orders, p. 131. (Leyden, 1951) (hereafter I.C.J. Repts. (1951)). The U.K. argued that it had been a rule of customary international law since 1930: McDougal and Burke op. cit., pp. 354-355.
43. I.C.J. Repts. (1951), p. 131.
44. O'Connell op. cit., p. 384.
45. Quoted in: Strohl op. cit., p. 6.
46. Quoted in: McDougal and Burke op. cit., pp. 343, 352.

47. ibid., p. 344.
48. Quoted in: Yates op. cit., p. 951.
49. Quoted in: O'Connell op. cit., p. 390.
50. ibid., p. 391; McDougal and Burke op. cit., pp. 344-345.
51. O'Connell op. cit., pp. 391-392.
52. ibid., p. 389. See also: Strohl op. cit., p. 221.
53. O'Connell op. cit., p. 389. Strohl comments that: "The record of the I.L.C.'s discussion of the 10 mile rule would suggest that it was not prepared to consider the I.C.J.'s decision ... as either final or even very authoritative guidance:" op. cit., p. 217.
54. U.N. Doc. No. A/CN.4/77 (1954), p. 11 cited in: McDougal and Burke op. cit., p. 355.
55. ibid., p. 356. Sweden, for example, protested that it was without basis in international law: Strohl op. cit., p. 221.
56. ibid., pp. 221, 222.
57. ibid., p. 223. See also: McDougal and Burke op. cit., pp. 356-357.
58. O'Connell op. cit., p. 389. See also p. 392.
59. In its Commentary to its 1955 Draft, the I.L.C. said that this meant that "the distance between the two extremities shall be twice the depth of the indentation, i.e., twice the distance between the closing line and the head of the bay:" quoted in: McDougal and Burke op. cit., p. 348.
60. O'Connell op. cit., p. 392.
61. ibid., pp. 392-393. See also: S.W. Boggs "Delimitation of Seaward Areas under National Jurisdiction" American Journal of International Law, 45 (1951), pp. 240-266, at p. 254.
62. Hodgson and Alexander op. cit., p. 8.
63. Bays were not a major issue at UNCLOS I, and the topic was little discussed, most discussion focussing on historic bays: Strohl op. cit., p. 227.
64. ibid., p. 186. See also p. 173.

65. ibid., p. 186. Strohl added that this length bore no relation to defence, navigation or economic interests, unlike the 10 mile rule, which represented some sort of economic equilibrium between States: ibid. See also: Westerman op. cit., p. 168.
66. ibid., p. 167; Strohl op. cit., pp. 227-228; O'Connell op. cit., p. 407.
67. Strohl op. cit., p. 228. For the same view, see: Westerman op. cit., pp. 167, 168.
68. ibid., p. 168. See also p. 169.
69. O'Connell op. cit., p. 416.
70. For a concurring viewpoint, see: De Guttry op. cit., p. 400.
71. They point out that there is a multiple choice as to the appropriate closing line in many instances: Hodgson and Alexander op. cit., p. 3.
72. Bouchez op. cit., pp. 58, 59.
73. ibid., p. 56.
74. O'Connell op. cit., pp. 373-374; Bouchez op. cit., pp. 54-55.
75. ibid.
76. De Guttry op. cit., p. 401.
77. cf. Articles 7(4) and 10(5) of the Territorial Sea and 1982 Conventions respectively.
78. Of the six "bays" identified in 1984, only one appears to fulfil the semi-circle test: T. Scovazzi "Bays and straight baselines in the Mediterranean Sea" Ocean Development and International Law, 19 (1988), pp. 401-420, at p. 405.
79. Bouchez op. cit., pp. 56-57.
80. ibid., pp. 57-58.
81. Laws and Regulations on the Regime of the Territorial Sea, United Nations Legislative Series ST/LEG/SER/B/6, pp. 313-314, at p. 314. (New York, 1957)
82. Bouchez op. cit., pp. 61-62, at p. 62.
83. ibid., p. 61.

84. Quoted in: De Guttry op. cit., p. 403.
85. Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 18 (June 1991), pp. 9-24, at p. 10.
86. G. Francalanci, D. Romanò and T. Scovazzi Atlas of the Straight Baselines: Part 1: Art. 7 of the Convention of the United Nations on the Law of the Sea, p. 136. (Milan: Giuffrè, 1986)
87. It is defined as part of the straight baseline system under Article 16 of the 1987 Law: Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 18 (June 1991), pp. 15-16.
88. Quoted in: Bouchez op. cit., p. 94.
89. De Guttry op. cit., p. 400. Scovazzi disagrees: he says that the Moroccan coast contains *only one* juridical bay: op. cit., p. 404.
90. Bouchez op. cit., pp. 62-63.
91. ibid., p. 63.
92. ibid.; U. Leanza, L. Sico and M.U. Ciciriello Mediterranean Continental Shelf: Delimitations and Regimes: International and National Legal Sources, Vol. 2 (Book III), p. 1281. (Dobbs Ferry, New York: Oceana Publications, 1988)
93. Greece is *not* a party to the Territorial Sea Convention.
94. Quoted in: De Guttry op. cit., p. 405.
95. See: "Straight Baselines - Syria" Limits in the Seas, No. 53 (10 October 1973). (Office of the Geographer, Bureau of Intelligence and Research, U.S. Department of State)
96. De Guttry op. cit., p. 402.
97. E.g. Khrysokou Bay, Morphou Bay, Famagusta Bay, Larnaca Bay, Akrotiri Bay and Episkopi Bay: ibid., p. 400.
98. ibid.
99. G.H. Blake "Offshore jurisdiction in the Mediterranean" Ekistics, 48 (1981), pp. 339-344, at p. 339. However, Blake also suggests that this bay "looks like a classic example of an historic bay:" ibid.

CHAPTER 3 - MEDITERRANEAN STATES AND HISTORIC BAYS

"Historic bays do exist and cannot be eliminated."

3.1 Introduction

There are two reasons why geographers should be interested in studying historic bay claims.

Firstly, historic bays may enclose considerable expanses of water. This is important because the waters enclosed by their closing lines are "internal waters," and therefore assimilated to land from the point of view of territorial sovereignty. Moreover, there is no right of innocent passage through internal waters created by historic bay claims, such as exists where a system of straight baselines delimits areas of internal waters.

Secondly, the enclosure of large "bays" may significantly shift seaward the zones of national jurisdiction, measured from their closing lines and, as a consequence, may affect the delimitation of boundaries with neighbouring States. Indeed, both Article 12 of the Territorial Sea Convention and Article 15 of the 1982 Convention, state:

"Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement

between them to the contrary, to extend its territorial sea beyond the median line from the nearest points on the baselines from which the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

Not surprisingly, both of these spatial aspects of historic bay claims have been somewhat neglected by lawyers, who have rightly focussed their attention on the legal criteria by which such claims may be approved, albeit with limited success. However, the perception of the historic bay claim as a legal issue has, it appears, also deflected the attention of geographers, who have paid far less attention to historic bays than to straight baselines.

3.2 Historic Bays under International Law

The historic bay concept originated as a direct consequence of the attempts to codify a maximum width for the length of a bay closing line, for it was recognised that many bays that had always been regarded as parts of the territory into which they intruded would be unable to be regarded as internal waters, because of the width of their mouths. Therefore, in order for them to continue to be recognised as constituent parts of a State's territory, an exception to the standard rules was necessary.² Hence, today, the doctrine of historic waters

provides for exceptions to the generally accepted rules of maritime delimitation, and, in the case of bays, is invoked by States that wish to place under their exclusive jurisdiction bays which do not fulfil the requirements of the semi-circle test, or which have closing lines in excess of 24 miles, or both.

However, although the term "historic bay" is used in Article 7(6) of the Territorial Sea Convention and Article 10(6) of the 1982 Convention, neither define what is meant by the term, which would appear to make it exceedingly difficult to deny or approve particular historic bay claims. On the other hand, most jurists, amongst them Gidel, Jessup, Bourquin and Malek, have suggested a definition which includes three main elements, namely:

- (i) that an historic bay must be claimed to be under the sovereignty of the coastal State;
- (ii) that the claim must be confirmed by the exercise of sovereignty for a sufficiently long period; and
- (iii) that it must be acquiesced in by other interested States.³

In addition, Gidel noted that "while the theory of historic waters is a necessary theory, it is an exceptional theory..," and thus for an historic bay to exist, exceptional treatment demands the existence of exceptional conditions, thereby requiring that the claimant State bear the burden of proof that such exceptional conditions exist.⁴

(a) Historic Bays and Conventional International Law

The concept of an "historic bay" was first discussed at meetings of the international law associations in the late nineteenth and early twentieth centuries, culminating in its consideration at the 1930 Hague Codification Conference. Many definitions were proposed, but none was codified in international law, although certain elements were commonplace and remain today accepted criteria for validating historic bay claims (Table 9). In all cases, historic bays were seen as an exception to the normal rules for bay enclosure, usually on the basis that their mouths exceeded the maximum breadth of closing line being proposed.

At the Hague Codification Conference, draft Article 4 proposed a 12 mile closing line "unless a greater distance has been established by continuous and immemorial usage." This prompted Schücking to comment that he would like to see established a register of coastal State claims to historic bays, which would preclude future declarations of exclusive sovereignty over legally non-enclosable waters:

"As these historical rights restrict in a special manner the common use of the sea, ... [i]t should be made impossible for such rights to be acquired in the future."⁵

In his view States either had or did not have historic bays, therefore it was "necessary that they should be definitely formulated in an

Table 9 - A summary of early attempts to codify a definition of an
historic bay

<u>Date</u>	<u>Organisation</u>	<u>Definition</u>
1894	Institut de droit international	Draft article 3 (adopted) proposed a 12 mile closing line "unless a continued usage of long standing has sanctioned a greater breadth."
1895	International Law Association	Article (3) on bays contained clause "unless a continued usage of long standing has sanctioned a greater breadth."
1925	American Institute of International Law	Article on bays states "unless a greater width shall have been sanctioned by continued and well-established usage."
1926	International Law Association	Adopted Article 7, which, although it proposed no closing line limit for bays, contained the qualification "unless an occupation or an established usage generally recognized by Nations has sanctioned a greater limit." (Article 5 prescribed a 3 mile territorial sea limit, therefore, it may be assumed that the maximum closing line is 6 miles).

<u>Date</u>	<u>Organisation</u>	<u>Definition</u>
1926	International Law Association of Japan	Draft article on bays contained the qualification "unless a greater width has been established by immemorial usage."
1928	Institut de droit international	"... unless an uncontested international usage has sanctioned a greater width." Amended to remove the adjective "uncontested."
c. 1929	Judge Bustamente's "Project Convention" (submitted by the American Institute of International Law to the Hague Codification Conference)	Historic bays (or estuaries) were "those over which the coastal State or States, or their constituents have traditionally exercised and maintained their sovereign ownership, either by provisions of internal legislation and jurisdiction, or by deeds or writs of the authorities." Bustamente also proposed that each State should declare its historic bay claims upon ratification of the Hague Convention.

<u>Date</u>	<u>Organisation</u>	<u>Definition</u>
1929	Harvard Research	Draft Article 5 on bays proposed a 10 mile closing line, but commented that there were certain "historic bays" whose mouths exceeded this breadth, which were "considered as wholly territorial waters of ... States because of claims long maintained," e.g. Delaware, Chesapeake and Conception Bays. This made necessary a separate draft article on historic bays (Article 12) which dealt with "historic claims made by certain States and acquiesced in by other States ... based upon usage which has been established before this convention comes into force." The comment to this Article also made clear that future historic bay claims based upon "established usage" were not debarred.

Source: M. P. Strohl The International Law of Bays, pp. 305-308. (The Hague: Martinus Nijhoff, 1963).

international convention;" if the emphasis was on "continuous and immemorial usage," this would logically debar States from enclosing bays of a considerable size.⁶ Where the historic claim of a State was disputed by another State, such disputes should be referred first to a mixed commission, and thereafter on appeal to the Permanent Court of International Justice. Unfortunately, the closing line being reduced from 12 to 10 miles, the historic bay exception was left unaltered.⁶

The next stage was to gather the views of governments on the draft article. From these it would appear few paid the historic bay exception much attention, for, after receiving their replies, the Preparatory Committee optimistically observed that these appeared to indicate that where the coastal State could prove a usage commensurate with a claim to internal waters,⁷ agreement upon the enclosure of bays with mouths greater than 10 miles could be easily reached. Thus, the Committee produced Basis of Discussion No. 8, which read:

"The belt of territorial waters shall be measured from a straight line drawn across the entrance of a bay, whatever the breadth may be, if by usage the bay is subject to the exclusive authority of the coastal State; the onus of proving such usage is upon the coastal State."¹⁰

It would be wrong to suggest, however, that this was not an indication that some States felt that international law should make provision for historic bays as exceptions to the general rules on bays.

For example, the Japanese delegate emphasised two essential elements, namely immemorial usage and general acquiescence, whilst Great Britain emphasised that a coastal State had to prove by usage, prescription or otherwise, whether it had exercised exclusive authority over the waters of a specific indentation into the land.¹¹ On the other hand, Portugal held that the historic bay concept was founded upon an explicit claim by a coastal State based upon its own national interests and a long-established usage such as exclusive fishing, a precursor of the vital bay concept examined below.

Other States, however, opposed the historic bay concept. Norway and Sweden believed there could be no exceptions when, at that time, definite rules on bays did not exist. Rather they upheld the right of every State to decide which of its bays were under its sovereignty, and to draw baselines no longer:

"... than is justified by the rules generally admitted either as being an international usage in a given region or as principles consecrated by the practice of the State concerned and corresponding to the needs of that State or the interested population and to the special configuration of the coasts or the bed of the sea covered by the coastal waters."¹²

The United States also rejected the historic bay doctrine,¹³ but some delegations did feel that the subject should be further investigated before codification was attempted in order to discover the principles

by which historic bays were enclosed, perhaps with a view to establishing a closed list of historic bays, but other States rejected this suggestion.¹⁴

In the deliberations of the I.L.C., the topic of historic bays was omitted from its draft articles until 1955, when historic bays were mentioned as a limited exception to the rules relating to the drawing of closing lines, not as an exception to the whole set of rules concerning bays. Only when South Africa pointed out that the intention was to make historic bays an exception to all the rules on bays was the exception drafted as it appears in Article 7(6) of the Territorial Sea Convention, although historic bays themselves were left undefined.¹⁵ Indeed, historic bays received relatively little attention, although the U.N. Secretariat did prepare a Memorandum on Historic Bays prior to UNCLOS I.

At the Conference itself, a number of States, amongst them Yugoslavia, proposed that in the absence of an agreed definition, a special body be set up to study the subject of historic bays, but this was protested by some States. For example, Panama held it was:

"...indispensable that the international instruments to be drafted should deal with such questions as the definitions of historic bays, the rights of the coastal state or states, the procedure for declaring a bay 'historic,' the conditions concerning their

recognition by other states, and the peaceful settlement of the disputes arising from objections by other states."¹⁶

Norway wished the subject to be discussed in the context of the discussion on bays, whilst Francois proposed that all historic bay disputes be referred to the I.C.J., which would have the flexibility to decide the case according to the particular circumstances rather than being bound by some general rule.¹⁷ This was rejected by Japan, which, motivated by the U.S.S.R.'s recent enclosure of Peter the Great Bay upon dubious historic grounds, held that defining the historic bay concept formed part of the Conference's codification activities, and was not the function of the I.C.J., whose job it was to interpret not codify.¹⁸

Thus, regarding the definition of an historic bay in Article 7 as essential, Japan proposed that Article 7(4) of the draft convention be amended to read:

"The term 'historic bays' means those bays over which the coastal State or States have effectively exercised sovereign rights continuously for a period of long standing, with explicit or implicit recognition of such practice by foreign States."¹⁹

However, as this definition included the controversial elements of the topic it did not receive much support, the general view remaining that the subject required further study.²⁰

Finally, a revised resolution from India and Panama was accepted, by which the U.N. General Assembly was entrusted with the task of carrying out a study of the juridical régime of historic waters, including historic bays.²¹ Nevertheless, the exception of historic bays from the general rules on bay enclosure was still included in Article 7(6) of the Territorial Sea Convention accepted by the Conference.

Subsequently, the I.L.C. undertook on behalf of the U.N. an exhaustive study of historic waters claims, the results of which were published in 1962. This avoided asking States to declare what they regarded as historic waters for fear that they would make both extravagant and novel claims before the principles upon which such waters were claimed had been ascertained, but by taking the view that until each claim had been examined the principles upon which claims could be validated could not be determined, the work on historic bays came to a halt.²²

No action was taken on the I.L.C.'s findings, and it was not until the Geneva session of UNCLOS III in 1975 that the subject of historic bays was discussed again, and then only briefly. An informal consultative group met twice to discuss historic waters and historic bays, and a smaller working party also held two meetings, but it was not until 1976 that any draft articles were submitted. These were from Colombia, and reflected that State's opposition to Venezuela's sovereignty claim for the Gulf of Venezuela, namely in respect of their

provisions for the case of historic bays shared by two or more States.²³ Paragraph 1 of these draft articles is the only paragraph that deals with the single State situation found in the Mediterranean, and read:

"1. A bay shall be regarded as historic only if it satisfies all of the following requirements:

(a) that the State or States which claim it to be such shall have clearly stated that claim and shall be able to demonstrate that they have had sole possession of the waters of that bay continuously, peaceably and for a long time, by means of acts of sovereignty or jurisdiction in the form of repeated and continuous official regulations on the passage of ships, fishing and any other activities of the nationals or ships of other States;

(b) that such practice is expressly or tacitly accepted by third States, particularly neighbouring States."²⁴

It proved to be the only attempt at UNCLOS III to define a historic bay, and did not result in any separate article. Instead, Article 10(6) of the 1982 Convention merely repeats Article 7(6) of the Territorial Sea Convention.

Yates suggests that the international community has been deliberately reluctant to define a historic bay, in order purposely to keep the concept vague, thereby allowing the coastal State a greater flexibility in its actions.²⁵ Alternatively, the lack of codification

may indicate that the historic bay doctrine does not reflect the common interests of the international community,²⁶ a view which is held by Goldie, who reports that the I.L.C., and UNCLOS I and III, were unable to find an appropriate balance between on the one hand those States with authentic claims to adjacent sea areas based on long usage, and on the other hand, those States which either opposed specific historic bay claims, or which imposed strict criteria for their recognition in order to uphold the freedom of the high seas.²⁷

Therefore, in the absence of a codified definition of historic bays, one must rely upon customary international law, and the opinions of jurists and arbitral bodies, as to what constitutes an acceptable definition.

(b) Historic Bays and Customary International Law

At UNCLOS I, Germany, whilst willing to accept historic bay claims, was reluctant to codify a definition based upon prescriptive criteria, stating "it would be difficult to establish general rules applicable to historic bays."²⁸ However, jurists do not appear to have had the same difficulty. For example, after considering various definitions, Bouchez concluded that:

"Historic...[bays] are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period

of time, exercises sovereign rights with the acquiescence of the community of States."²⁹

The 1962 U.N. Study also upheld these broad principles, suggesting a general consensus as to the legal requirements for the establishment of historic title over water areas.³⁰ However, it is the fact that each of the main elements of this definition are open to interpretation, which partly at least explains why the international community has not been willing to codify a definition, although each element has in some form found widespread recognition as an appropriate guiding criterion.

By claiming an historic bay, a coastal State establishes sovereignty over a part of the sea which would not normally fall under its exclusive jurisdiction. Thus, it is thought necessary by many authors that such sovereign rights be established by an explicit sovereignty claim by the competent authorities of the coastal State, although Bourquin noted that most governments refrain from declaring the limits of their maritime domain unless some particular circumstances force them to do so.³¹ Other authors put less weight on the explicit sovereignty claim, allowing for the inference of exclusive authority from its factual exercise.³² Nevertheless, in the case of historic bays, because a claim to sovereign rights diverges from the established rules of international law, it may only have legal effect:

- (i) where the claim is confirmed by the effective exercise of sovereign rights over the area concerned; and
- (ii) where the claim is acquiesced in by other States.³³

The effective exercise of sovereign rights is not, however, of itself sufficient to establish coastal State sovereignty, in the absence of acquiescence.³⁴

It is impossible to define a generally applicable criterion by which to determine whether or not there has been an effective exercise of sovereignty, and indeed, as Bouchez notes, to formulate such would lead in some instances to injustice. The 1962 U.N. Study held that the activities of the claimant State must be continuous and commensurate with the sovereignty claim, so that the legal status of the waters concerned "would in principle depend on whether the sovereignty exercised in the particular case over the area by the claiming State and forming a basis for the claim, was sovereignty as over internal waters or sovereignty as over the territorial sea."³⁵ Thus, the exercise of any legislation pertaining to historic waters, whether it be regulating fishing, navigation, pollution, etc. *may* qualify as an effective exercise of sovereignty over an historic bay, provided it was in accordance with an internal waters claim.

As to the acts themselves, Gidel held that the exclusion of foreign vessels or the imposition on them of rules which went beyond the normal scope of regulations concerning navigation would constitute acts evidencing coastal State sovereignty.³⁶ However, Gidel was concerned here with coastal State intent. Bouchez, on the other hand, put emphasis upon the fact that acts in accordance with legislative provisions are necessary for an effective exercise of sovereignty over

an historic bay, which can only be assumed *provided the bay has previously been explicitly claimed as such in the appropriate national legislation*. In his opinion, the exercise of sovereign rights without prior claim could not by itself establish sovereignty over the waters concerned.³⁷

Perhaps, however, the most controversial aspect in the establishment of an historic bay claim is the passage of time necessary for sovereign rights to be acquired. The concept of "acquisitive prescription" requires that sovereign rights be exercised peacefully, continuously, and without opposition, for such time as it takes "to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order."³⁸ Thus the period of time will vary according to the specific circumstances involved, and, in particular, upon the attitude of other States. For example, MacGibbon held that:

"The passage of a considerable period of time is an essential element in the growth of prescriptive and historic rights, the presumption of general or particular acceptance which may be raised by absence of protest being strengthened in proportion to the length of time silence persists."³⁹

On the other hand, in the Fisheries Case, Judge Alvarez stated that:

"A comparatively recent usage ... may be of greater effect than an ancient usage insufficiently proved."⁴⁰

Many authors have regarded "long," or even "immemorial" possession, as necessary to establish the rights to historic waters.⁴¹ The requirement of immemorial possession would seem difficult to fulfil, suggesting as it does that a different situation has never existed. Although this has the advantage of defining a definite time period, it also has the effect of not only denying any "new" claims to historic bays, but also many established historic claims;⁴² and, indeed, as Fitzmaurice notes, immemorial possession cannot be supported by a prior claim to sovereignty.⁴³ Thus the period of time required for the consolidation of a territorial claim into a right must be less than immemorial.

However, by far the most important factor in deciding whether a certain water area is an historic bay or not is the attitude of other States to the claim, and its exercise during the period of consolidation.⁴⁴ Indeed, the legal consolidation of an historic bay claim cannot occur without its express recognition by, or the tacit acquiescence of, interested States.⁴⁵ The necessity for acquiescence derives from the fact that under modern international law, the high seas belong to the international community. Hence title cannot be obtained merely through occupation, because the area belongs to all States:

"Title to 'historic waters,' therefore, has an origin in an illegal situation which was subsequently validated. The validation could not take place by the mere passage of time: it must be consummated by the acquiescence of the rightful owners."⁴⁶

Acquiescence has been variously defined as "the inaction of a state which is faced with a situation constituting a threat to, or infringement of its rights," or to mean that foreign States "have simply been inactive."⁴⁷ Similarly, MacGibbon stated that:

"Acquiescence takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection,"⁴⁸

whilst, in the Fisheries Case, the I.C.J. spoke of the "toleration" of foreign States as being sufficient,⁴⁹ and this was taken up by the U.N. Secretariat in its 1962 Study. However, acquiescence cannot be presumed, or territorial rights acquired, unless the claim to sovereignty is generally known, and its exercise open.⁵⁰ This requires the claimant State either to notify other interested States, or to exercise its rights in accordance with the claim, thereby leaving no doubt as to the existence of the claim.⁵¹ The silence of a State cannot be presumed to indicate acquiescence, if that State is unclear as to the nature of the claim.⁵²

Clearly, acquiescence in an historic bay claim will depend on a number of factors, not all of which are legal. These include:

(i) the degree to which the interests of a State are affected by the particular claim;

(ii) whether such a claim will set a precedent for other similar claims;

(iii) political considerations.

In many cases all three factors may motivate a protest: for example, the United States protests the Libyan enclosure of the Gulf of Sirte because in its view it violates international law by converting international waters into internal waters. This affects the right of the U.S. fleets to exercise the freedom of navigation in the Gulf's waters and, if this claim was allowed to become a precedent, might encourage other States to close non-juridical bays to the detriment of the international community. However, there is no doubt that the U.S. protest is also motivated by its foreign policy towards Libya.⁵³

Goldie suggests that acquiescence is more likely where there is a minimal cost to the international community's rights: thus, in the case of a bay which is not used for international traffic, "the balance of convenience and equity favours enclosure."⁵⁴ However, this neglects the precedent which the enclosure of one bay has for another. Moreover, convenience cannot be admitted as a criterion for bay enclosure when clear and unequivocal rules for bay enclosure exist. Thus, whilst it must be admitted that a State is free to recognise a claim which is contrary to the generally applicable rules of

international law, it must also be understood that this weakens the judicial function which States exercise with respect to the claims of each other.⁵⁵

Nevertheless, where there is an absence of a protest at an historic bay claim for a sufficiently long period, the claim may be regarded as having been established, whereas where there are a number of protests, the claim must be rejected. However, it is not clear whether if one State objects to a claim, this is sufficient to prevent establishment of a valid title. It may be argued that to allow one State to stop an historic bay claim would be to leave the way open for political abuse. On the other hand, where the sole objector was the one State directly affected by the claim its protest should carry weight.

In the Fisheries Case, Norway argued that an individual protest loses weight by virtue of the acquiescence of other States,⁵⁶ whereas the U.K. argued that the rights of an individual State must be safeguarded:

"... the protest of a single State ... is effective to prevent the establishment of ... a title precisely to the extent that the State takes all the necessary and reasonable steps to prosecute all available means of redressing the infringement of its rights."⁵⁷

The I.C.J., however, found that the protest of a single State was insufficient to prevent the historic consolidation of the Norwegian practice,⁵⁹ an opinion with which O'Connell concurred. He held that not only is a single State protest insufficient, but that a State should also protest more than once in order to prevent consolidation of title, such protests being accompanied by conduct supporting the opposition to the adverse claim.⁶⁰

3.3 Mediterranean Historic Bay Claims

Having examined the relevant provisions of international law, one can now proceed to examine the historic bay claims made by Mediterranean States.

(a) The Gulfs of Tunis and Gabès

By Article 1 of Law No. 73-49 of 2 August 1973, the Tunisian territorial sea was to extend 12 miles from *inter alia* straight lines closing the Gulfs of Tunis and Gabès,⁶⁰ as delimited in Decree No. 73-527 of 3 November 1973 (Figure 3). Under Article 1(3) of that Decree, the Gulf of Tunis was closed by three lines joining Cape Sidi Ali Mekki, Plane Island, the northernmost point of Zembra Island, and Cape Bon, the waters so enclosed being made "internal" under Article 2(a).⁶¹ Likewise, the Gulf of Gabès was closed (under Article 1(7) of the 1973 Decree), by a line joining the buoy of Samoun, (located off the Kerkennah Islands), and Ras Turques, at the north-easternmost point of

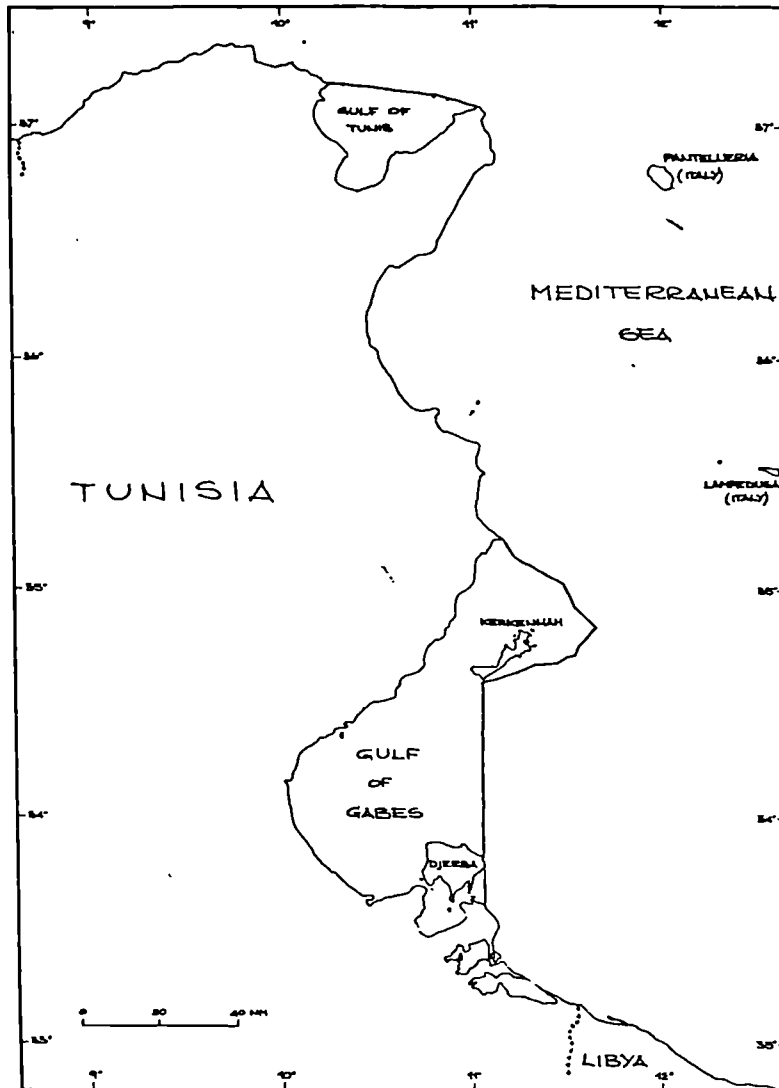


Figure 3 - The Gulfs of Gabès and Tunis.

Source: G. Francalanci, S. Mongardini, D. Romano and T. Scovazzi Atlas of the Straight Baselines: Part I: Art. 7 of the Convention of the United Nations on the Law of the Sea, p. 129. (Milan: Giuffrè, 1986)

the island of Jerba. By Article 2(b), these waters were also defined as "internal."⁶²

(i) The Gulf of Tunis as a Juridical Bay

The Gulf of Tunis has long been considered as an historic bay by many legal writers, and as a possible example of such by others.⁶³ For example, Gidel, writing in 1934, stated that both the Gulf of Tunis and the Gulf of Gabès constituted historic waters, but offered no evidence to support his assertion except the fact that foreign States had never protested the various rules promulgated for these waters, and in particular, those which had been implemented against foreign sponge fishermen in the Gulf of Gabès.⁶⁴ Nevertheless, this appeared sufficient for the U.N. Secretariat to include the Gulf of Tunis as an historic bay in its Memorandum prepared for UNCLOS I.⁶⁵

According to one view, the Gulf of Tunis fulfils both the Territorial Sea and the 1982 Conventions' requirements for juridical bay status, thereby rendering the question of the Gulf's historicity immaterial. This, however, is open to dispute, given the lack of unanimity as to the meaning of Article 7(3) (Territorial Sea Convention) and Article 10(3) (1982 Convention), which provide that:

"For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural

entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation."⁶⁶

In the case of the Gulf of Tunis, the islands of Plane and Zembra lie at its entrance, but *outside of* a hypothetical closing line drawn between its natural entrance points of Cape Sidi Ali Mekki and Cape Bon. Some authors, notably Hodgson and Alexander, have questioned whether Articles 7(3) and 10(3) are intended to apply only when the islands concerned lie on a line joining the two headlands, or may also apply when the islands lie seaward of such a line. They held that islands not intersected by the line between the natural entrance points should not be used as part of a bay's closing line, unless they were either "screening" islands or formed the headlands to the bay, neither of which is the case here.⁶⁷ In addition, rather than the three lines drawn by Tunisia, Gioia suggests that Articles 7(4) and 10(4) of the respective Conventions would appear to permit only one closing line joining a bay's natural entrance points.⁶⁸

Thus, although it is claimed that the Gulf of Tunis fulfils the semi-circle test whether it is enclosed by one line or three, the Gulf does not fulfil the 24 mile rule with a single closing line between the natural entrance points, i.e. its headlands, and therefore, cannot be

regarded as a juridical bay.⁶⁹ On the other hand, if one takes the view that, where islands are closely spaced and lie off what would otherwise be a bay's natural entrance point, the outermost islands, rather than the headlands of the mainland coast, can be regarded as the natural entrance points, the islands of Plane and Zembra would become the natural entrance points between which the closing line would be drawn. These islands lie approximately 23 miles apart,⁷⁰ thereby making the Gulf of Tunis a juridical bay. However, Hodgson and Alexander only consider that islands can be used as the headlands of a bay where they form a geographical prolongation of the coastline with which they are closely associated.⁷¹ Therefore, the fact that the island of Zembra lies at a distance west of Cape Bon would make it difficult to justify its use as a natural entrance point.

Nevertheless, the majority of commentators - and notably Gidel and Strohl⁷² - appear to accept a closing line joining the islands of Plane and Zembra. Indeed, during the proceedings of the Tunisia-Libya Continental Shelf Case, Libya implied its acceptance of the Gulf of Tunis as a juridical bay by referring to its 23 mile closing line.⁷³ Although it must be admitted that the enclosure of the Gulf of Tunis was not significant for the delimitation of the States' continental shelf boundary, Libya was nevertheless unlikely in the context of its contesting of the Tunisian baselines not to protest what it viewed as an illegal enclosure: its acceptance of the closing lines between islands would suggest, however, that there is minimal advantage to

Tunisia of departing from the axis of the Gulf's headlands in order to enclose the Gulf.

O'Connell and others have suggested that the presence of islands at the entrance of a bay is relevant only for application of the semi-circle test, and not as a justification for the drawing of closing lines which depart from the line joining the two natural entrance points, and which may therefore be advantageous to the claimant State.⁷⁴ Nevertheless, Westerman clearly shows that adherents to the Hodgson/Alexander/Gioia thesis are guilty of misconceiving the purpose and meaning of Articles 7(3) and 10(3). A requirement that islands in the mouth of a bay should lie on a line joining the natural entrance points would severely restrict the geographical applicability of Articles 7(3) and 10(3) to those cases where the islands are conveniently arranged on a straight line,⁷⁵ whereas in formulating what became Article 7(3), the I.L.C. made it clear that by definition, islands forming multiple entrances to an indentation form natural entrance points in the same way that headlands of an indentation normally do. Indeed, Westerman states that:

"... the presence of such islands creates an even more landlocked and well-marked indentation than one whose axis is fully open to the sea. Islands which create multiple entrances to an indentation tie that indentation more closely to the land regime and therefore trigger a special relaxation in the areal and geographical requirements for a bay. Islands which create more

than one entrance to an indentation, even one which might otherwise be deemed a mere curvature of the coast, have the legal effect of granting that indentation bay status."⁷⁶

Moreover, Westerman emphasises that Article 7(3) sets down absolutely *no* locational requirements for islands which create multiple entrances to an indentation, and makes no reference to islands lying "in the mouth of the bay;"⁷⁷ indeed, as O'Connell noted, Article 7(3) was "careful not to require that the islands lie on the line of the axis to the headlands: they might lie seaward of it, provided they create more than one mouth to the bay."⁷⁸ Instead, Westerman points out that Article 7(3) clearly states that because of the presence of islands the indentation will have more than one mouth in its entrance to the bay, so that:

*"It is the fact that certain islands factually create multiple entrances to the bay, not their location, which warrants the application of the special measurement rules of paragraph three."*⁷⁹

Thus, there is no doubt that islands lying beyond bay headlands may create multiple entrances to a bay, for to suggest otherwise, as Hodgson and Alexander have done, is to infer that there can be only two natural entrance points, and thereby to create a false premise "that regardless of the natural entrances formed by the islands themselves, a 'closing' line must initially be drawn between the mainland entrance

points." If this did not happen to intersect those islands "within the indentation," Hodgson and Alexander would wrongly debar those islands from constituting natural entrance points, despite the fact that to draw a closing line under paragraphs 3 or 4 of Article 7, ignoring the natural entrances created by the islands unless they bisected the "premature" closing line, would be to prejudge the juridical status of the indentation, the determination of which is dependent upon the special measurement rules for islands contained in paragraph 3.⁸⁰

Hodgson and Alexander also stated that while States are to draw lines between islands for semi-circle measurement purposes under Article 7(3), these same lines may not be used as closing lines under paragraphs 4 and 5. Instead, regardless of the presence of islands, the closing line of the indentation should be drawn between "entrance points" on the mainland.⁸¹ In the case of the Gulf of Tunis, this would mean that the islands of Plane and Zembra could be used for measurement purposes, but that the bay closing line would have to be drawn between Ras Sidi Ali Makkî and Cap Bon. However, such a schema would deny the geographical fact that these two islands themselves form natural entrance points to the Gulf. For this reason, if, as is the case here, the indentation fulfils juridical bay status as a result of applying the special rules of paragraph 3:

"Although there is no express directive in Article 7 to the effect that the measurement lines between islands made mandatory under paragraph three are to become the official closing lines of a

multi-mouthed bay, one may find implicit authority in the fact that once the indentation has been measured utilizing the lines between islands and a positive juridical determination has been made on the waters enclosed by these lines, it makes no sense whatever to draw the closing line landward of the islands, thereby deleting areas of water already effectively declared internal."⁸²

Moreover, Westerman is able to show that the I.L.C.'s Committee of Experts conceived of the measurement and closing lines as one and the same thing.⁸³

Therefore, it is clear that the doubts concerning Tunisia's right to draw closing lines across the Gulf of Tunis utilising the islands of Plane and Zembra are ill-founded, and "seem to have no basis in either the language of the Convention[s], the legislative history, or the historical treatment of bays."⁸⁴ The fact that the Gulf of Tunis fulfils juridical bay status using lines linking these islands and the Tunisian mainland, legitimises the use of bay closing lines which lie seaward of a hypothetical closing line between mainland entrance points.

Westerman also suggests that the 24 mile limitation of Article 7(4) *does not* apply where islands form natural entrance points to a multi-mouthed bay. Conventionally, it has been assumed that the sum of the closing lines linking islands and mainland should not exceed 24 miles, but Westerman's examination of the legislative history denies

this. In the case of multi-mouthed bays, the I.L.C. expressly rejected placing any limitation on the length of individual closing lines, and also refused to adopt a limit (i.e. 24 miles) on the sum total of the lengths of individual closing lines. Hence, Westerman concludes that the absence of such restrictions is implicit in Article 7, thereby allowing States a flexibility consistent with the view that islands creating multiple entrances to an indentation, "lock that indentation even more closely within the land territory" to such a degree that the semi-circle requirement can be somewhat relaxed under the terms of Article 7(3).⁶⁶ Therefore, if Westerman is right, the Gulf of Tunis and other island-mouthed bays may be enclosed as juridical bays, provided that they are both landlocked and fulfil the semi-circle test, irrespective of whether the sum of their closing lines exceeds 24 miles.

The Westerman thesis is certainly logical, for whereas a single-mouthed bay may be susceptible to the drawing of a single 24 mile closing line within it, where the distance between its natural entrance points exceeds 24 miles, because islands create a multi-mouthed bay, it may not be possible to limit the total length of closing lines to 24 miles, and still use each island as a natural entrance point. As it is the islands' presence which "lock that indentation even more closely within the land territory," to leave certain islands outside of the closing line simply to fulfil the 24 mile criterion defeats the object of enclosing bays within the territory of the coastal State. Hence, although the absence of the 24 mile limitation might be open to

potential abuse, it seems unlikely that islands creating several mouths to a bay will lie that far offshore as to make the 24 mile rule critical. Indeed, it is likely that an indentation would fail the semi-circle test where distant islands are claimed as natural entrance points, whilst it would be difficult to substantiate the view that such distant islands actually formed the entrances to the indentation.

Thus, the Gulf of Tunis would appear to be a juridical bay, given that by utilising the formula of Article 7(3) it fulfils the semi-circle test with closing lines drawn to and between the islands of Plane and Zembra.

(ii) Tunisia's Historic Title to the Gulf of Tunis

If, however, the juridical bay status of the Gulf of Tunis is not accepted, it becomes necessary to examine Tunisia's historic title over the Gulf's waters, the coral reefs of which Tunisia is said to have exercised sovereign rights over since time immemorial. This assertion is based on a number of pieces of evidence.

Firstly, Moussa reports that from 1117 the Bey of Tunis asserted a right to licence exploitation of the coral reefs along Tunisia's northern coast, with foreigners being allowed to fish the area only upon payment of specified sums of money. In 1604, a treaty between Henry IV of France and the Turkish Sultan Amat allowed French nationals to fish within the lines of jurisdiction of Algeria and Tunisia

according to their historic fishing rights in the area; and by a Treaty of 26 October 1832, the Bey of Tunis conceded the exclusive right to exploit the coral reefs to France, in exchange for an annual revenue.⁸⁶ Finally, by a fishing decree of 26 July 1951, the Gulf's waters were reserved for French and Tunisian nationals.⁸⁷ Since then, the Gulf of Tunis has been claimed first as "territorial sea" by Law No. 62-35 of 16 October 1962, and Law No. 63-49 of 30 December 1963, before being incorporated into Tunisia's "internal waters" in 1973.⁸⁸ -

This latter claim, therefore, prompted Gioia to state that:

"The 1973 legislation was the culmination of a long process of development in the claims of Tunisia over the Gulf of Tunis, a process which began at least by 1951."⁸⁹

She reports that Italy expressly recognised the "territoriality" of the Gulf of Tunis in its 1963 and 1971 fishery agreements with Tunisia, but there is no evidence to suggest that Italy accepted that the Gulf of Tunis was an historic bay. Indeed, although the degree of sovereignty for historic bay status has been recognised in some cases as being that of territorial waters, it has come to be accepted that historic bays must be claimed as internal waters, which in the case of the Gulf of Tunis did not occur until 1973. However, by Article 1(a) of the fishing agreement of 19 June 1976 between Tunisia and Italy, Italy accepted the baselines defined by Tunisia in 1973, which included the enclosure of the Gulf of Tunis.⁹⁰

Whether legislation concerning fisheries is sufficient to validate the closure of the Gulf of Tunis as an historic bay is unclear, but it is notable that the Libyan Memorial in the Tunisia-Libya Continental Shelf Case commented that the 1963 Tunisian Law only claimed sovereignty over the Gulf of Tunis, (and not over the Gulf of Gabès), and thus "only the Gulf of Tunis ... merited closure by a straight closing line on the basis that it was an 'historic' bay."⁹¹ This is interpreted by Gioia as indicative of Libya's acceptance of the Gulf of Tunis as a historic bay. However, the Libyan Reply states that there is "clear evidence" that Tunisia "officially treated the Gulf of Tunis as a juridical bay in 1963."⁹² This would suggest that contrary to Gioia's view, Libya approved of the Gulf of Tunis's enclosure as a *juridical not an historic bay*.⁹³

Therefore, the conclusion must be that both Libya and Italy were happy to accept the closure of the Gulf of Tunis as a juridical bay, but that their approval cannot be read as acquiescence in any historic bay claim. Thus, if the use of multiple closing lines where islands lie outside of the normal bay closing line were to be ruled illegal, and the Gulf of Tunis could not be enclosed as a juridical bay, the acquiescence of Italy and Tunisia in the enclosure of the Gulf as an historic bay could not be presumed.

(iii) The Gulf of Gabès as a Juridical Bay

Insofar as the Gulf of Gabès is concerned, there is no question of it being enclosed as a juridical bay because its closing line is in excess of the permitted 24 miles. Thus, although the bay fulfils the semi-circle test with the closing line delimited in 1973, at 45 nautical miles its length denies it juridical bay status;⁹⁴ or more correctly, although the Gulf of Gabès qualifies as a juridical bay by fulfilling the semi-circle test, because the distance between the natural entrance points exceeds 24 miles, Tunisia is permitted only to draw a straight baseline of 24 miles within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.⁹⁵

It is also debateable whether the light buoy of Sammoun is an appropriate natural entrance point from which to draw the bay closing line. Although neither Article 7 of the Territorial Sea Convention, nor Article 10 of the 1982 Convention, specifically debar use of a low-tide elevation as the natural entrance point of a bay, it is unlikely that the drafters of these articles envisaged such a use. Nevertheless, by analogy, Tunisia may argue that the beacon upon this low-tide elevation satisfies the rules for straight baselines of Article 4(3) of the Territorial Sea Convention, of which system Tunisia argues the Gulf of Gabès is a part. Even so:

"... normally, when a State claims a bay as 'historic,' it would be expected that the closing line adopted for the bay coincides with a line joining the natural entrance points of the bay."⁹⁶

(iv) The Gulf of Gabès as an Historic Bay

Tunisia's 1973 legislation provided no justification for its enclosure of the Gulf of Gabès. Indeed, it was not until its Reply in the Continental Shelf Case with Libya that Tunisia validated its claim upon Article 7(6) of the Territorial Sea Convention, to which Tunisia was not a party, although a signatory.⁹⁷ It claimed that the enclosure of the Gulf of Gabès was based upon both the doctrine of historic bays *and the rules governing the drawing of straight baseline systems*, of which Tunisia regarded the Gulf of Gabès as being a part.⁹⁸

The succeeding chapter will show that the straight baselines around the Kerkennah Islands may be legitimate, but there is no legal reason why the Gulf of Gabès should be viewed as a natural continuation of the straight baselines drawn beyond the Kerkennah Islands,⁹⁹ unless the Gulf of Gabès is an historic bay. There are no fringing islands off the Gulf's coast, nor is it deeply indented and cut into: thus the closure of the Gulf may only be measured against the rules for the closure of bays, and the straight baselines should cease at Ras-Es-Moun.

As to the status of the Gulf of Gabès as an historic bay, Gioia is

able to show that although several legal writers have cited the Gulf of Gabès as a possible example of such, their opinion has been based on that of Gidel, who, whilst he did not hesitate in describing the Gulf of Tunis as an historic bay, was more cautious in his assertions concerning the Gulf of Gabès.¹⁰⁰ It is therefore instructive to examine the exchange of views between Tunisia and Libya as to the Gulf's status, which occurred in the context of their continental shelf boundary dispute.

For obvious geographical reasons, Libya concentrated its efforts on demonstrating the invalidity of Tunisia's baselines drawn in the region of the Gulf of Gabès, as their acceptance would potentially have a considerable effect in diverting the continental shelf boundary to its disadvantage. Libya claimed that Tunisia had provided no proof that it had denied the innocent passage of foreign vessels in the area over which it claimed historic rights, and therefore, that the acquiescence of foreign States was only of significance after the internal waters claim of 1973.

Tunisia replied by referring to its acquisition of historic rights of great antiquity, gathered during a period of history when the distinction between the various zones of offshore jurisdiction was unknown; its 1973 legislation merely completed the evolution of these rights into the full sovereignty claim demanded by contemporary circumstances.¹⁰¹

Gioia questions, however, whether a State may enclose as internal waters an area of the sea over which its historic rights were acquired for fishing purposes only. Following the statement of the U.N. Secretariat in its 1962 study of historic waters, she argues that the scope of the sovereignty exercised determines the scope of the historic title, and that Tunisia may not claim as internal waters, an area of the sea over which its historic rights were acquired for fishing purposes only, unless these historic rights can be considered as indicative of a right of full sovereignty.¹⁰²

She finds that no claim to exclusive sovereignty over the Gulf of Gabès was made until 1973. Before then, Tunisia had only claimed sovereign rights for the purpose of exploiting the natural resources of the sea and seabed. In addition, on several occasions, it had been made clear that Tunisia's exclusive fishing rights in the area were acquired *beyond the territorial sea*. For example, in 1911, when two Italian fishing boats were captured off the Kerkennah Islands, France, as the protecting power, stated that these rights existed beyond Tunisia's territorial sea; whilst Law No. 63-49 of December 1963, made it clear that the waters beyond Tunisia's then 6 mile territorial sea were to be regarded as part of a contiguous fishing zone. Moreover, when attempts were made to infer that these exclusive fishing rights were indicative of territorial sovereignty, they prompted protests from third States. For example, in 1912, the Italian postal steamer *Tavignano* was captured off of the Tunisian coast and, based partly on the fact that the Bey of Tunis had claimed historic fishing rights over

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the area of seizure, France claimed it to be territorial waters. This claim was rejected by Italy. Italy also protested the attempt of Tunisia to include the whole of the Gulf of Gabès within her territorial sea as defined by Law No. 62-35 of October 1962. The protest led to the Law's repeal in December 1963, and its replacement with one which clearly distinguished between the Tunisian 6 mile territorial sea and a contiguous fishery zone which extended beyond the territorial sea as far as the 50 metre isobath.¹⁰³

Thus, Gioia concludes that these historic rights are not to be considered as indicative of the full sovereignty necessary for the waters to be regarded as "internal" *before* the claim of 1973 to historic bay status and, therefore, based upon the doctrine of acquisitive prescription, Tunisia's historic bay claim for the Gulf of Gabès must fail. No claim was made for an historic bay before 1973; the exercise of jurisdiction over the waters claimed was not sufficient to be regarded as territorial sovereignty; and the claim was not acquiesced in: thus, the Gulf of Gabès was not in 1973 an historic bay.¹⁰⁴ At best, the internal waters claim for the Gulf of Gabès in 1973 could be regarded as the beginning of a process by which Tunisia could claim the Gulf as "historic." However, the Libyan protests of 1973 and 1979 against its enclosure would deny it historic bay status.¹⁰⁵

Moreover, it would also appear that neither Malta nor Italy have acquiesced in this Tunisian claim: Malta has protested the Tunisian

baselines, whilst Italy, in addition to its rejection of the enclosure of the Gulf of Gabès as territorial waters in 1962, only recognised its waters as part of Tunisia's reserved fishing zone in its 1963 and 1971 fishing agreements with Tunisia. More significantly, the 1976 fishing agreement between the two States only referred to the baselines on Tunisia's northern coast, and not to the reserved fishing zone recognised by Italy as lying beyond 12 miles from the Tunisian coast in the Gulf of Gabès.¹⁰⁶

Even Judge Evensen, who upheld the historic bay status of the Gulf of Gabès, appears unsure as to why he should, as he does not clearly link Tunisia's historic fishing rights with the historic bay claim:

"The very particular economic interest of the local population in these marine areas, especially in connection with their traditional fisheries based on stationary fishing gear or traditional fishing banks, which over the ages have assumed the character of proprietary rights, have been demonstrated. It seems equally clear that the Gulf of Gabès has the characteristics of an historic bay."¹⁰⁷

Finally, it is interesting to note that Moussa claims Tunisia erred in not claiming the Gulf of Gabès as an historic bay in 1963, thereby depriving Tunisia of many miles of territorial sea.¹⁰⁸

(b) The Bays of El Arab, Solum, Abu Hashaifa, Pelusium and El Arish

In its 1926 Reply to Questionnaire No. 2 of the Committee of Experts on the Progressive Codification of International Law, Egypt stated that:

"According to Egyptian public law, the breadth of the territorial waters is three miles, except as regards the Bay of El Arab, the whole of which is, owing to its geographical configuration, regarded as territorial waters."¹⁰⁹

The Bay of El Arab resembles a gentle curvature of the shoreline, enclosed by a straight line approximately 95 miles wide (Figure 4). At its furthest point from the coast, the closing line lies 25.7 miles offshore;¹¹⁰ enclosed as such, the bay clearly does not fulfil the semi-circle test, although such a test did not exist at the time the claim was made.

Nevertheless, despite the fact that there was no established length of closing line in 1926, no government was known to countenance the use of such a long closing line, and thus the Bay of El Arab could not have been enclosed in 1926 unless it was regarded as "historic."

Egypt made no claim to historic title for the Bay of El Arab, validating its enclosure purely on the basis of geographical configuration, but there is no record of any protests at the Bay's

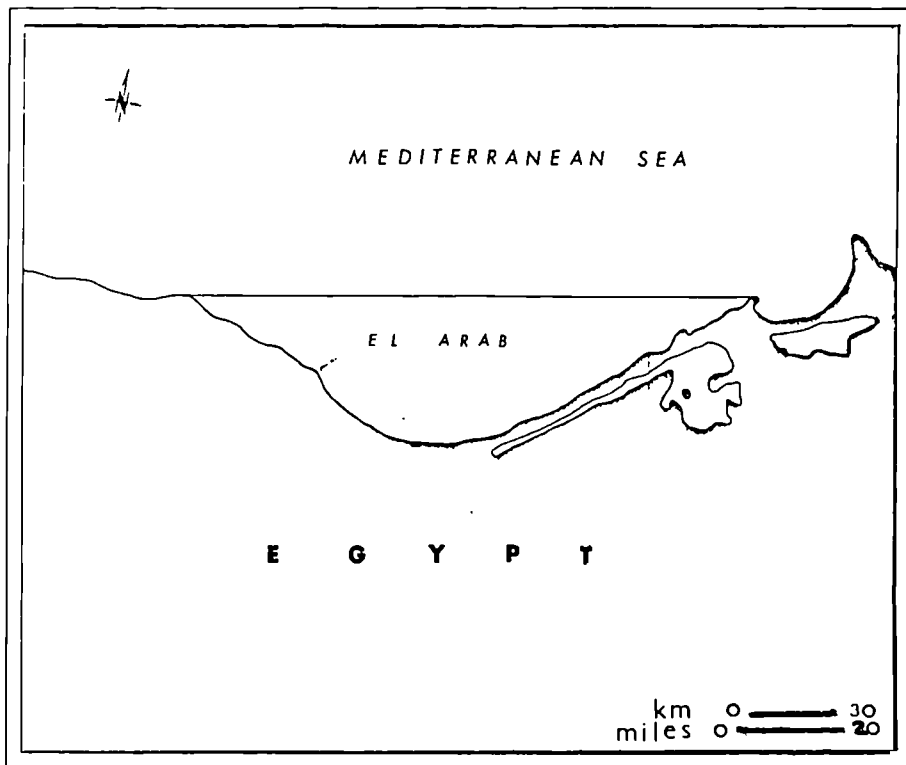


Figure 4 - The Bay of El Arab.

Source: D.W. Nixon "A Comparative Analysis of Historic Bay Claims" in International Court of Justice Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Technical Annexes to the Reply submitted by the Socialist People's Libyan Arab Jamahiriya Vol. II, (15 July 1981), Annex II-3, pp. 1-21.

closure before that of the U.K. on 23 May 1951. This was issued in response to the Royal Decree of 15 January 1951, by which Egypt made inland waters "all the waters of the bays along the coast of the Kingdom of Egypt."¹¹¹

The Decree stated that "where a bay confronts the open sea," the "coastal area of the Kingdom of Egypt" was measured from "lines drawn from headland to headland across the mouth of the bay."¹¹² A series of maps in Volume 11 of the Revue Egyptienne de droit international (1955), makes it clear that the Decree added the Bays of Solum, Abu Hashaifa, Pelusium and El Arish to Egypt's claimed internal waters (Figures 5-8).¹¹³ None of these bays satisfy the semi-circle test¹¹⁴ and, as Table 10 makes clear, each of these four bays has a closing line in excess of 30 miles long. Thus none of these bays meets the legal criteria for bay enclosure unless it is an historic bay.

As with the Bay of El Arab, no historic title is invoked in support of their enclosure, although several sources may point to this as validating the Egyptian claims. For example, Strohl has interpreted a paper published in the Revue Egyptienne de droit international of 1955, as indicating that Egypt felt that proof of historic title or long continuous usage was unnecessary for historic bay claims, and that a State might draw baselines in accordance with its own local conditions.¹¹⁵ A careful reading of this paper does not, however, support this interpretation.

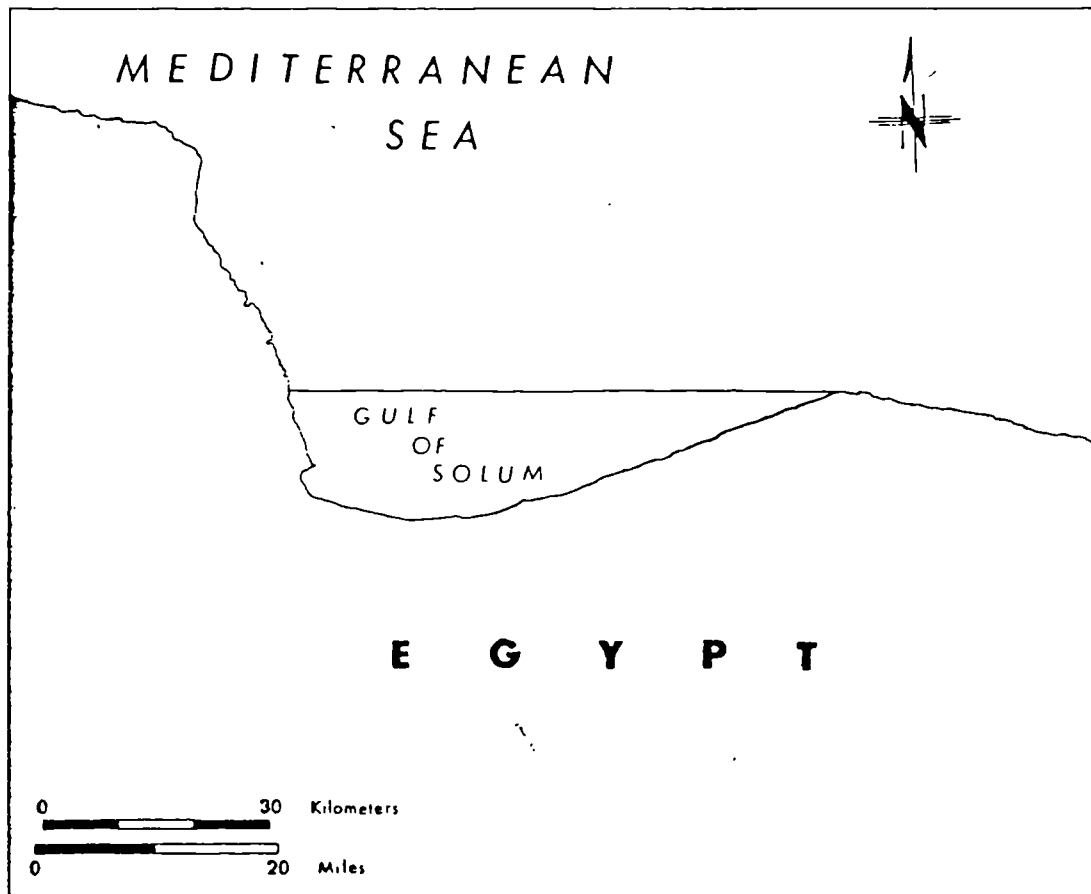


Figure 5 - The Bay of Solum.

Source: D.W. Nixon "A Comparative Analysis of Historic Bay Claims" in International Court of Justice Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Technical Annexes to the Reply submitted by the Socialist People's Libyan Arab Jamahiriya Vol. II, (15 July 1981), Annex II-3, pp. 1-21.

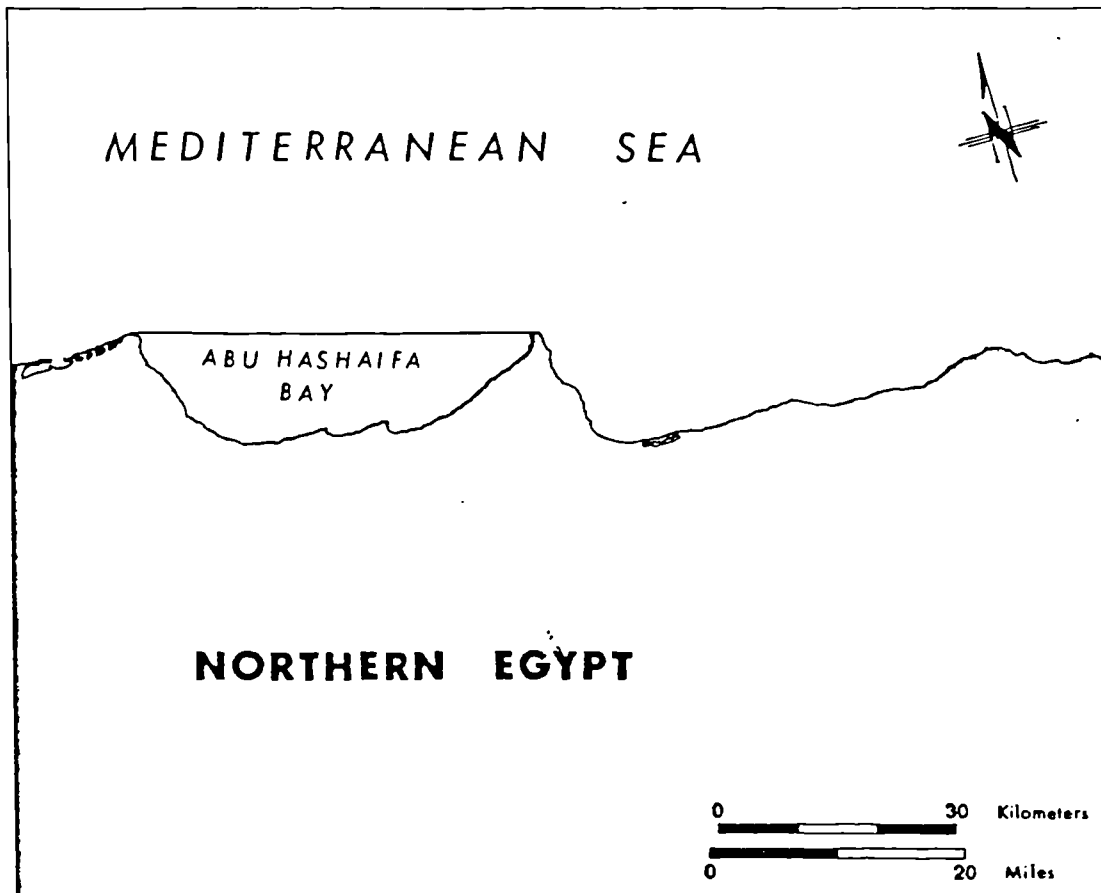


Figure 6 - The Bay of Abu Hashaifa.

Source: D.W. Nixon "A Comparative Analysis of Historic Bay Claims" in International Court of Justice Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Technical Annexes to the Reply submitted by the Socialist People's Libyan Arab Jamahiriya Vol. II, (15 July 1981), Annex II-3, pp. 1-21.

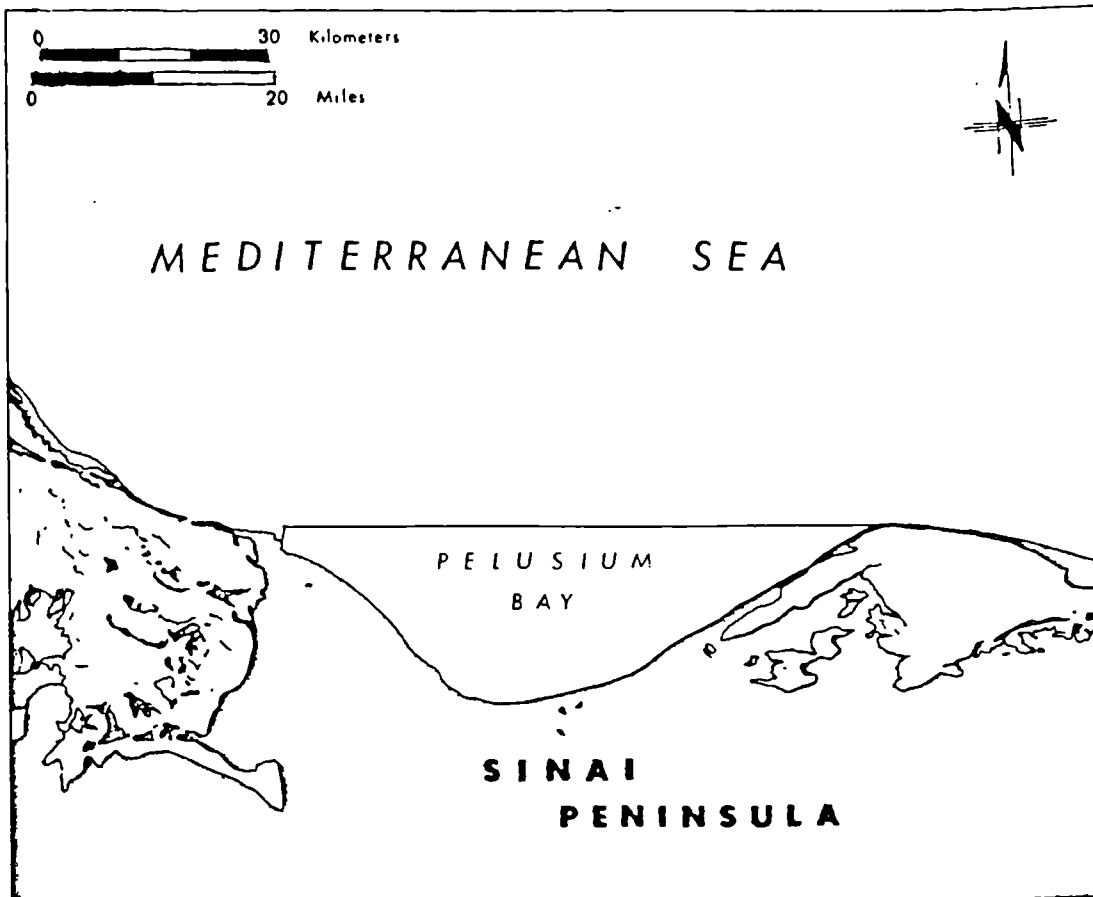


Figure 7 - The Bay of Pelusium.

Source: D.W. Nixon "A Comparative Analysis of Historic Bay Claims" in International Court of Justice Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Technical Annexes to the Reply submitted by the Socialist People's Libyan Arab Jamahiriya Vol. II, (15 July 1981), Annex II-3, pp. 1-21.

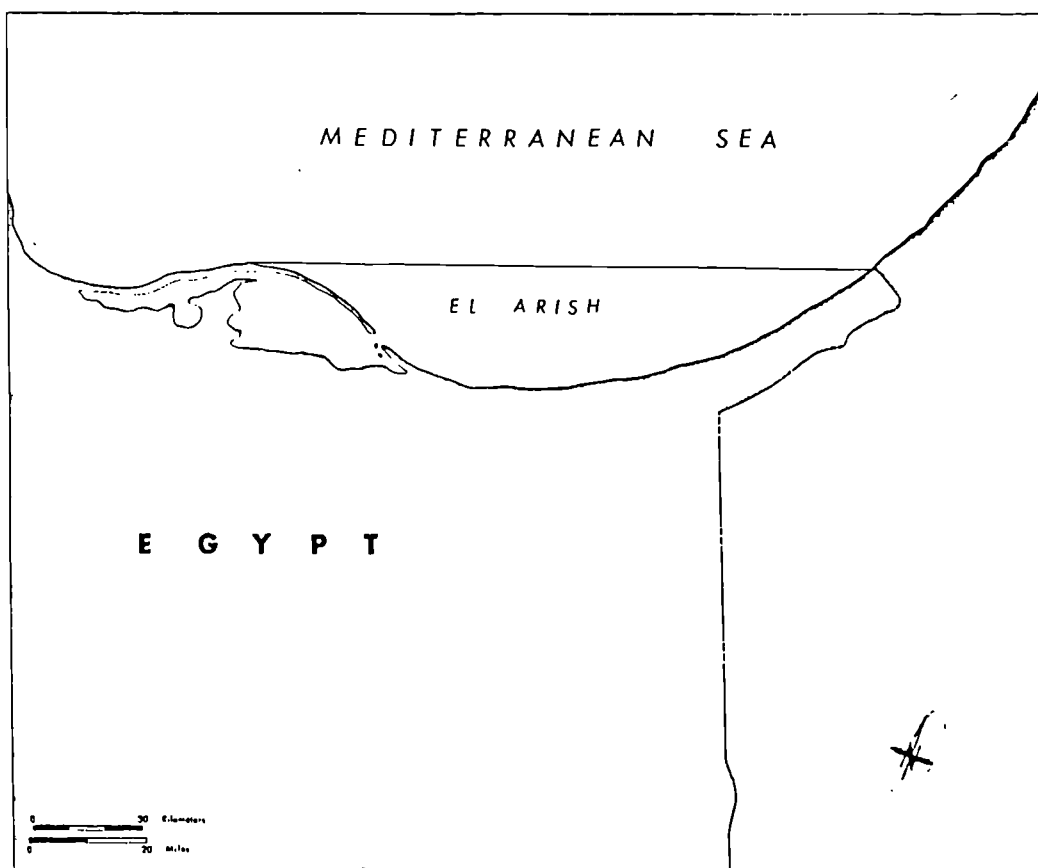


Figure 8 - The Bay of El Arish.

Source: D.W. Nixon "A Comparative Analysis of Historic Bay Claims" in International Court of Justice Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Technical Annexes to the Reply submitted by the Socialist People's Libyan Arab Jamahiriya Vol. II, (15 July 1981), Annex II-3, pp. 1-21.

Table 10 - Egyptian Bays enclosed under the Royal Decree of 15 January

1951

	<u>Distance between headlands</u>	<u>Maximum distance from</u>
	<u>(miles)</u>	<u>closing line to inner</u>
		<u>shore (miles)</u>
Gulf of Solum	45.4	19.9
Abu Hashaifa Bay	31.6	7.9
Bay of Pelusium	49.3	13.3
Bay of El Arish	65.0	11.8
Bay of El Arab	94.7	25.7

Sources: (i) Revue Egyptienne de droit international, 11 (1955), pp. 190-207, at p. 206; (ii) Mitchell P. Strohl The International Law of Bays, p. 260. (The Hague: Martinus Nijhoff, 1963)

The paper states that Egypt accepted that even though they posited a 10 mile maximum closing line, the I.L.C.'s 1954 draft articles on bays were in accordance with Egyptian law,¹¹⁶ because 10 miles did not represent an agreed limit. Indeed, Egypt itself proposed a 12 mile closing line, corresponding to twice its territorial sea breadth, but "subject to greater extent of jurisdiction established by long-continued usage."¹¹⁷

As for the semi-circle test, commenting on the I.L.C.'s draft articles of 1955, Egypt felt it to be a purely artificial piece of geometry, "questionable in principle and difficult in application," so much so, that:

"In the case of Egypt whose coast is marked by a succession of well recognised bays of considerable breadth and relatively small depth, the rule would be ... essentially nonrealistic."¹¹⁸

Thus Egypt rejected what it viewed as the "controlling" effect of the semi-circle test. How then can Egypt's views on length of closing line, historicity, and the semi-circle test be reconciled?

The answer lies in the fact that until the South African amendment which made historic bays an exception to *all* the rules on bays, the historic bay exception referred only to *the length of bay closing lines*, and it was to this earlier draft that the Egyptian comments were addressed. The Egyptian proposal for a 12 mile bay closing line makes

it clear that Egypt was not opposed to the establishment of a limit upon the length of a bay closing line, because there was a "get-out" clause in respect of bays over which there could be established by long-continued usage a greater extent of jurisdiction, (although Egypt drew attention to the difficulty of denying or approbating particular historic bay claims). On the other hand, because the historic bay exception was initially drafted without reference to the semi-circle test, Egypt was strongly opposed to its inclusion in the rules on bays, given that the test would continue to be operative in respect of historic bays, thereby denying Egypt the right to enclose its Mediterranean bays. Hence the reason for the strength of Egyptian opposition to the semi-circle test's "controlling" effect. Thus, Egypt appears to have believed that although it could justify the use of longer closing lines than were being suggested as a conventional limit, this justification would be rendered useless because its bays could not survive the semi-circle test on the basis of their geographical configuration.

This still leaves open the question as to whether Egypt regarded its Mediterranean bays as historic. In the paper referred to above, it was implied that they were: this referred to bays "long traditionally recognized as such [i.e. historic]," but which had not been the object of legislative or other formal declarations, thereby making proof of the assertion of authority difficult "even in cases where common knowledge would seem to suggest the existence of a good 'historical' claim."¹⁹ In the same way, it was noted that there were difficulties

concerning the lack of definition of "long-continued usage," by which it was further implied that the U.K.'s 1951 protest was invalid, as there was no proof that Egypt had not established title "by continuous and immemorial usage."¹²⁰

Therefore, it would appear that Egypt claims its Mediterranean bays as historic. However, no title, with the possible exception of that over the Bay of El Arab, can be regarded as having ripened into a right, given the non-acquiescence of the U.K. (and subsequently, the U.S.A.). In its protest of May 1951, the U.K. stated that it found itself unable to accept the Egyptian Royal Decree "as being in conformity with the rules of international law," because:

"Except in the case of historic bays, a State is only entitled to trace the base line across the waters of an indentation at the nearest point to the entrance at which the width does not exceed 10 miles and then only if the indentation qualifies in law as a bay. In order to qualify in law as a bay the indentation must penetrate inland in such proportion to the width of its mouth as to constitute more than a mere curvature of the coast."¹²¹

It continued by noting that the term "gulf"¹²² was defined in Article 1(b) of the Royal Decree as including "any inlet, lagoon, bay or arm of the sea," and that under Article 6(b) the baseline of the Egyptian territorial sea was to be measured in the case of gulfs from a straight line connecting the headlands of each individual gulf. These

provisions were "unacceptable" to the U.K., because Article 1(b) did not state that:

"... a gulf must have a reasonable penetration inland in proportion to its width and, furthermore, there is also no definition of the size of the gulfs covered by the rule in Article 6(b)."

Thus, "[a]part from certain historic bays (none of which is situated in Egypt), where a greater distance has been established by continuous and immemorial usage," it was unable to accept the enclosure of any bay with a closing line in excess of 10 miles. In other words, the U.K. declared both that no historic bays existed along the coast of Egypt, and that those so claimed were mere curvatures of the coast, and not juridical bays.¹²³

The United States also indicated its non-acquiescence in the Egyptian claims by its protest of 4 June 1951, in which it took exception to:

"All provisions which purport to extend the inland waters of the Kingdom [of Egypt] seaward from the waters of ... such bays and other enclosed arms of the sea as are recognised as inland waters by international law,"

deeming such provisions "to be unsupported by accepted principles of international law", and reserving its rights and those of its nationals with respect thereto.¹²⁴

Although Blake believes that Egypt could provide credible arguments to support historic title to each of its Mediterranean bays with the exception of El Arish, he does not indicate what these arguments may be or why they are not pertinent to the Bay of El Arish.¹²⁵ It is thus difficult to see why Egypt felt it necessary to close these bays, though the most probable reason was security. This motivation appears, however, to have disappeared as by Decree No. 27 of 9 January 1990, straight baselines are drawn *within* the bays as defined in 1951.¹²⁶ It is, therefore, difficult to see how, in the future, Egypt can press historic bay claims when negotiating its maritime boundaries with neighbouring States.

(c) The Gulf of Sirte

The most notorious historic bay claim in the Mediterranean, and perhaps in the world, is that of Libya to the Gulf of Sirte (Figure 9). This claim has been actively challenged by the United States on several occasions, leading twice to military incidents, in 1981 and in 1986; and many States have protested the enclosure as an unlawful abuse of the freedom of the high seas.

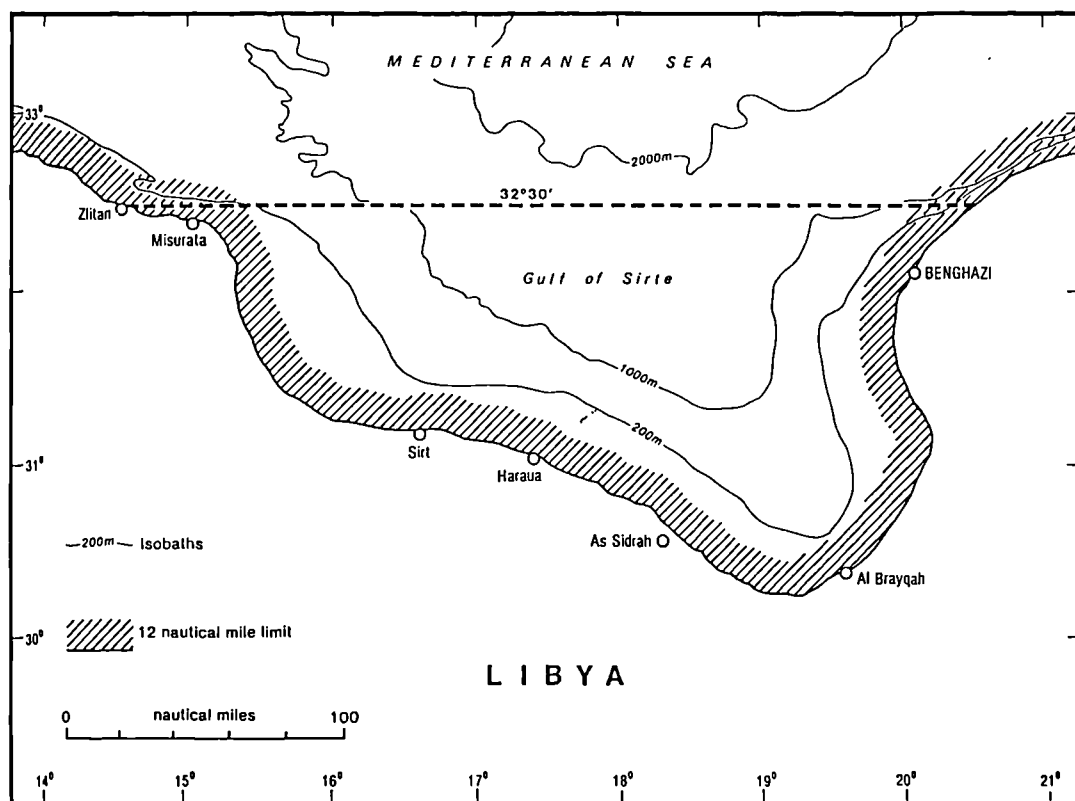


Figure 9 - The Gulf of Sirte.

Source: S.R. Langford Libya: The Gulf of Sirte Closing Line, p.11.
 International Boundaries Research Unit, Boundary Briefing Number 3.
 (Durham: Boundaries Research Press, 1990)

Libya first declared sovereignty over the Gulf of Sirte's waters by a unilateral proclamation of 9 October 1973, the content of which was communicated to the United Nations by a Note Verbale of 19 October 1973.¹²⁷ This read:

"The Gulf of Surt¹²⁸ located within territory of the Libyan Arab Republic and surrounded by land boundaries on its East, South, and West sides, and extending North offshore to latitude 32 degrees and 30 minutes, constitutes an integral part of the Libyan Arab Republic and is under its complete sovereignty.

As the Gulf penetrates Libyan territory and forms a part thereof, it constitutes internal waters, beyond which the territorial waters of the Libyan Arab Republic start.

Through history and without any dispute, the Libyan Arab Republic has exercised its sovereignty over the gulf. Because of the gulf's geographical location commanding a view of the southern part of the country, it is, therefore, crucial to the security of the Libyan Arab Republic. Consequently, complete surveillance over the area is necessary to insure the security and safety of the State.

In view of the aforementioned facts, the Libyan Arab Republic declares that the Gulf of Surt, defined within the borders stated above, is under its complete national sovereignty and jurisdiction in regard to legislative, judicial, administrative and other aspects related to ships and persons that may be present within its limits.

Private and public foreign ships are not allowed to enter the Gulf without prior permission from the authorities of the Libyan Arab Republic and in accordance with the regulations established by it in this regard.

The Libyan Arab Republic reserves the sovereign rights over the Gulf for its nationals. In general, the Libyan Arab Republic exercises complete rights of sovereignty over the Gulf of Surt as it does over any part of the territory of the State."¹²⁹

This declaration contains several justifications for the Libyan claim of territorial sovereignty, which make it unclear under which rules of international law the claim is made.¹³⁰ However, there are only two mutually exclusive possibilities under which the Gulf of Sirte can be enclosed as internal waters:

- (i) if it qualifies as a juridical bay; or
- (ii) if it fulfils the conditions for acceptance as an historic bay.

(i) The Gulf of Sirte as a Juridical Bay

The first two paragraphs of the Libyan declaration appear, in a non-explicit manner, to attempt to establish the Gulf of Sirte's status as a juridical bay. They refer to the Gulf being surrounded on three sides by land, and to its penetration into Libyan territory so as to form a part thereof. Thus descriptively, if not in physical fact, Libya appears in these references to be suggesting that the Gulf of Sirte fulfils the condition of being "a well-marked indentation whose

penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast" (Article 7(2) of the Territorial Sea Convention, Article 10(2) of the 1982 Convention). However, the rules governing bay enclosure acknowledge that it is a bay's character as internal waters *in a geographical sense*, which justifies its legal enclosure. In other words, it is the bay's landlocked character which distinguishes it from a mere curvature of the coast, and which justifies its legal assimilation to land with the consequent denial of rights of innocent passage.¹³¹

Insofar as the Gulf of Sirte is concerned, however, the waters enclosed by the parallel of latitude 32° 30' North do not have the appearance of being landlocked, despite the fact that Youssef holds that they resemble an interior lake or sea of Libyan territory.¹³² Rather, the Gulf appears to be no more than a mere curvature of the coast, with natural entrance points which are not readily discernible. It is partly for this reason, therefore, that Articles 7 and 10 also require that a bay satisfy the requirements of the semi-circle test, as this is regarded as being an additional and objective means of establishing a bay's landlocked character. Applying this test to the Gulf of Sirte it is found that the enclosed sea area is considerably smaller than the area of the semi-circle drawn upon the Gulf's closing line,¹³³ and thus the Gulf cannot qualify as a juridical bay.

However, O'Connell suggests that a failure to fulfil the semi-circle test should not of itself prevent a bay being enclosed if its waters can be regarded as landlocked, despite the fact that Article 7(2) states that "[a]n indentation shall not ... be regarded as a bay" unless it fulfils this test. For this view he relies upon both the opinion of Shalowitz,¹³⁴ and upon the United States Supreme Court's ruling in the 1969 Louisiana Boundary Case. In the latter, the Court made it clear that the semi-circle test was not an independent criterion divorced from the requirements for an indentation to be well-marked and have a penetration in such proportion to the width of its mouth as to contain landlocked waters, but rather a secondary and additional condition which may, or may not be, fulfilled by measuring a bay against these requirements.¹³⁵ Similarly, Westerman argues that a bay may be enclosed on geographical criteria alone, and if unchallenged, may stand, but where there is opposition to a bay's enclosure the semi-circle test provides a more objective means of settling the dispute.¹³⁶

Nevertheless, the fact that the Gulf has a closing line of 296 nautical miles¹³⁷ and a maximum penetration of 96 nautical miles means that it does not even satisfy Strohl's suggestion that where the maximum penetration of the bay equals or exceeds the width of its mouth, it would satisfy the prior intent of the rule that an indentation's penetration must be in such proportion to the width of its mouth so as to contain landlocked waters.¹³⁸ Moreover, even were the Gulf of Sirte to be upheld as fulfilling the conditions of a

juridical bay solely on the basis of its having landlocked waters, it could not survive as such when it came to a consideration of its length of closing line, which, at 296 nautical miles long, is far in excess of the 24 miles permitted under international law (Article 7(4) of the Territorial Sea Convention, Article 10(4) of the 1982 Convention).

On the other hand, Westerman's recent attempt to give content to the landlocked requirement of Article 7(2) places the emphasis not upon geographical factors, but upon the pattern of human activity in relation to waters which penetrate the coastline, where in marginal cases, such as the Gulf of Sirte, the geographical configuration is not determinative of the indentation's landlocked character. In her view, the absence of international trade routes and/or foreign shipping, the primary use of the indentation's waters by the local population, and the coastal location of important security installations, all provide evidence of greater coastal State, rather than international community, interest in the indentation's waters sufficient to conclude that the waters are landlocked.¹³⁹ However, by effectively laying aside geographical facts in favour of "vital interests," Westerman endangers the very community interest she praises Article 7 for protecting, for by following her procedure one begins to feel that the Gulf of Sirte, for example, does have the landlocked character of a bay, irrespective of its geographical configuration. Consequently, Westerman finds herself having to contradict her earlier opinion that a bay need not fulfil the semi-circle test if it contains landlocked waters,¹⁴⁰ in

order to debar bays such as the Gulf of Sirte from juridical bay status.

Moreover, because the Gulf of Sirte fails the semi-circle test, Libya is not even entitled to draw a 24 mile line "within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length." The configuration and size of the Gulf of Sirte would appear to provide numerous alternatives for such an exercise, but both Shalowitz and Westerman have made it clear that an indentation only qualifies as a juridical bay by first satisfying the semi-circle test as applied to the indentation. The length of closing line becomes irrelevant once this test is failed. The construction of a 24 mile closing line within a bay of greater width in such a way as to enable it to fulfil the semi-circle test as applied to the area of bay enclosed by that closing line,¹⁴¹ cannot subsequently qualify the whole indentation as a juridical bay. Support for this view is to be found in the Louisiana Boundary Case (1969), where, in applying Article 7 of the Territorial Sea Convention, the U.S. Supreme Court dismissed Louisiana's argument that although East Bay did not meet the semi-circle test using a closing line between its natural entrance points, it was possible to draw a 24 mile line within the bay which met the semi-circle test.¹⁴²

Hence, in its 1974 protest at the enclosure of the Gulf of Sirte, the United States was justified in stating that:

"Under international law, as codified in the 1958 Convention on the Territorial Sea and Contiguous Zone, the body of waters enclosed ... cannot be regarded as the juridical internal or territorial waters of the Libyan Arab Republic."¹⁴³

Indeed, this holds true even under customary international law, despite the fact that Libya is not a party to the Territorial Sea Convention. These rules cannot apply to Libya unless they are declaratory of customary international law, and, as was seen earlier, it is doubtful whether in 1958, the Convention's rules on bays could be so regarded. However, by the time of the Libyan claim to the Gulf of Sirte in 1973, the rules contained in Article 7 of the Territorial Sea Convention were regarded as declaratory of customary international law as a result of subsequent State practice and judicial decisions, and thereby applicable to Libya.¹⁴⁴

(ii) The "Historic Bay" Claim

Having made clear that the Gulf of Sirte cannot be regarded as a juridical bay because:

(i) it does not contain landlocked waters;

(ii) it fails the semi-circle test; and

(iii) its closing line is in excess of 24 miles;

a closing line can only be drawn if the Gulf is recognised as an historic bay.

In the 1951 Fisheries Case, the I.C.J. stated that:

"... the delimitation of the sea areas has always an international aspect, it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law ... [for] [although ... the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law." ¹⁴⁵

Therefore, in the absence of a valid claim to juridical bay status, the only legitimate means for Libya to draw a closing line enclosing the Gulf of Sirte, was for it to invoke the historic bay concept. This Libya has done, though more by allusion than by explicit reference, for nowhere in the 1973 declaration is mention made of an historic bay claim. Indeed, the Libyan claim has two distinct, though interrelated aspects: first, that Libya has exercised sovereignty over the waters throughout history and without any dispute - which may be termed the true "historic bay" claim; and secondly, that sovereignty over the bay is necessary for the national security of Libya - the "vital interests" or "vital bay" claim. ¹⁴

As noted above, the requirements to be fulfilled in respect of a historic bay claim are first, that the bay must be claimed to be under the sovereignty of the coastal State; secondly, the sovereignty claim must be openly and effectively demonstrated and confirmed by the

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exercise of sovereign authority over the bay for a sufficiently long period of time; and thirdly, and perhaps most crucially, the claim must have the knowledge and acquiescence of other interested States. By claiming an historic bay, a coastal State establishes sovereignty over a part of the sea which would not normally fall under its exclusive jurisdiction and, therefore, each of these elements is necessary for the ripening and eventual establishment of a valid historic bay claim based upon prescription.

In the case of the Gulf of Sirte, Libya's 1973 declaration makes reference in three places to the Gulf being placed under the complete national sovereignty of Libya, the rights of which are reserved solely for its nationals; and as a claim based upon Libya's municipal authority, its publication by the United Nations ensured its widespread knowledge. However, most commentators and governments have taken the view that the Gulf of Sirte is not an historic bay, because Libya has failed to offer any evidence to substantiate the claim that it has exercised sovereignty over the Gulf, "[t]hrough history and without dispute," and because of the non-acquiescence in the claim by other States.

As noted above, there is no generally applicable criterion by which to determine whether or not there has been an effective exercise of sovereignty, save that it be in accordance with the type of claim made. Insofar as the Gulf of Sirte is concerned, it appears that Libya has only discharged its obligation effectively to exercise and confirm

its sovereignty claim *since 1973*, by attempting to exclude the vessels and aircraft of the U.S. Navy from traversing its waters.¹⁴⁷

Prior to 1973, there is no evidence that the Gulf of Sirte's waters were under either Turkish or Italian sovereignty when these two powers were in turn sovereign over Libya and Tripolitania; indeed, Italy's 1974 protest at Libya's enclosure of the Gulf of Sirte would be invalid if it had earlier exercised historic title over the Gulf's waters.¹⁴⁸ Instead, Libyan territorial waters were measured from the low-water line along its entire coast. A Note from the Libyan Ministry of Foreign Affairs of 1955 confirms that this remained the case following independence, for it stipulated that the Libyan territorial waters were measured "*from the coast*;" furthermore, the extension of Libya's territorial waters from 6 to 12 miles in 1959, did not affect this method of delimitation.¹⁴⁹ Thus until the declaration of October 1973, the Libyan territorial sea in the Gulf of Sirte was measured from the coast, rather than as under the 1973 proclamation, from a line which links the outermost parts of the two cities of Benghazi and Misurata, and which follows the parallel of latitude 32° 30' North.

Moreover, as measurement from the coast had been the practice before 1951:

"It is thus hardly surprising that in the literature of the international law of the sea, no trace of evidence seems to exist:

of a 'historic' claim to the Gulf during the pre-independence period."¹⁵⁰

Indeed, neither Bouchez nor Strohl, both of whom made exhaustive studies of historic bays in the early 1960s, mentions the Gulf of Sirte as an historic bay, although admittedly, both were heavily reliant upon the Memorandum on Historic Bays prepared by the United Nations Secretariat for UNCLOS I. Even so, the Secretariat's subsequent study of 1962, noted that although the previous study had been non-exhaustive "it would be difficult to make useful additions" to its catalogue of historic bays.¹⁵¹ It is, therefore, hard to escape the conclusion that contrary to its 1973 assertions of longevity, Libya did not exercise its sovereignty over the Gulf of Sirte as an historic bay before 1973.¹⁵²

This is also the conclusion reached by Spinnato,¹⁵³ although he notes that in March 1973 - seven months before the declaration of sovereignty - a U.S. military aircraft was intercepted by the Libyan air force well beyond the 12 mile territorial sea of Libya, as measured from its coast. Libya claimed the U.S. had violated a restricted area of Libyan airspace lying within a radius of 100 miles from Tripoli. However, in its protest to the U.N. Security Council, Libya did not rely upon a claim of sovereignty over the Gulf of Sirte.¹⁵⁴ Nevertheless, this incident may well have provoked the internal waters' claim to the Gulf, thereby making the 1973 declaration more of a means

to prevent military overflight rather than a claim of undisputed sovereign usage, as required by the doctrine of historic waters.

Blum argues that under Article 2 of the 1958 High Seas Convention, the unilateral appropriation of high seas areas is invalid, and thus there is no longer any need, as there was in the past, for other States to protest contemporary historic bay claims in order to prevent such claims being established.¹⁵⁵ However, this view is based on the implicit argument that the list of historic bays is closed, although even Blum seems unsure about this.¹⁵⁶ Whatever the case, interested States have not left it to chance, as many have protested the enclosure of the Gulf of Sirte's waters, whilst only Burkina Faso¹⁵⁷ and more recently, Syria, accept the claim to ownership of the Gulf. At the United Nations Security Council debate in March 1986, Syria stated that it did not "for a moment doubt that the Gulf of Sidra is historically an Arab Gulf,"¹⁵⁸ although its support for the Libyan claim has more to do with politics than any sympathy for the legality of the Libyan case.

Not surprisingly, the United States has been the most vigorous protestor of the Gulf's enclosure. It has actively challenged the claim on several occasions, twice leading to military engagements.

The basis of the U.S. and many other States' protests is that the Libyan enclosure converts international waters into internal waters, and as such, is an unlawful abuse of the freedom of the high seas. In its Reply of 11 February 1974 to the Libyan Note of 11 October 1973,

the U.S. declared that the Libyan proclamation was "unacceptable and a violation of international law," a view which it explained thus:

"The Libyan action purports to extend the boundary of Libyan waters in the Gulf of Sirte northward to a line approximately 300 miles long ... and to require prior permission for foreign vessels to enter that area. Under international law, as codified in the 1958 Convention on the Territorial Sea and Contiguous Zone, the body of waters enclosed by this line cannot be regarded as the juridical internal or territorial waters of the Libyan Arab Republic. Nor does the Gulf of Sirte meet the international law standards of past, open, notorious and effective exercise of authority, continuous exercise of authority, and acquiescence of foreign nations necessary to be regarded historically as Libyan internal or territorial waters. The United States Government views the Libyan action as an attempt to appropriate a large area of the high seas by unilateral action, thereby encroaching upon the long established principle of freedom of the seas.

...

In accordance with the position stated above the United States Government reserves its rights and the rights of its nationals in the area of the Gulf of Sirte affected by the action of the Government of Libya."¹⁵⁹

In turn, Libya has protested the violation of its sovereign territory and claimed the right of self-defence to rebut the U.S. invaders. For

example, in 1975, Libya protested the overflight of U.S. aircraft over the Gulf's waters, referring to its intention to protect both its land territory and its internal waters. A similar protest was lodged by Libya on 19 February 1977.¹⁶⁰

Ever since 1974, the United States has continued to challenge the Libyan claim, both by its actions and by formal protests. For example, in 1977, in response to a protest by Libya concerning U.S. military flights, the U.S. reasserted its view that Libya had unlawfully attempted to appropriate the Gulf as internal waters,¹⁶¹ and its subsequent actions in 1981 and 1986 have similarly given evidence of the U.S. position. However, two incidents in particular have made the headlines.

The first of these occurred on 19 August 1981, when two Su-22 aircraft of the Libyan air force were shot down after intercepting two American F-14 Tomcats from the aircraft carrier *Nimitz*. At the time, these aircraft were part of the United States' Sixth Fleet carrying out naval exercises within the Gulf of Sirte, according to Prescott, following ten previous exercises carried out in the vicinity of the Gulf in the period 1977-1980.¹⁶² However, significantly, it was the first in which the United States had directly challenged the Libyan internal waters claim by carrying out manoeuvres *within* the Gulf of Sirte closing line. The incident took place 60 miles off the Libyan coast, and within the disputed waters established by the enclosure of the Gulf in October 1973. The United States claimed its aircraft had

been attacked in airspace overlying international waters, whereas Libya maintained that its actions had been carried out over Libyan waters as part of the defence of Libyan national territory.¹⁶³

The second major incident occurred in March 1986 during the fourth major naval exercise carried out by the U.S. Sixth Fleet off the Libyan coast within a period of three months. Three aircraft carriers and 27 warships were assembled off the Libyan coast, when on 24- March, U.S. aircraft flew across the Gulf of Sirte closing line, whereupon they were fired upon by Libyan SA-2 and SA-5 surface-to-air missiles from the anti-aircraft battery at Sirte. The U.S. retaliated by destroying the Libyan missile battery at Sirte, shelling its suburbs, and sinking two Libyan patrol boats. By the end of the following day, four Libyan patrol craft had been sunk, another badly damaged, and a second attack on the Sirte missile battery had occurred.¹⁶⁴

As in 1981, the U.S. justified its actions as maintaining the freedom of navigation in international waters, although, in both cases, the United States' incursions into the claimed internal waters of Libya, occurred within the context of a high level of tension between the two States, and formed part of a concerted policy by the United States Government against the Ghadaffi régime.¹⁶⁵ Indeed, Mr. Caspar Weinberger, U.S. Defence Secretary, claimed in a television interview on 23 March 1986, that the U.S. had crossed the Gulf's closing line seven times in the period since the 1981 incident.¹⁶⁶ Thus, although outwardly the United States was upholding the freedom of navigation.

within what it regarded as international waters, in both instances the decision to navigate within the so-called "line-of-death" was a warning as to Libya's conduct in the carrying out of its foreign policy.¹⁶⁷

Nevertheless, there are two ways to interpret the 1981 and 1986 incidents. The first relies upon the acceptance of the Libyan claim to the Gulf of Sirte as internal waters. If so accepted the Libyan responses to incursions by the United States beyond the Gulf of Sirte's closing line must be regarded as legitimate means of protecting Libyan sovereignty over the claimed waters as, under both the Territorial Sea Convention and the 1982 Convention, there exists no right of innocent passage or of overflight over internal waters. Conversely, if the Gulf of Sirte is denied historic bay status, the actions of the United States may be viewed as a legitimate means of protecting the freedom of navigation upon the high seas,¹⁶⁸ in particular, because, according to one view, a protest by itself is insufficient to protect a valid legal right, or effectively to halt the process of consolidation of an adverse historic bay claim.¹⁶⁹ On the other hand, Haerr argues that "although the presence of United States forces conducting naval maneuvers within the Gulf is lawful in the isolated context of freedom of navigation, the 'freedom of navigation' exercise may be rendered unlawful by the threat of force its presence conveys," as this is contrary to Article 2(4) of the U.N. Charter, which does not permit such use or threat of force except in self-defence at an armed attack or when authorised by the U.N. Security Council.¹⁷⁰ However, because Libya's territorial claim is not internationally recognised, neither

did it have a right to self-defence against U.S. intrusion into the Gulf's waters.¹⁷¹

Nevertheless, even after the March 1986 confrontation, and its subsequent bombing of Tripoli and Benghazi in April, the U.S. continued to conduct "freedom of navigation" exercises outside of the Gulf of Sirte closing line, but within the Tripoli Flight Information Region, including in August 1986, a joint exercise with the Egyptian air force.¹⁷²

However, the United States has not been alone in standing out against the enclosure of the Gulf of Sirte. Britain, France, Italy, Greece, Malta, Turkey, and the U.S.S.R., all issued protests soon after the claim was made.¹⁷³ For example, immediately upon receipt of a Note Verbale from Libya detailing the enclosure, Italy contested its legitimacy, and made known its strong reservations.¹⁷⁴ However, these appear, at least temporarily, to have been retracted upon the Italian enclosure of the Gulf of Taranto on similarly dubious security grounds.

On 28 July 1978, the Italian fishing vessel *Eschilo* was stopped by a Libyan patrol boat while fishing some 30 miles off Cap Misurata on the Libyan coast. Commenting upon this incident, the Italian Under-Secretary for the Merchant Marine stated that as the Gulf of Sirte - like that of Taranto - was regarded as "an internal sea," the Libyan territorial sea was measured from the baseline connecting the cities of

Kliden and Teksa, and thus the fishing boat "was almost certainly located in Libya's territorial waters."¹⁷⁵

This statement would appear to indicate acquiescence in the Libyan claim to the Gulf of Sirte, given that the Libyan territorial sea extends only 12 miles from the coast unless the Gulf of Sirte closing line is accepted as a legitimate baseline from which to measure the territorial sea, and as such would provide an example of Conforti's reciprocity principle. However, Italy has never officially retracted its protest of 1974: indeed, in its Intervention proceedings before the I.C.J. in the Libya-Malta Continental Shelf Case, Italy reverted to its original position, stating its inability to accept Libya's claim over the Gulf of Sirte.¹⁷⁶

Similarly, in a Note Verbale of 8 August 1974, Malta informed Libya that it could not:

"... accept or recognise the contention that the Gulf of Sirte ... is a part of Libyan territory or falls under Libyan sovereignty. The Government of Malta continues to regard as the baselines for the delimitation of Libyan territorial waters and continental shelf the internationally recognised baselines as applicable prior to October 1973."¹⁷⁷

These reservations were repeated in the United Nations Security Council debate of 26-31 March 1986, consequent upon the military confrontation

between the U.S. and Libya. For example, the United Kingdom stated that:

"It is well-known that Libya has eccentric border policies which cause trouble to its neighbours ... In the Mediterranean Sea its neighbours are not just the countries which occupy the littoral on either side of it, but the whole international community. We all have a right to traverse international waters and no country has a right to arrogate these waters exclusively to itself."¹⁷⁸

Likewise, France stated that it considered the Libyan claim to be "without foundation in history" and to be "unjustified under the 1958 and 1982 Conventions;" whilst Malta repeated the view contained in its 1974 protest.¹⁷⁹

Other States also used this debate as an opportunity to object to the enclosure of the Gulf of Sirte. Perhaps most pertinent, however, has been the reluctance of the League of Arab States to uphold the Libyan claim. Although, it condemned the United States' use of force after both the 1981 and 1986 incidents, the legitimacy of the Libyan claim has not been mentioned except insofar as Kuwait suggested that "the difference of opinion" between the U.S. and Libya was "an issue that should be regulated by international law and arbitrated through customary norms."¹⁸⁰ Likewise, the Permanent Observer of the League of Arab States accepted the right of the United States to challenge the claim, though disapproving of the means.¹⁸¹

Similarly, amongst writers on the subject, only one Western commentator on the subject - Rousseau - appears to uphold the Libyan case,¹⁸² and his acceptance is noted with approval by both Youssef and el Majdoub.¹⁸³ However, Blum indicates that Rousseau simply took the Libyan assertions of long-term, effective, and uncontested sovereignty over the Gulf's waters at face value,¹⁸⁴ and thus they carry no weight.

(iii) The "Vital Bay" or "Vital Interests" Claim

In his statement to the U.N. Security Council in March 1986, the Permanent Observer of the League of Arab States noted that there was:

"... some logic to Libya's claim. It may not be universally accepted logic, but it exists."¹⁸⁵

Blum regards this statement as "an obvious attempt to placate Libya,"¹⁸⁶ but another perhaps more valid interpretation of these remarks is that reference was being made to Libya's claim as a measure adopted in order to protect its vital interests, in this case, "the security and safety" of the Libyan State.

McDougal and Burke have noted that "security" is a major motivation for claims to adjacent sea areas, where a coastal State's interests and activities are concentrated.¹⁸⁷ They also note that a precise length of bay closing line may subvert community interests by authorising baselines which bear no relation to a coastal State's

interests, while at the same time, debarring closure where a bay's mouth is too wide, despite the fact that a coastal State's interests may justify the longer baseline:

"The omission is important not only because it may ignore the merit of particular coastal claims to a greater area of internal waters than would otherwise be permitted, but because it also contributes to broader claims than can be justified by the realistic assessment of coastal needs."¹⁸⁸

Therefore, they suggest longer baselines should be permitted where coastal interests justify them, but that in the absence of these (undefined) interests, the length of baseline should be limited.¹⁸⁹ They predicted that otherwise the concept of historic title, coupled with strict limits on the length of a bay closing line, would be likely to lead to claims - such as that of Libya - to larger areas of internal waters "than are justified by present or potential necessities."¹⁹⁰

Little is known of the resources, either living or non-living, within the Gulf of Sirte, although it is not thought that the waters are rich in either fish or hydrocarbons. Consequently, it can be assumed that these did not prompt the Libyan claim. Instead, it appears to have been motivated purely by security considerations. However, claims to bays based on "vital interests", including national security, are not a new phenomenon. Where bays have been enclosed as internal waters on this basis, they are usually, though not always.

termed "vital bays," as distinct from "historic bays." For example, the 1962 U.N. Study acknowledged that claims to bays based on vital interests might justify a claim to historic title independent of usage, but that such bays were an independent category of historic waters which should be studied as such.¹⁹¹ However, this distinction, which is by no means upheld by all authors,¹⁹² is somewhat difficult to reconcile with the fact that the effect of enclosing a bay by invoking "vital interests" is the same as that which occurs where the doctrine of historic bays is utilised: namely, a bay which does not meet the generally accepted criteria for enclosure as internal waters is, nevertheless, so enclosed as an exception to those rules. Thus "vital bays" appear to be a specific subset of "historic bays," or at worst, a less exacting derivative of the latter.

The vital bay concept originated in Dr. Drago's Dissenting Opinion in the North Atlantic Coast Fisheries Arbitration (1910), although geographical facts, long usage *and vital interests* had influenced General Randolph's Opinion as to the territoriality of Delaware Bay (1906), and defence had also been suggested as a motivation for the territoriality of Chesapeake Bay in the case of *The Alleganean* (1898).¹⁹³ In his Dissent, Dr. Drago stated that:

"It may be safely asserted that a certain class of bays, which might be properly called the historical bays such as Chesapeake and Delaware Bay in North America and the great estuary of the River Plate in South America, form a class distinct and apart, and

undoubtedly belong to the littoral country, whatever be their depth of penetration and the width of their mouth, when such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage *and above all, the requirements of self-defence justify such a pretension.*"¹⁹⁴

This view, although a minority opinion, clearly commanded respect, for in 1917, the Central American Court of Justice recognised that the Gulf of Fonseca was jointly the internal waters of El Salvador, Nicaragua and Honduras, basing its opinion on the views of Dr. Drago.¹⁹⁵ Studying the characteristics of the Gulf "from the threefold point of view of history, geography and the *vital interests* of the surrounding States," it decided that the Gulf's legal character had been established by its riparian States' performance of acts and laws concerning national security and "the observance of health and fiscal regulations."¹⁹⁶ The Court also referred to the Gulf's geographical location, its commercial value as one of the best ports on the Pacific, its defensibility, and the intense industrial development along its shores, as making the area of "vital interest" to its littoral States,¹⁹⁷ concluding that:

"[T]he Gulf of Fonseca belongs to the special category of historic bays and is the exclusive property of El Salvador, Honduras and Nicaragua ... on the theory that it combines all the characteristics or conditions that the text writers on

international law, the international law institutes and the precedents have prescribed as essential to territorial waters, to wit, secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations, the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that those States should possess the Gulf as fully as required by those primordial interests and the interest of national defence."¹⁹⁸

Subsequently, at the thirty-first meeting of the International Law Association in 1922, Storni suggested a State could claim the territoriality of a bay where there was a continuous and century-old usage or, in the absence of such, where "the requirements of self-defence or neutrality" or the need to ensure "the various navigation and coastal maritime police services" made occupation of the bay "unavoidably necessary."¹⁹⁹ This view was utilised by the Portuguese delegate at the Hague Codification Conference, who stated that:

"If certain States have essential needs, ... those needs are as worthy of respect as usage itself, or even more so. Needs are imposed by modern social conditions, and if we respect age-long and immemorial usage which is the outcome of needs experienced by States in long past times, why should we not respect the needs

which modern life, with all its improvements and demands, imposes upon States."²⁰⁰

Thus, he included amongst the justifications for proclaiming full sovereignty over a bay "the security and defence of the land territory and ports, and the well-being and even the existence of the State."²⁰¹

The doctrine of vital bays has not yet had wide recognition or acceptance and has been considered an old view by some commentators,²⁰² although it has re-emerged strongly in recent practice,²⁰³ providing a means by which Libya might validate its claim to the Gulf of Sirte. Spinnato argues that the doctrine of vital bays is limited to those bays which, despite the fact that they do not meet the general rules for bay enclosure, are, nevertheless, sharply defined indentations: thus the doctrine cannot apply to the Gulf of Sirte which is "practically indistinguishable from the Mediterranean Sea," and which could be considered to be "a mere curvature of the coast."²⁰⁴ However, the evidence that the doctrine is so geographically limited is not strong enough to make such an assertion; moreover, Spinnato relies selectively upon the fact that Dr. Drago's comments in the North Atlantic Coast Fisheries Arbitration concerned the Bays of Chesapeake and Delaware, which sharply indent their respective coasts, have mouths of 12 and 10 miles wide respectively, and which both form integral parts of major river systems,²⁰⁵ whilst neglecting the fact that Dr. Drago's comments also concerned the large River Plate estuary. Thus, he concludes:

"In view of the doubtful applicability of the vital bay doctrine, coupled with the lack of geographical conditions required to show the needs of self-defence, it is unlikely Libya can legitimately rely on this doctrine. Libya has not presented any facts which indicate any particular security needs different from other coastal States. It would be difficult to prove them.

...

[Indeed], Libya stands in the same position as other coastal states as to its ability to meet its security and surveillance needs with the designation of the Gulf as high seas. Given the rather undefined physical characteristics of the Gulf, Libya has not demonstrated a need for greater protection than that afforded other states."²⁰⁶

However, the fact that Libya has not presented any facts which indicate any particular security needs different from other coastal States does not mean that they do not exist: indeed, as Spinnato admits, it would be difficult to prove them. On the other hand, as the withdrawal of an area of high seas from the international community is an exception to the general rules of international law, it would appear to require that the coastal State bear the burden of proof, irrespective of whether the claim is based upon vital interests or historicity. As McDougal and Burke have stated:

"A coastal state claim to a large area of internal waters in a bay on the ground of special local conditions, would need a clear

demonstration by the coastal state of its alleged needs and of the reasonableness of its authority asserted in relation to the deprivation of the community interests. The case for departure from a uniform, modest area of internal waters should be a very strong one."²⁰⁷

It is difficult, however, to define what geographical conditions are required to show Libya's needs of self-defence, and-although it would have been helpful for Libya to have presented those facts it felt substantiated its claims to enclose the Gulf of Sirte on security grounds, it has at no time been under any obligation to reveal them. Indeed, to do so might well be to the detriment of Libyan security! Thus, it is quite possible that Libya does actually have security concerns which necessitate the designation of internal waters rather than of high seas: where else in the world, for example, are a State's second and third largest cities - Benghazi and Misurata - separated by an arm of the sea in which foreign navies have free rights of passage? Moreover, situated in the centre of Libya, the Gulf of Sirte's extensive waters could enable surprise attacks upon Benghazi and the east coast of Barka, thereby posing a threat to Libya's oil reserves, which are principally concentrated in the sparsely populated hinterland of the Gulf, from where they are exported via the port of Marsi Al Barka.²⁰⁸ Nevertheless, it is only if the doctrine of vital bays - by which Libya's claim can be solely validated - is rejected by a court of law, that the legal status of the Gulf of Sirte's waters as internal

can be categorically denied: until such time as this occurs, doubt as to the legality of the claim *must* remain.

In this context, it is worth noting that, in 1981, the United States cited the Gulf of Sirte area as the best region in which to conduct missile firing exercises in the Mediterranean Sea, because it is generally free of commercial air and sea traffic.⁷⁰⁹ However, the U.S. Government did not *have* to enter Libya's claimed internal waters but could as previously, have confined its manoeuvres to the area outside of the Gulf of Sirte's closing line, given that its 1974 protest had already indicated its non-acquiescence in the Libyan claim. The fact that it did not had far more to do with U.S. foreign policy towards Libya than to keeping with its longstanding policy of maintaining the rights of high seas navigation. Indeed, the fact that the United States was able to legitimise its actions in this way was both fortunate and coincidental, although the by-product may turn out to be that:

"The continuation of unnecessary and provocative naval incursions into the Gulf of Surt could ultimately strengthen Libya's case that sovereignty over the bay is necessary for national security,"⁷¹⁰

although this could not of course retrospectively validate the historic bay claim.

Finally, El Majdoub suggests Libya made its 1973 declaration not only for security reasons, but also to enable it to research and safeguard the natural resources, both living and non-living within the Gulf of Sirte's waters.²¹¹ However, Libya's rights over its natural resources could be protected by continental shelf and E.F.Z. legislation, and do not, and must not, involve claims to internal waters unless a historic title can be substantiated.

(d) The Gulf of Taranto

Until 1977, Italian legislation with respect to bays broadly conformed to conventional international law. By Law No. 359 of 14 August 1974, by which Italy amended Article 2 of the Navigation Code, (approved by Royal Decree No. 327 of 30 March 1942):

"Gulfs, indentations and bays the coasts of which form part of the territory of the State [of Italy] are subject to national sovereignty when the distance between the headlands at the mouth of the gulf indentation or bay does not exceed twenty-four miles. In the event of such distance exceeding twenty-four miles national sovereignty shall extend to that portion of the gulf indentation or bay falling within a base line drawn between these two outward points having a distance between them of twenty-four nautical miles."²¹²

Clearly, this legislation was in conformity with Article 7, paragraphs 1, 4 and 5, of the Territorial Sea Convention, although no mention is made of the semi-circle test contained in paragraph 2.

However, by Presidential Decree No. 816 of 26 April 1977, Italy enclosed all the major gulfs on its mainland coast, despite the fact that the Gulfs of Venice, Manfredonia, Salerno, Squillace and Taranto, each have closing lines which exceed both its municipal, and the conventional, 24 mile limit for juridical bay status.²¹³ The straight lines drawn across these bays, therefore, contradict Article 2 of the Navigation Code, (as amended in 1974), but are justified on the basis that they form part of the Italian straight baseline system. The exception, is the Gulf of Taranto, which is classified as an "historic bay," the Decree referring to an historic title in its assertion of authority.

The closing line of the Gulf of Taranto drawn between Alice Point and Cape Santa Maria di Leuca (Figure 10) measures approximately 60 nautical miles.²¹⁴ At the midpoint of the closing line, the low-water line of the Gulf's coast is approximately 63 nautical miles away. Ronzitti claims that the Gulf is a juridical bay, which strictly it is, because it fulfils the semi-circle test,²¹⁵ but this neglects the fact that it has a closing line in excess of 24 miles. Under Article 7(5) of the Territorial Sea Convention, where the distance between the natural entrance points of a bay exceeds 24 miles, "a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as

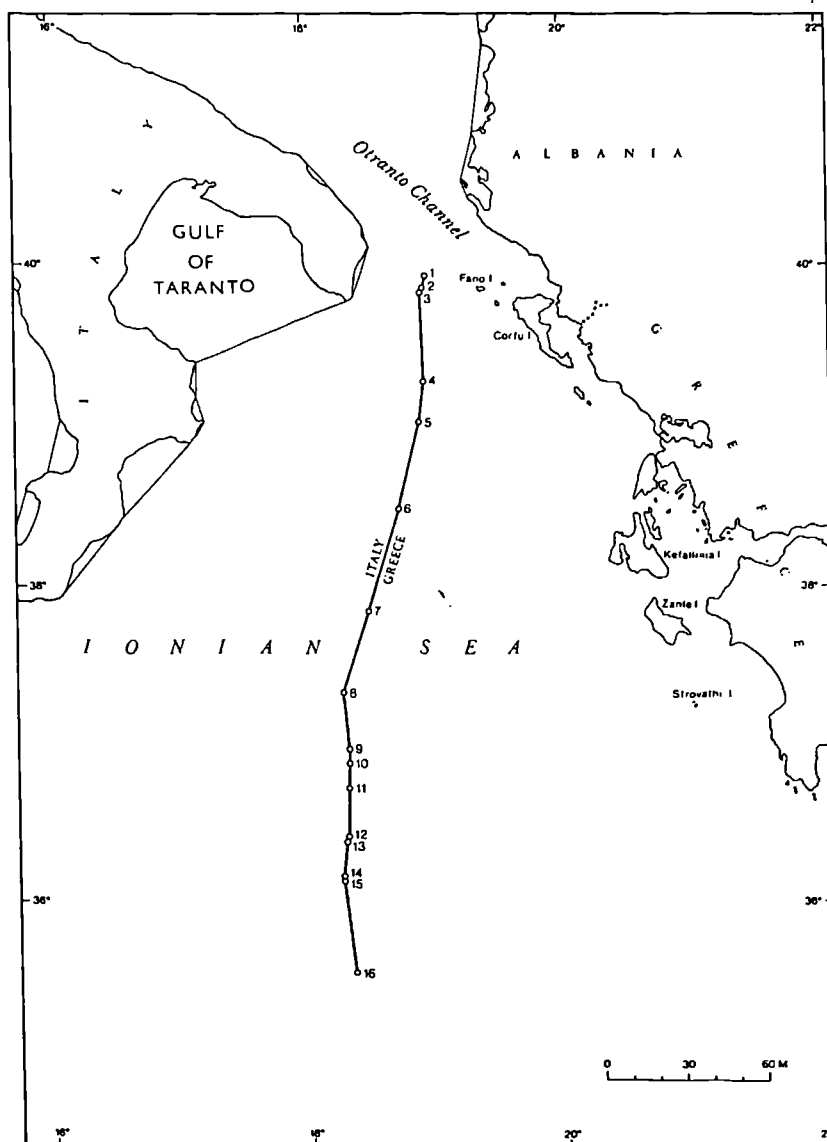


Figure 10 - Map showing the Gulf of Taranto.

Source: G. Francalanci Aspetti e problemi tecnici del nuovo diritto del mare 1958-1982 (3rd Edition). (AGIP Geodesia Cartografia Fotointerpretazione, 1984)

to enclose the maximum area of water that is possible with a line of that length." A similar provision was included in Article 2 of the amended Navigation Code (1974). Moreover, if the Gulf of Taranto was a juridical bay, there would no need for Italy to justify further its enclosure by proclaiming it an "historic bay," nor for Ronzitti to test the Italian claim to historic title. But in the absence of a 24 mile closing line, the only justification for the enclosure of the entire Gulf is on historic grounds.

However, Ronzitti's examination of all the relevant Italian legislation, from the 1861 Proclamation of the Kingdom of Italy to the 1977 Presidential Decree, fails to reveal the historic title over the Gulf of Taranto claimed by Italy. Legal writers, with the exception of De Cussy in 1856, have similarly failed to identify the Gulf of Taranto as an historic bay,²¹⁶ and neither of the United Nations' studies cite it as such.²¹⁷

That no historic title exists is made clear by the report of the Commission which drafted the 1977 Presidential Decree: at best, this implies that Italy has always had authority over the Gulf by virtue of its deep indentation into Italian territory:

"... [Article 7(6) of the Territorial Sea Convention] does not make it clear what is meant by historic bay; neither does an examination of legal literature or the present practice of States give sufficient elements for a definite conclusion.

It is true that the historic bay is defined in the literature of international law as one over which the coastal State can claim to have exercised rights over a considerable length of time; the classic examples usually cited are the Chaleur, Chesapeake and Delaware Bays, among others. However the examples are not exhaustive and it is evident that when the coasts of a bay belong to only one State, that State will normally have control over it. The examples of enclosed bays with an entrance more than 24 nautical miles in width [which] must therefore be considered as 'historic' are legion"²¹⁸

However, the idea that where a bay belongs to only one State it will normally fall under that State's control and, therefore, can be considered "historic," irrespective of the fact that its mouth exceeded 24 miles, would mean that all non-juridical bays bordered by only one State are historic, thereby rendering Article 7 of the Territorial Sea Convention redundant!

The report continues by citing examples of State practice since 1945, where bays have been enclosed with lines in excess of 24 miles:

"... Some examples are Peter the Great Bay, enclosed by the Soviet Union in 1957, the Gulf of Gabes enclosed by Tunisia, all the enormously wide-entranced bays on the River Plate enclosed by Argentina and Uruguay in 1966, all the Egyptian bays and gulfs enclosed by Egypt in 1951, all the bays of Gabon enclosed in 1966

and 1968, the bays of Guinea enclosed in 1964, and the Bay of Ungwana closed by Kenya in 1960, the Panama Gulf closed by Panama in 1956, etc."²¹⁹

Noticeably, no distinction is made between those bays enclosed on the basis of vital interests and those such as the Gulf of Gabès, enclosed on the basis of legitimate historic title. Also noticeable by its absence is any reference to the Gulf of Sirte whose enclosure Italy protested.

The main reason for the Gulf of Taranto's enclosure appears, like the Gulf of Sirte, to be security, although this was not specified in the 1977 Decree:

"It is beyond all doubt that enclosure of the Gulf of Taranto has the object of ensuring Italian defence, particularly as one of Italy's largest naval bases, vital for Italian defence, the strategy of the NATO southern flank, and Italy's military commitments under the treaty which binds Italy to guarantee Malta's neutrality, lies within this bay."²²⁰

Indeed, Ronzitti concludes that the fact that foreign warships and submarines could legally enter the Gulf, and, if they wished, conduct military exercises beyond the Italian 12 mile territorial sea, while still remaining proximal to the coast, not only allowed for the emplacement of military devices on the Gulf's seabed, but also enabled

accurate assessment of coastal defences and threatened interference with Italian peacetime military exercises. These threats to Italian national security and defence, therefore, made it impossible for the Gulf's enclosure to be delayed.²²¹ If correct, it is clear that the Gulf of Taranto was enclosed on the basis of the vital bay/interests doctrine.

However, despite the fact that there is no historical evidence of a sovereignty claim to the Gulf of Taranto having been made or exercised before 1977, unlike Libya's claim for the Gulf of Sirte, only the United States has protested its enclosure (in 1984, 1986 and 1987).²²² This lack of protest can be explained by the fact that most NATO countries have no interest in challenging a claim which is to their benefit, whilst the U.S.S.R., whose submarines are alleged to have penetrated beyond the Gulf's closing line on two occasions in 1982, has preferred to deny its culpability, rather than to protest the claim.²²³ For this reason, the Soviet incursions into the Gulf of Taranto do not bear comparison with the U.S. actions in the Gulf of Sirte: their covert nature means that they cannot be regarded as maintaining the freedom of navigation on the high seas, nor as indicating Soviet non-acquiescence in the Italian claim. Nor as Francioni suggests, can the lack of protest by the U.S.S.R. be explained by its own enclosure of Peter the Great Bay on similar criteria in 1957,²²⁴ for such an acquiescence in the Italian claim would be inconsistent with its protest at Libya's enclosure of the Gulf of Sirte.

This inconsistency is not, however, confined to the U.S.S.R.: the fact that Italy's allies have refused to condemn the enclosure of the Gulf of Taranto, and that the U.S. Sixth Fleet has not found it necessary to uphold the freedom of navigation in the Gulf's waters, seriously undermines any efforts to deny the validity of historic bay claims based on vital interests. Whilst it may be argued that, under international law, no State is bound to protest a claim to exclusive jurisdiction based upon dubious criteria if its own individual interests are undamaged by that specific claim, there is a more general obligation placed upon States to protect the rights of the international community as a whole, by protesting claims which ultimately through imitative State practice may become detrimentally established as custom.²²⁵ Thus, somewhat curiously, whilst a State has to claim a historic bay on the basis of historic title and not vital interests, it is vital interests which motivate protests and result in non-acquiescence.

In 1981, the U.K. Foreign Secretary, Lord Carrington, replying to a question in the House of Lords, stated that Italy's internal waters claim for the Gulf of Taranto was "not consistent" with the U.K.'s interpretation of the Territorial Sea Convention,²²⁶ but no official protest was forthcoming. Hence, in March 1982, the Italian Minister of Defence was able to declare that:

"... the Italian decision to consider as internal waters the waters of the Gulf of Taranto has neither been challenged or [sic.] questioned by any State."²²⁷

Moreover, this lack of protest indicates acquiescence in the Italian claim, sufficient perhaps to suggest that the claim has received international recognition: a claim to sovereignty has been made, the attempt to intercept submarine intruders denotes its effective exercise, and the claim has been acquiesced in by other States (the U.S. excepted). The only problem would appear to be whether there has been sufficient time between the date of the claim and the date of its assumed international recognition. For this reason, Ronzitti is more cautious in his assertions, regarding the 1977 Decree as "*the starting point* of the process giving birth to an historic title," which requires continued uninterrupted exercise of sovereign rights over the Gulf with the acquiescence of third States.²²⁸

However, it is noteworthy that as with the straight baselines claimed by the same Decree, many Italian authors (including Conforti, Fusillo, Adam, Migliorino, and Francioni) have repudiated their Government's enclosure of the Gulf of Taranto on suspect "historic" grounds. However, it must be admitted that others (including Giuliano, Fontana, Bastianelli and Francalanci) uphold the Italian claim.²²⁹ For example, Fontana takes the view that it is "incontrovertible" that a historic bay exists in international law if three conditions are met:

(i) there has been an immemorial possession accompanied by sovereign

acts, pacific and uninterrupted and with the tacit consent of other States;

(ii) where a bay has a special geographical configuration which safeguards the vital interests of the State from an economic, agricultural, commercial and industrial point of view; and

(iii) where there is an absolute and indispensable need with respect to vital interests and national defence to possess a bay in totality.²⁷⁰

However, although Fontana attempts to show that the Gulf of Taranto meets his three conditions, only the first condition has been widely approved in international law. The other two, based upon the validation of a State's vital interests, would seem to leave the door open for all non-juridical bays to be claimed as historic, and to make redundant any rules concerning bay enclosure.

Conforti suggests that the Gulf of Taranto could be closed on the basis of reciprocity in respect of other States, such as Libya, which have enclosed large bays without having a valid historic title.²⁷¹ However, if the Gulf of Taranto is accepted as an historic bay, it will strengthen the case for recognition of the Libyan claim to the Gulf of Sirte, and provide even further motivation for States to claim historic title over large bays based upon vital interests. If one eschews the vital bay doctrine, the fact that no historic title can be found for the enclosure of the Gulf of Taranto means that legally the only option for Italy is to enclose the maximum area of waters possible within a 24 mile closing line. The shape and size of the Gulf of Taranto allow for several 24 mile closing lines to be drawn, and the most obvious

these, namely that enclosing the port of Taranto, is not that which encloses the maximum area of waters possible.²³²

3.4 Historic versus Vital Bays: The Need for Adjudication

Blum states that:

"Claims to historic waters (and to historic bays in particular) are relics of an older and by now largely obsolete legal regime. While the international community may still be willing to consider, in exceptional circumstances, the validity of already *existing* claims of this kind, it has firmly rejected any attempts to establish any *new* maritime claims of an extravagant character. This approach is dictated by the realisation that any such claims - if successful - clearly encroach on what otherwise would be considered the common domain of the international community, i.e. they would deprive the international community of certain portions of the high seas. It is on this basis that Article 2 of the Convention of the High Seas categorically states that 'The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty.'"²³³

Thus, since 1945, the international community has, in Blum's opinion, "frozen the existing situation in regard to historic bays, with a view to preventing the emergence of new 'historic' claims,"²³⁴ such as those of Libya to the Gulf of Sirte and Italy to the Gulf of Taranto.

Both of these claims are more correctly "vital bay" claims which seek the "historic bay" label to strengthen the case for their legal acceptance. As such, they form part of a re-emergent State practice by which mainly recently independent States, such as those of Africa and Latin America, (although also some parties to the Territorial Sea Convention, such as Italy) have claimed exclusive sovereignty over bays which do not meet the conventional rules for closure, but whose enclosure is justified on the basis of alleged "vital interests" of a security or an economic nature. These States have used the vital bay doctrine to bypass the supposed "freeze" on "new" "historic" bays, claiming that this unfairly maintains the traditional law of the sea bias towards the older maritime nations, which the 1982 Convention was designed to remove. They argue, for example, that because of their short lives as independent States, they cannot, unlike well-established States, establish historic bay claims, unless they had been asserted by their former colonial masters.²³⁵

But that this is the case seems both logical and fair, particularly because, as Blum notes, the extension of the territorial sea to 12 miles, plus the additional institution of the continental shelf and E.E.Z. régimes, were designed "to meet those needs of the coastal State (economic, security, etc.) that had traditionally justified 'historic' claims - and in so doing, to compensate 'new' States for their lack of 'historicity'."²³⁶ However, it could be argued that:

"... if it is possible to claim certain bays contrary to the general rules of international law by virtue of interests which have manifested themselves a long time ago, then it is unreasonable to dismiss such a claim when only recent interests are at issue,"²³⁷

in particular, because the present-day interests of a State are arguably of greater importance than those upon which past claims were made. Indeed, Strohl notes that the factors which motivate claims to bays which can be legally enclosed are the very same factors that prompt the illegal enclosure of bays.²³⁸ Hence the reason why Venezuela can state (at UNCLOS I) that it "... could never accept the thesis that rights could be acquired through immemorial usage," for "there could be no acquisition of a prescriptive title to the detriment of new countries now in the full process of development."²³⁹

However, Blum observes that the concept of historic bays was intended to provide a transition between the "vague and obsolete notions of the late Middle Ages to the more stringent requirements of the modern international law of the sea,"²⁴⁰ leading ultimately to the concept's *de facto* incorporation into the general international law of the sea. As such, therefore, the elimination of the right to assert exceptional claims which operate to the detriment of the interests of the international community as a whole, can only in the long run benefit the smaller and "newer" States, for to perpetuate the right will "favour the interests of the stronger powers capable of asserting

such claims at the expense of the common property of the international community."²⁴¹ Thus, in Blum's view, the historic bay concept must be applied and interpreted in a restrictive manner, otherwise new claims will be made based on "asserting and militarily maintaining adverse possession."²⁴²

Nevertheless, the enclosures of the Gulfs of Sirte and Taranto provide evidence of a resurgence in claims to historic bays based upon vital interests, which makes a mockery of the view of some authors that the vital bay concept is outdated. Thus, rather than the historic bay concept being applied and interpreted restrictively to the ultimate benefit of the whole international community, Libya and Italy have applied and interpreted the concept expansively so as to incorporate the notion of the vital bay in satisfaction of their individual concerns in the Mediterranean's highly strategic and geographically confined space. In so doing, they suggest that both "old" and "new" States will henceforth make claims to "historic bays" based upon "vital interests," so that in time the "vital bay" may come to replace the more narrowly conceived concept of the "historic bay" as a means of asserting exceptional claims to strategically important areas of marine space. Therefore, instead of the historic bay concept being absorbed into the general international law of the sea as envisaged by Blum, the current trend towards vital bay claims could mean the concept of historic bays being "entirely recast" and superseded by claims based on vital interests.²⁴³

This "recasting" of the concept of historic bays may, however, also involve the recasting of the concept of vital bays, for, as Blum notes:

"... the so-called 'vital interests' of the coastal state, taken in isolation, do not appear to have been recognized in the past as a sufficient ground for the acquisition of an historic title, and were relied upon only *in conjunction* with all the other considerations which, through their combination, warrant the inference of an international acquiescence."²⁴⁴

For example, in 1917, the Central American Court of Justice held it was necessary to examine the characteristics of a bay "from the threefold point of view of history, geography and the vital interests of the surrounding States;"²⁴⁵ whilst in the Fisheries Case (1951), the I.C.J. took into account Norway's economic needs, but stressed that the "reality and importance" of these interests were "clearly evidenced by a long usage."²⁴⁶ Nevertheless, since UNCLOS I, State practice has seen the enclosure of many so-called "historic bays" solely on the basis of vital interests, with scant if any regard for the "historic" or "time" element, leading some authors to conclude that such practice has so transformed customary norms that historic bays no longer rely upon the exercise of exclusive rights by the claimant State over a long period of time.²⁴⁷

This, for example, is the view of Francioni, who believes that the claims of Libya and Italy may be viewed as:

"... a step taken in the process of the assertion of a special regime which may or may not be successfully established depending upon the acquiescence of other States, the extent of analogous claims advanced in international practice, and the persistence of ... [these claims] in the future."²⁴⁸

He points to the fact that the general interest of the international community in the freedom of the sea has been gradually but steadily reduced in its relative importance and scope by a movement towards more and more exclusive use of marine areas by individual States. Whether it was Norway's straight baseline system, or Canada's Arctic Waters Pollution Prevention Act, or Iceland's E.F.Z., initial opposition gave way to acquiescence, followed by a consolidation both in State practice and in conventional law:

"The international law of bays is similarly influenced by this general trend, and the number and frequency of coastal States' claims in this regard show that the old concept of historic bay is undergoing an evolution towards a more flexible notion in which the crucial elements rather than immemorial usage and the long passage of time, are the *bona fide* assertion of State interests over the bay and the recognition of and acquiescence with such interests on the part of other countries."²⁴⁹

Clearly, there are similarities between this view and the original opinion of Dr. Drago, who appeared to suggest that "historic" bays might include waters over which no historic title had been claimed, and for which there need not be any requirement of acquiescence.²⁵⁰ However, McDougal and Burke were adamant that historic bays could not be claimed upon the alleged "vital interests" of the coastal State as an alternative to the passage of time, because the historic bay concept has always been connected to past events rather than to emerging needs and aspirations. They did accept though that "new" States should be permitted to create under certain (undefined) conditions, "larger areas of internal waters than are generally needed by others and should not be forced to rely on an escape valve, not easily open to them, in the form of historic title," in order that vital bays might supplement but not supplant, historic bays.²⁵¹ Nevertheless, it is somewhat surprising to note that amongst all the varied views on historic bays put forward at UNCLOS III, whenever reference was made to "vital interests" - whether for defence or economic purposes - these interests were always considered in combination with the exercise of exclusive rights for "a long" or a "considerable period of time."²⁵²

Ironically, only time will tell whether this alleged new concept of historic bays will be received into the general body of the international law of the sea, or be rejected through the non-acquiescence in such claims by the international community. In the meantime, Francioni suggests that those States which claim historic bays should at least respect the untested claims of others, based upon

the principle of reciprocity.²⁵³ However, there seems no good reason why, for example, Tunisia, if its enclosures of the Gulfs of Tunis and Gabès are upheld as being based upon valid historic title, should recognise the claims of Italy and Libya based upon vital interests. Indeed, if such a principle is to operate at all it should only do so between States with claims based on "vital interests," and should not need to be imposed, given that the recognition of a like claim may only serve to consolidate the concept. If the U.S.S.R. and Italy cannot accept the Libyan claim to the Gulf of Sirte, they have no reason to expect other States to accept their respective claims to Peter the Great Bay or the Gulf of Taranto.

There can be no objective standards by which historic bay claims based on defence interests can be validated because such concerns are inherently subjective;²⁵⁴ indeed, it is difficult to decide whether any interest is "vital," particularly, because the invoking State will claim to be in the best position to judge the importance of its own interests.²⁵⁵ Thus, Bouchez agrees with Bourquin and Gidel that:

"It is inadmissible to interpret the concept of 'historic bays,' ... in such a way, that mere vital interests are a justification for the creation of sovereign rights over bays which under the general rules of international law cannot be so enclosed."²⁵⁶

Similarly, Zimmerman has stated that the doctrine of historic bays is diluted by a recognition of historic title on the basis of national defence or economic necessity, for:

"Claims based upon vital interests alone subject the practice of delimitation to fabrication and abuse."²⁵⁷

Clearly, the "vital bay" concept appears to pose the threat of an increase in coastal State control over adjacent maritime areas, and it is not difficult to foresee "vital interests" being used to validate "historic" claims for wider areas of internal waters with serious consequences for the freedoms of the high seas so carefully protected in the régime of the E.E.Z. Indeed, the U.S.S.R. already claims the White Sea, the Black Sea, the Kara Sea, the Sea of Okhotsk, the Baltic Sea, and the Sea of Japan as "closed seas," in which only the littoral States may exercise the freedom of navigation.²⁵⁸

The current trend in favour of bay enclosure on the basis of vital interests alone, coupled with the fact that the 1982 Convention has again failed to define what is meant by the term historic bay, means that "almost any bay could be declared, with some justification, as a historic bay."²⁵⁹ If the new trend in State practice is to be halted, this problem, common to both customary and conventional international law, needs resolution through submission of a disputed historic bay claim to third-party arbitration,²⁶⁰ for as Yates has noted:

"So long as this loophole in the law exists, it will be quite difficult to make effective those principles upon which there is apparent agreement."²⁶¹

It is, therefore, to arbitral solutions that we now turn.

(a) Historic Waters in International and Domestic Litigation

Historic waters were considered in both the Fisheries Case and the Tunisia-Libya Continental Shelf Case, but neither drew its significance from their consideration. The historic rights of Norway were not crucial to the validity of its straight baseline system,²⁶² whilst in the latter case, the Court found it unnecessary to consider Tunisia's historic rights. Thus, within international law, only the case concerning the Gulf of Fonseca has directly considered the problem of an adverse historic bay claim. However, this litigation may not be capable of direct application to all other historic bay disputes, given that it concerned the historic bay claim of more than one State. Conversely, if it is found to have precedential value, the emphasis placed upon vital interests might be thought to weaken the historic bay doctrine, although significantly, these vital interests were not divorced from history or geography in establishing historic title.

However, within the U.S.'s domestic litigation there have been a number of cases concerning historic bays, beginning with Civil Aeronautics Board v. Island Airlines, Inc. (1964). In determining

whether there was a historic right to the claimed waters in that case, the U.S. District Court for Hawaii took into account the exercise of authority over the waters by the state claiming the right, the continuity of this exercise of authority, and the attitude of foreign States. It found that the necessities for the establishment of a claim in the absence of international approval to be thus:

"the sovereignty claimed must be effectively exercised; the intent of the State must be expressed by deed and not merely by proclamations, e.g. keeping foreign ships or foreign fishermen away from the area, or taking action against them. The acts must have a notoreity which is normal for the acts of the State."²⁶³

Subsequently, the U.S. Supreme Court has heard a number of cases concerning the implementation of the 1953 Submerged Lands Act to the federal states, in which, as a result of adopting, for the purposes of this Act, Article 7 of the Territorial Sea Convention, the Court has been asked to interpret the provision of paragraph 6 concerning historic bays. As a result, the Supreme Court has had an opportunity to develop judicial criteria by which to rule on the validity of an historic bay claim, which on first sight would appear promising for adaptation to the international sphere.

(i) The Submerged Lands Cases 1965-1983

Under the Submerged Lands Act each coastal state is deemed to possess all the subsoil and subsurface resources within three miles of its coastline, defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."²⁶⁴ However, the baselines for the measurement of the territorial sea are those laid down by the federal government, which, as a matter of foreign policy, primarily to safeguard the innocent passage of its vessels in the world's oceans, is conservative in its offshore claims. Hence, the U.S. still only claims a 3 mile territorial sea, measured with but a few exceptions from the low-water line.

A number of states have challenged the baselines laid down by the federal government as omitting areas of historic inland waters, including historic bays, in the realisation that their offshore jurisdiction might be extended by claiming additional areas beyond the low-water line as inland waters. The result has been a number of cases in which the claim of a state to an historic bay is treated as if it was asserted by the federal government and opposed by foreign nations, and in which *both* state *and* federal assertions of sovereignty, and their exercise against foreign nations, are considered relevant.²⁶⁵

The first of the Submerged Lands cases, U.S v. California, was heard by the Supreme Court in 1965. Herein, the Court accepted that an

historic bay was a bay "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations."²⁶⁶ The U.S. had disclaimed that any of the disputed areas were "historic inland waters," but added that it was "reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was *clear beyond a doubt*."²⁶⁷

In the subsequent case, *U.S. v. Louisiana* (1969), the Supreme Court noted that although historic bays were acknowledged to exist by Article 7 of the Territorial Sea Convention, they were undefined, so that the term derived its content from general principles of international law. However, despite the lack of "universal accord" on the term's meaning, the Court noted that there was "substantial agreement, . . . , on the type of showing which a coastal nation must make in order to establish a claim to historic inland waters."²⁶⁸ It repeated its opinion concerning the assertion and maintenance of sovereignty with the acquiescence of foreign nations,²⁶⁹ and:

"...accepted the general view that at least three factors are significant in the determination of historic bay status: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of authority."²⁷⁰

In addition, the Court also adopted and added to the rigorous standard of proof applied in *U.S. v. California*, by stating that whilst it did not find Louisiana's evidence of historic waters "clear beyond a doubt," nor was it so "questionable" that the U.S. disclaimer was conclusive. Specifically, the Court concluded that the state laws and regulations relating to transportation and navigation were insufficient exercises of dominion for a claim to historic inland waters, because the innocent passage of foreign vessels was a territorial sea right, rather than a characteristic of inland waters. Hence the state's exercise of authority was not commensurate in scope with the nature of the title claimed,²⁷¹ thereby echoing the criterion expressed in the 1962 U.N. Study.

This requirement of conclusive proof became crucial in succeeding cases (*U.S. v. Maine*, *U.S. v. Alaska*, *U.S. v. Florida* and *U.S. v. Maine et al*), where it was applied in conjunction with the three previously identified conditions for historic bay status.²⁷² In each case, the federal government issued disclaimers denying that the disputed areas of waters were historic, which were found to be decisive in the absence of the coastal state providing evidence "clear beyond doubt" to support its claim. In addition, in *U.S. v. Alaska*, the Supreme Court overturned the District Court's finding that historic title had been established by the "failure of any foreign nation to protest," and decided that "something more than the mere failure to object must be shown," unless it was demonstrated "that the government of those

countries knew or reasonably should have known of the authority being asserted."²⁷³

(ii) The Alabama/Mississippi Boundary Case 1985

From the above, it is clear that in the period 1965-1983 the Supreme Court validated each historic bay on the basis of three well-accepted criteria, namely:

- (i) the open, notorious and effective exercise of sovereign authority over the area, not merely with respect to local citizens, but as against foreign nationals as well;
- (ii) the exercise of this authority over a considerable period of time; and
- (iii) foreign State acquiescence in the exercise of this authority as against their nationals.²⁷⁴

In addition, the Supreme Court developed its own requirement of indisputable evidence that historic title was present, the "extraordinarily high standard of proof" of which left considerable doubt as to whether any state's historic bay claim, "though technically possible under U.S. law, could possibly prevail."²⁷⁵ Thus, when an historic bay claim to the Mississippi Sound became the subject of the case between the U.S. and Louisiana et al (Alabama/Mississippi Boundary Case) (1985), there was no reason to suspect that the Supreme Court would relax its strict requirement of proof. However, this became the first case in which the states, despite the federal government's

disclaimer, were able to convince both the Special Master and the Supreme Court that an area of waters was historic, *but only* because the Court relaxed its previously strict requirements for historic bay recognition, and not because of the quality of the evidence they provided.

The Special Master to whom the case was referred, characterised the disputed Mississippi Sound as both a juridical bay²⁷⁶ *and* an historic bay, both of which the U.S. objected to. However, when the case was subsequently heard by the Supreme Court, it ignored the finding that the Mississippi Sound was a juridical bay,²⁷⁷ and found for the states that the development of the Sound for intra-coastal waterway purposes, the construction of a military fortification, the erection of a lighthouse, and a statement in the 1906 boundary case between Louisiana and Mississippi, was evidence that displayed a long history of the federal government's treatment of the Sound as historic inland waters:

"... this evidence, in effect, put foreign nations on notice that the Sound was deemed inland waters by both the state and federal governments, and that there was effective and continuous exercise of sovereignty over the disputed waters."²⁷⁸

In the light of previous favourable findings, this decision must have astounded the U.S. It had argued that the construction of Fort Massachusetts on Ship Island was not built with the purpose of

excluding foreign navigation, had nothing to do with the exercise of sovereignty over adjacent waters, and had been abandoned fifteen years after construction began, at which point any claims to Mississippi Sound would have ceased to exist. The U.S. also argued that the reference to the Mississippi Sound in the Louisiana-Mississippi Case as "an inclosed arm of the sea" failed to establish its character as inland waters, and since the U.S. had not been a party to the litigation, it could not be bound by this ruling. Moreover, the U.S. reminded the Court that it had twice dismissed the selfsame case as having no bearing on previous submerged lands disputes, and thus the evidence was inadmissible.²⁷⁹

However, to the accompaniment of claims by the U.S. that the Special Master had disregarded the very heavy burden resting on the proponents of an historic bay claim, and that the evidence did "not remotely show that, at any time during American sovereignty, the exclusion of peaceful foreign vessels was attempted, much less accomplished in such a notorious usage,"²⁸⁰ the Court went back on its previous decisions concerning the extent of authority exercised to establish sovereignty, and rejected the U.S. contention that the exclusion of foreign navigation from the disputed waters was necessary to prove historic bay status. Instead, the Court adopted the view of the 1962 U.N. Study that the requirement of effective exercise of sovereignty over the claimed area did not:

"...imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken."²⁸¹

However, adoption of this view directly contradicted the Court's decision in the U.S. v. Florida, where it had required seizure of a ship.

The Court also directly contradicted its decision in U.S. v. Alaska, where, as pointed out by the U.S., the Court had found that more than a mere failure to protest was required to establish foreign State acquiescence. Instead, despite the U.S. contention that no foreign State could reasonably have regarded its activities as asserting sovereignty over the Sound's waters, the Court concluded that the U.S. had "publicly and equivocally" asserted sovereignty over the Sound, and that foreign States had had reasonable notice of the claim, thereby acquiescing in the U.S. sovereignty over its waters.²⁸²

(b) The Supreme Court Cases as a Model for International Jurisdiction?

Clearly, fulfilment of the three criteria identified in the Louisiana Boundary Case as necessary to prove historic bay status has proved to be a workable means of validating such claims, with the added advantage of being in accord with what appears to be customary law on the subject. However, with the exception of the Alabama/Mississippi Boundary Case, it has been the extraordinary burden of proof placed upon states by the Supreme Court, which has made these criteria workable: namely that the states must provide evidence "clear beyond a doubt" of their historic title.

Zimmerman has pointed out that the "clear beyond a doubt" criterion is problematic for the states, because federal and state policies with respect to the exercise of sovereignty over particular waters may be contradictory, and therefore, can only deny the "effective and continual exercise of sovereignty" required for historic bay status.²⁸³ Moreover:

"The facts which are dispositive of the question whether a body of water is an historic bay deal with exercise of jurisdiction over the area by the United States and the acquiescence of foreign nations in such exercise of jurisdiction. The States are thus put in the difficult position of arguing against the United States and therefore without assistance from the United States, the factual assertion that the United States has continuously exercised

authority over the area and that foreign nations have acquiesced in the exercise of that authority."²⁸⁴

Nevertheless, the federal government's opposition to the states' attempts to expand their seaward limits may be viewed as a microcosm of the international situation whereby one or more States attempts to restrict the offshore claims of a coastal State, but with one important difference: the settlement of international historic bay disputes lacks any of the evidentiary complications arising in a domestic dispute. Hence, the criteria developed by the Supreme Court should be capable of transference into the international arena. Whether, however, the stipulation that a State must prove historic title "clearly beyond a doubt" can be applied to the international sphere must depend upon individual States' views as to the sacrosanctity of the freedom of the high seas, for few historic bay claims can be thought likely to pass the rigorous standard of proof upheld in all but one of the Submerged Lands cases.

If one follows McDougal and Burke, then:

"A relatively relaxed interpretation of the evidence of historic assertion and of general acquiescence of other states to historic bay claims seems more consonant with the frequently amorphous character of the facts available to support these claims than a rigidly imposed requirement of the certainty of proof."²⁸⁵

On the other hand, if the goal is to restrict historic claims for bays such as the Gulfs of Sirte and Taranto, which being based upon vital interests lack the historic elements essential for territorial sovereignty to be upheld, then a rigidly imposed requirement of indisputable proof would appear to be the touchstone upon which the adjudication of historic bay disputes ought to be made.

However, the use of the Supreme Court's Submerged Lands cases as a model for international application has been severely weakened by its one aberrant judgement in 1985. The Court's relaxation of the "clear beyond a doubt" criterion in the Alabama/Mississippi Boundary case, and the contradictions of its findings in this case compared with its previous judgements, are only explicable in terms of the weight the Court accorded "vital interests" in reaching its decision, for in considering its judgement, the Court took into account defence needs, economic interests, and the Sound's geographical configuration, leading Justice Blackman to state that:

"The historic importance of Mississippi Sound to *vital interests* of the United States, and the corresponding insignificance of the Sound to the interests of foreign nations [as an international waterway] lend support to the view that Mississippi Sound constitutes inland waters."²⁹⁶

Consequently, the Court, having consistently applied the same criteria in all the cases it heard between 1965 and 1983, and therefore, having

seemingly clarified the issue, in one aberrant judgement weakened the force of its own carefully constructed requirements by allowing for greater emphasis to be placed upon vital interests.

Before its decision in the Alabama/Mississippi Boundary Case, the Supreme Court cases provided an adjudicatory body with a substantial amount of judicial practice, which although not having any binding or precedential value outside of the U.S., nevertheless, could have guided the manner in which an international tribunal considered the historic evidence placed before it. Instead, its admission of "vital interests" undermines all of the Supreme Court's previous and future work in this area, for it would now be difficult to uphold the requirement of indisputable *historic* evidence of sovereign title given the weight accorded vital interests. Moreover, the fact that such vital interests were upheld clearly strengthens the case for validating the Italian and Libyan claims. In particular, Italy and Libya may now argue from precedent that the importance of the respective Gulfs of Taranto and Sirte to their vital interests, and the corresponding insignificance of their waters for international navigation, support their claims to historic title; and of especial significance to Libya, judicial pronouncements in the domestic litigation of the U.S. "which rely upon vital interests in the practice of delimitation interfere with American diplomacy, requiring the executive branch to accept assertions of sovereignty based upon economic and defence considerations."²⁸⁷

Thus, in the apparent absence of an adjudicatory means of settling historic bay disputes, it would seem that the international community is left with but one option: to eschew the doctrine of historic bays as obsolete in modern international law. However, this is far from simple to achieve, given that it would appear inequitable retrospectively to rescind all past historic bay claims, or to impose a critical date after which no more historic bay claims could be admitted. Neither of these actions would cause problematic claims to disappear: indeed, such moves might encourage further internal water claims based on intangible historic evidence. Moreover, as ancient historic bay claims must have been based on vital interests it is difficult to outlaw their modern day equivalents, even though, as some authors have pointed out, the institution of new legal régimes to govern offshore rights - in particular, the E.E.Z. - would have appeared to have reduced the need for such claims.²⁸⁸ However, as with straight baselines, the much abused historic bay doctrine represents one of the few means still available by which a State may exert its authority over its offshore domain.

3.5 Mediterranean Historic Bays: the Doctrine of Ancient Title as an Alternative Means of Validation

The previous discussion has focussed upon the use of acquisitive prescription as the legal doctrine by which a State may subsume an area of waters within its sovereign territory, which Johnson has asserted is the only means by which to validate historic bay claims.²⁸⁹ However,

an alternative means of validating the enclosure of Mediterranean historic bays using the doctrine of "ancient title" is provided by Goldie, O'Connell, and Ruderman. Indeed, Goldie has questioned the application of acquisitive prescription to all "historic" bay claims.

The major difference between the two doctrines is that historic title is based on "adverse possession" - the concept of acquisitive prescription - whereas ancient title is based on "original possession," strengthened by long usage.²⁹⁰ Massachusetts, relied upon the doctrine of ancient title in its claims to Vineyard and Nantucket Sounds in the Massachusetts Boundary Case (U.S. v. Maine, 1986), noting that the modern law governing the high seas is based on the Grotian idea that the high seas are not open to acquisition by occupation either collectively or by individual States, but are open to all.²⁹¹ In other words, States are prohibited from obtaining title through mere occupation because the high seas are *community* not *ownerless* territory.²⁹² However, this has not always been the case. The period between the end of the sixteenth century and the beginning of the nineteenth century was characterised by the doctrine of *mare clausum* rather than *mare liberum*. Thus, prior to the doctrine of the freedom of the high seas, sea areas were regarded as *territoria nullis*, i.e. ownerless, rather than community territory. Consequently, from this concept of "sovereignless territory" originated the doctrine of ancient title, for although areas of the sea contiguous to a coastal State were regarded as *territoria nullis*, they were nevertheless susceptible to

claims of sovereignty by the coastal nation, such claims being established by occupation.²⁹³

Admittedly, there was a degree of overlap between the eras of *mare clausum* and *mare liberum*, but, in the Massachusetts Boundary Case, the Special Master stated that:

"Claims which arise after the emergence of the doctrine of the high seas are subject to scrutiny under the doctrine of historic title; claims which precede the doctrine are subject to scrutiny under the doctrine of ancient title."²⁹⁴

Thus, although claims originating before the advent of the freedom of the high seas doctrine may be validated by the doctrine of historic title, such claims are more likely to be legitimated by the less stringent requirements of the doctrine of ancient title,²⁹⁵ where, as the Special Master noted in the Massachusetts Boundary Case:

"Effective occupation, from a time prior to the victory of the doctrine of freedom of the seas, suffices to establish a valid claim to a body of water under ancient title."²⁹⁶

Consequently, under the doctrine of ancient title:

"The element of acquiescence is not essential, but evidentiary at best. The requirement of a peaceful and continuous exercise of

sovereignty is significantly less burdensome than requirements under a claim of historic title."²⁹⁷

Even so, the legitimacy of ancient title derives in part from the acceptance of historic title, for:

"To maintain that a claim by a state may divest the title of the community of states (historic title), but cannot predate the community's claim (ancient title), seems untenable."²⁹⁸

There have been three cases, in which the doctrine of ancient title has been applied: the Fisheries Case (1951), Annakumaru Pillai v. Muthupayal (1903), and the Massachusetts Boundary Case (1986).

Goldie draws attention to the fact that the 1962 U.N. Study contrasted the doctrine of "ancient title" with that of "historic title," noting that in the Fisheries Case (1951) the I.C.J. rejected the concept of acquisitive prescription by viewing Norway's claims to historic rights as applying to areas which had formerly been a part of the Norwegian Sea claimed by Dano-Norwegian kings in the time of *mare clausum*. Thus, Norway's claims to historic rights had nothing to do with prescription, but were simply "the consolidation of shrunken rights which had been maintained over centuries," and which had been finally enunciated in the Royal Decrees of 1935.²⁹⁹ The I.C.J. accepted that Norwegian fishermen had fished the waters lying between its mainland and *skjaergaard* "from time immemorial," and that fishermen

from other States had been excluded from these waters from a period predating the doctrine of the freedom of the high seas, thereby establishing an ancient title over these waters.³⁰⁰

Likewise, in *Annakumar v. Pillai v. Muthupayal*, Ruderman shows that "claims predating freedom of the high seas (here dating back to the sixth century B.C.) were not invalid merely because the law had subsequently changed."³⁰¹

Finally, although the U.S. Supreme Court resolved the case on grounds other than ancient title, the Report of the Special Master in the Massachusetts Boundary Case relied on this doctrine in evaluating Massachusetts' claims to Vineyard and Nantucket Sounds.³⁰² The Court did not find it necessary to establish a critical date after which the international community asserted a claim based on the freedom of the high seas, but did judge that "effective 'occupation' must have ripened into 'clear original title,' 'fortified by long usage,' no later than the latter half of the 1700's."³⁰³ It also appeared to accept the Special Master's view that effective occupation from a time prior to the doctrine of the freedom of the high seas was necessary to establish a valid historic title, whilst indicating that effective occupation might derive from an "exploitation of the marine resources ... equivalent to a formal assumption of sovereignty."³⁰⁴ In addition, it made it clear that "occupation requires, at a minimum, the existence of acts, attributable to the sovereign, manifesting an assertion of exclusive authority over waters claimed," and that a State must

continue to treat the claimed territory in a manner consistent with its assertion of sovereignty over the area concerned.³⁰⁵ Thus, taken together, these dicta provide guidelines by which to measure future ancient title claims.³⁰⁶

3.6 The Doctrine of Ancient Title: Some Final Remarks

O'Connell takes Goldie's arguments one step further. He regards the concept of acquisitive prescription as only appropriate where historic claims are exceptions to standard rules on bays; therefore, in the absence of established customary rules for bay, there can be no exceptional cases to validate on the basis of historic title. Consequently, history is but one factor, along with geographical, political and economic circumstances, by which to incorporate a bay into the national territory. Indeed, O'Connell notes that the historic bays most often cited, i.e. Delaware, Chesapeake, Conception, and Chaleur (U.S), and Granville (France), became internal waters because they were regarded as internal for reasons of *geography*; history played:

"... a subordinate, ancillary and reinforcing (not exclusive) role, being adverted to in order to increase the conviction that the geographical factors were relevant and decisive. In none of these cases was it emphasised that the bay was an exception to standard rules; nor was claim and acquiescence by other nations insisted upon, or, in most cases, even mentioned."³⁰⁷

Italy on this basis, given, ironically, the lack of any historical assertion to this effect.

In the 1962 U.N. Study, ancient title was mentioned merely to indicate that the scope of historic title does not include the concept of occupation. However, occupation is a crucial element in the doctrine of ancient title, acquisition of territory requiring:

- "1) the state to be the first sovereign to make a claim to that particular area (or the last to have a recognized claim prior to the advent of the freedom of the high seas doctrine); and
- 2) effective occupation by a standard contemporary to the claim."³⁰⁹

This means that any claim based on a recent occupation is unacceptable, because under modern international law the doctrine of the freedom of the high seas "establishes a claim on behalf of the community of states to all areas which were unclaimed prior to the advent of the doctrine."³¹⁰ Hence, a claim based on ancient title would have to be reliant on an occupation predating the freedom of the high seas.³¹¹

Consequently, Goldie suggests that where there are bays and historic waters over which a coastal State's jurisdiction pre-dates the doctrine of the freedom of the seas - under which the concept of acquisitive prescription came into being - such claims must be recognised as valid survivors from earlier periods of international

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Consequently, Goldie suggests that where there are bays and historic waters over which a coastal State's jurisdiction pre-dates the doctrine of the freedom of the seas - under which the concept of acquisitive prescription came into being - such claims must be recognised as valid survivors from earlier periods of international

law, where they were established under a different legal régime. This could include the Gulf of Sirte, the Gulfs of Tunis and Gabès, and the various Egyptian bays, over which rights *may* have been asserted under Islamic law, which was little affected by the Western doctrine of the freedom of the seas. Therefore, if it could be proved that historic rights - or in this case, ancient title - had been exercised over the Gulf of Sirte in the period before Libya was under Italian sovereignty, the non-assertion of Italian sovereignty over the Gulf's waters would not terminate Libya's title to its waters.

However, Goldie concludes that "it is highly probable that historic rights never were effectively consolidated under Islamic law," thereby perhaps explaining why Libya did not assert a claim to the Gulf of Sirte as an historic bay.³¹² Nevertheless, he applied the doctrine of ancient title in his interpretation of paragraph 2 of the recommendations on "'Historic Bays' and 'Historic Rights'" adopted by the African States at their Regional Seminar held in Yaoundé on 20-30 June 1972. This paragraph, with applicability to the historic bay claims of Egypt, Libya and Tunisia, declared that:

"(2) The impossibility of an African State to provide evidence of an uninterrupted claim over a historic bay should not constitute any obstacle to the recognition of the rights of that State over such a bay."³¹³

Goldie regards this paragraph as safeguarding the historic rights either acquired or undeveloped previous to colonial occupation, which the colonial powers preferred not to claim or exercise in order to uphold the freedom of the high seas.³¹⁴ This interpretation, however, seems less likely than one that suggests that the paragraph's real intention was to validate historic bay claims made on the basis of "vital interests," without the need for a significant passage of time for consolidation of the title.³¹⁵

Nevertheless, Ruderman warns that Libya, for example, might seize upon the Supreme Court's discussion of ancient title in the Massachusetts Boundary Case to validate its claim to the Gulf of Sirte, given that a claim based on ancient title does not require the acquiescence of other nations.³¹⁶

3.7 Conclusions

The above discussion has illustrated the difficulties caused by the reluctance of the international community to codify a definition of an historic bay. Mediterranean States have not been slow to seize upon the diversity of opinion which surrounds the subject and to enclose bays which they would be prevented from enclosing under international law, citing a variety of justifications for their actions. Whilst the international community refuses to lay down strict criteria for the admittance of claims to bays based upon historicity, or to challenge the legitimacy of a dubious claim in the international court, continued

restrictions upon the legitimate freedom to navigate in certain areas of the world's oceans will continue and proliferate. The political self-interest which motivates so many States to protest the Libyan enclosure of the Gulf of Sirte, but to turn a blind eye to the Italian enclosure of the Gulf of Taranto, must be laid aside, and a definitive register of historic bays established using one or several of the various bases for enclosure described above. If not, the U.S.S.R.'s claims to whole sea areas upon the doctrine of historic waters will become the next means by which States will extend their offshore territorial jurisdiction, rendering concepts such as the E.E.Z. and E.F.Z. defunct.³¹⁷

Notes:

1. T. Scovazzi "Bays and straight baselines in the Mediterranean Sea" Ocean Development and International Law, 19 (1988), pp. 401-420, at p. 403.
2. T. Gihl "The Baseline of the Territorial Sea" Scandinavian Studies in Law, 11 (1967), pp. 119-174, at pp. 142, 143. "The original purpose of the theory of historic bays was to exclude from application of the general regime of bays, certain bays whose status had already been settled by history:" A.L. Shalowitz Shore and Sea Boundaries Vol. 1, p. 48. (Washington: U.S. Government Printing Office, 1962)
3. L.J. Bouchez The Regime of Bays in International Law, pp. 200-201. See also pp. 202-203. (Leyden: A.W. Sijthoff, 1964) "Such a prescriptive claim may be established over bays of great extent, the legality of the claim is to be measured not by the size of the area affected, but by the definiteness and duration of the assertion and the acquiescence of foreign powers:" P.C. Jessup The Law of Territorial Waters and Maritime Jurisdiction, p. 382. (New York, 1927)
4. Quoted in: J.M. Spinnato "Historic and vital bays: an analysis of Libya's claim to the Gulf of Sidra" Ocean Development and International Law, 13 (1983), pp. 65-95, at p. 72.
5. Quoted in: M.P. Strohl The International Law of Bays, p. 309. (The Hague: Martinus Nijhoff, 1963)
6. Quoted in: ibid., pp. 309, 310.
7. ibid., pp. 311-312.
8. ibid., pp. 314-315.
9. ibid., p. 314. See also p. 313.
10. Quoted in: ibid., p. 314; Bouchez op. cit., p. 203
11. ibid., p. 204.
12. Quoted in: ibid., pp. 203-204.
13. Strohl op. cit., pp. 314-315.
14. Bouchez op. cit., pp. 204, 205.
15. Strohl op. cit., pp. 220-221.
16. Quoted in ibid., p. 319.
17. ibid.; Bouchez op. cit., pp. 205-206.
18. ibid.; Strohl op. cit., pp. 319-320.

19. Quoted in: ibid., p. 320; Bouchez op. cit., pp. 205-206.
20. At UNCLOS I, India held that: "Each bay having its own particular characteristics, a mass of data would have to be sifted and collated before any general principles could be established:" quoted in L.F.E. Goldie "Historic bays in International Law - an impressionistic overview" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 211-273, at p. 270.
21. Bouchez op. cit., p. 207.
22. D.P. O'Connell The International Law of the Sea Vol. 1 (Edited by I.A. Shearer), p. 420. (Oxford: Clarendon Press, 1982)
23. Goldie op. cit., pp. 266-269.
24. Quoted in: ibid., p. 265.
25. G.T. Yates III "International Law and the Delimitation of Bays" North Carolina Law Review, 49 (1971), pp. 943-963, at p. 959.
26. J.M. Zimmerman "The Doctrine of Historic Bays: Applying an Anachronism in the *Alabama and Mississippi Boundary Case*" San Diego Law Review, 23 (1986), pp. 763-790, at p. 789.
27. Goldie op. cit., p. 218.
28. Quoted in: Strohl op. cit., p. 319.
29. Bouchez op. cit., p. 281. See also p. 203.
30. But, as Pharand notes, it also evidenced the degree of disagreement as to the formal expression of these requirements: D. Pharand "Historic waters in International Law with special reference to the Arctic" University of Toronto Law Journal, 21 (1971), pp. 1-14, at p. 6.
31. Cited in: Strohl op. cit., p. 253. McDougal and Burke suggest that a coastal State's expectation of its authority over a bay must not be unequivocally manifested by an explicit claim that the bay is considered within internal waters: M.S. McDougal and W.T. Burke The Public Order of the Oceans: A Contemporary International Law of the Sea, p. 340. (New Haven and London: Yale University Press, 1962)
32. See: O'Connell op. cit., pp. 427-428.
33. Bouchez op. cit., pp. 238, 239.
34. ibid., pp. 247, 248.
35. Quoted in: O'Connell op. cit., p. 433; Pharand op. cit., pp. 5-6.
36. Cited in: ibid., p. 7.
37. Bouchez op. cit., p. 249.

38. Oppenheim and Lauterpacht quoted in: ibid., p. 254. See also pp. 251-253.
39. Quoted in: ibid., p. 253.
40. International Court of Justice "Fisheries Case (United Kingdom v Norway), Judgment of 18th December 1951" Reports of Judgements, Advisory Opinions and Orders, p. 152. (Leyden, 1951) (hereafter I.C.J. Repts. (1951))
41. Malek referred to "longstanding usage," Gidel to "long usage," Starke and Smith to "long periods," Bourquin and Westlake to "immemorial usage," and Cavaré to recognition since time immemorial, whilst it will be remembered that the draft article of the Hague Codification Conference referred to "immemorial usage," and the Japanese proposal at UNCLOS I to "a period of long standing:" quoted in: Bouchez op. cit., pp. 200-203, 206.
42. O'Connell op. cit., p. 432.
43. Sir G. Fitzmaurice "The Law and Procedure of the International Court of Justice, 1951-1954: Points of Substantive Law - II" British Yearbook of International Law, 31 (1955), pp. 20-96, at p. 34. See also: Bouchez op. cit., pp. 255-256.
44. See, for example, the views of De Visscher quoted in: Goldie op. cit., p. 271.
45. "[A]lquiescence on the part of other States is intrinsic only in so far as it is true that the reactions of governments may interfere with the peaceful and continuous exercise of sovereignty:" O'Connell op. cit., p. 422.
46. B.L. Ruderman "The Doctrine of Ancient Title: Unknown Origins and Uncertain Future" San Diego Law Review, 24 (1987), pp. 769-793, at p. 783, n. 102.
47. Fitzmaurice quoted in: Spinnato op. cit., p. 76.
48. Quoted in: Bouchez op. cit., p. 203.
49. I.C.J. Repts. (1951), p. 138.
50. Spinnato op. cit., p. 73; Bouchez op. cit., p. 262.
51. ibid., pp. 265-266. "As the claimant is capable of showing its intention to claim a certain water area by its line of conduct it is not necessary to regard notification as a condition *sine qua non* for the acquisition of sovereign rights over historic bays, however desirable such a practice may be:" ibid., p. 266.
52. ibid., pp. 273, 274, 277-278, especially p. 274.

53. Nevertheless, it should be pointed out that the U.S. also protests Italy's enclosure of the Gulf of Taranto, which sets a similar precedent for future dubious historic bay claims: R.W. Smith (Ed.) "National Claims to Maritime Jurisdiction" Limits in the Seas, No. 36 - 6th Revision (3 January, 1990), p. 79 . (Office of Ocean Law and Policy, Bureau of Oceans and International Environmental and Scientific Affairs, United States Department of State)

54. Goldie op. cit., p. 222.

55. See Bouch z op. cit., pp. 279, 280.

56. This is also the view of O'Connell: op. cit., p. 43.

57. Quoted in: Bouchez op. cit., p. 270.

58. I C.J. Repts. (1951), p. 139 cited in: Pharand op. cit., p. 11.

59. O'Connell op. cit., pp. 39-43.

60. A. Gioia "Tunisia's claims over adjacent seas and the doctrine of 'historic rights'" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 327 376, at p. 330.

61. ibid., p. 332.

62. ibid., p. 343.

63. See: ibid., p. 332.

64. Cited in. Strohl p. cit., p. 263.

5. Gioia p. cit., p. 332.

66. See: G.S. Westerman The Juridical Bay, pp. 119-126. (New York: Oxford University Press; Oxford: Clarendon Press, 1987)

67. R.D Hodgson and L.M. Alexander Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls, pp. 16, 17. Law of the Sea Institute Occasional Paper No. 13. (Kingston, Rhode Island. Law of the Sea Institute, University of Rhode Island, 1972). See also: O'Connell op. cit., p. 403; L.M. Alexander "Baseline Delimitations and Maritime Boundaries" Virginia J urnal of International Law, 23 (1983), pp. 503-536, at p. 512.

68. Gioia op. cit., p. 335. "If the distance between the low-water marks of the natural entrance points of a bay does not exceed tw nty-four miles, a closing line may be drawn between these two low-water marks" Article 7(4) (Territorial Sea Convention) (*italics added*).

69. ibid.

70. ibid., p. 336.

71. Hodgson and Alexander op. cit., p. 17. Westerman has shown this thesis to be erroneous: op. cit., pp. 143-147.
72. See, for example: Strohl op. cit., p. 263; F. Moussa La Tunisie at Le Droit de la Mer, p. 43. (Faculte de Droit et des Sciences Politiques et Economiques de Tunis, Centre d'Etudes de Recherches et de Publication Imprimerie Officielle de la Republique Tunisienne, 1981); G.N. Barrie "Historical bays" Comparative and International Law Journal of South Africa, 6 (1973), pp. 39-62, at p. 53. Gidel said that the Gulf of Tunis was an historic bay. Cited in: Gioia op. cit., p. 336.
73. ibid., p. 342.
74. supra. note 67.
75. Westerman op. cit., pp. 128, 138.
76. ibid., pp. 126, 127 at p. 127. Westerman provides considerable evidence of customary practice where islands are used as the natural entrance points to bays, and emphasises that the drafters of Article 7 intended the focus to be on the nature of the indentation, rather than on the nature of the entrance points: "If an indentation meets the landlocked and well-marked requirements of paragraph two as well as the semi-circle test, then it should be a matter of supreme indifference whether the coasts of the indentation are wholly formed by mainland or partially formed by islands:" ibid., pp. 148-153, at p. 153. See also pp. 154-159.
77. ibid., p. 128. See also: Hodgson and Alexander op. cit., p. 12; Shalowitz op. cit., p. 220; P.B. Beazley Maritime Limits and Baselines: A Guide to their delineation (Second Edition), pp. 18-19. (The Hydrographic Society Special Publication No. 2, August 1978)
78. O'Connell op. cit., p. 403.
79. Westerman op. cit., pp. 128-129, at p. 129. See also pp. 132, 133.
80. ibid., p. 131.
81. ibid., pp. 131, 132.
82. ibid., p. 132.
83. ibid., pp. 132, 133.
84. ibid., p. 128. For the historical treatment of bays in State practice, see: ibid., pp. 148-151.
85. ibid., pp. 133-137.
86. Moussa op. cit., p. 19.
87. Gioia op. cit., pp. 340-341.

88. ibid., p. 341.
89. ibid., p. 340.
90. Rivista di Diritto Internazionale, 59 (1976), p. 859.
91. Quoted in: Gioia op. cit., p. 342.
92. Quoted in: ibid.
93. Gioia suggests these statements could be read as an attempt to strengthen Libya's refusal to recognise the Gulf of Gabès as an historic bay by drawing attention to Tunisia's different treatment of the Gulf of Tunis, without taking any position with regard to the validity of Tunisia's claims for the latter: ibid. pp. 342-343.
94. ibid., p. 344. See also p. 345.
95. See Westerman op. cit., pp. 160-161. She argues, contrary to Shalowitz, that the bay so enclosed does not need to fulfil the semi-circle test with this straight baseline, because it is whether the bay as a whole fulfils the test which is important, not whether part of the bay does. Westerman also makes it clear that once a bay is designated juridical, it is then delimited. Paragraphs 1-3 of Article 7 refer to designation, paragraphs 4 and 5 to delimitation. To test an indentation's juridical character by reference to a semi-circle drawn on the straight baseline within the bay is to delimit before designating and, therefore, the incorrect procedure. Paragraphs 4 and 5 only come into operation once the bay has been accorded juridical status: ibid. pp. 170-175, especially p. 175. See also: Shalowitz op. cit., p. 223. The term "closing line" is used to denote a bay which can be completely enclosed under Article 7, whereas the term "straight baseline" is used in paragraph 5 where only part of the bay can be enclosed as internal waters: Westerman op. cit., pp. 161, 162.
96. Quoted from the Libyan Reply in the Tunisia-Libya Continental Shelf Case in: Gioia op. cit., p. 345.
97. On 30 October 1958.
98. Gioia op. cit., p. 345.
99. This is the view of Judge Evensen: International Court of Justice "Case Concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriya): Judgment of 24 February 1982" Reports of Judgements, Advisory Opinions and Orders, pp. 316-317 (Dissenting Opinion) (The Hague, 1982)
100. Gioia op. cit., pp. 345-346.
101. ibid., p. 346.
102. ibid., pp. 346-347. See also: Goldie op. cit., p. 261.

103. Gioia op. cit., pp. 348-349.

104. "[T]he Tunisian 1963 Law failed to identify the Gulf of Gabès as a historic bay and in fact provided for the Tunisian territorial sea to be measured from the low-water mark along the shoreline of the Gulf:" quoted by Gioia from the Libyan Reply in the Tunisia-Libya Continental Shelf Case: ibid., p. 342.

105. ibid., p. 349. In its Counter-Memorial in the Tunisia-Libya Continental Shelf Case, Tunisia claimed that it had received no protest from Libya regarding its 1973 legislation before 29 January 1979. Quoted in: ibid.

106. ibid., pp. 349-350.

107. supra. note 99.

108. Moussa op. cit., p. 38.

109. Quoted in: Bouchez op. cit., p. 221. See also: Strohl op. cit., pp. 258-259.

110. D.W. Nixon "A Comparative Analysis of Historic Bay Claims" in International Court of Justice Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Technical Annexes to the Reply submitted by the Socialist People's Libyan Arab Jamahiriya Vol. II (15 July 1981) Annex II-3, pp. 1-21, at p. 15. Bouchez claims it is 75 miles long and 18 miles from shore: op. cit., p. 221; Strohl, 94.7 miles long: op. cit., p. 260. For a concurring view, see: G. Francalanci and T. Scovazzi "The Old and New Egyptian Legislation on Straight Baselines," p. 2. Paper presented at the Second International Boundaries Research Unit Conference "International Boundaries: Fresh Perspectives," held at Collingwood College, University of Durham, 18-21 July, 1991. See also: "Report of the International Law Commission on the Regime of the High Seas and of the Territorial Sea With Notes on the Egyptian position" Revue Egyptienne de droit international, 11 (1955), pp. 190-207, at p. 206. (hereafter "Report of the I.L.C., etc.")

111. Article 4(a) quoted in: Bouchez op. cit., p. 221. See also: Strohl op. cit., p. 260; Revue Egyptienne de droit international, 6 (1950), p. 176.

112. Quoted in: A. De Guttry "The delimitation of territorial waters in the Mediterranean Sea" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 377-415, at p. 404.

113. "Report of the I.L.C., etc." op. cit., p. 206. See also: Strohl op. cit., p. 260. "Territorial Sea and the Continental Shelf" Revue Egyptienne de droit international, 7 (1952), p. 127 cited in: Francalanci and Scovazzi op. cit., pp. 3-4.

114. Nixon op. cit., p. 15.

115. Strohl op. cit., pp. 260-261.

116. ibid., p. 260.
117. Strohl op. cit., p. 260; "Report of the I.L.C., etc." op. cit., p. 204.
118. ibid., pp. 202, 203.
119. ibid., p. 205.
120. ibid.
121. Quoted in: Bouchez op. cit., p. 221. See also: Revue Egyptienne de droit international, 7 (1951), pp. 91-94, at p. 92.
122. The term "gulf" appears only in the U.K. protest and not in the Egyptian legislation which uses the term "bay."
123. Bouchez op. cit., p. 221; Revue Egyptienne de droit international, 7 (1951), p. 92; Strohl op. cit., p. 259.
124. ibid.; Revue Egyptienne de droit international, 7 (1951), p. 94.
125. G.H. Blake "The United Nations Convention on the Law of the Sea and the Eastern Mediterranean," (1985), p. 7. (Unpublished paper)
126. Francalanci and Scovazzi op. cit., pp. 7-8. See also: Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 16 (December 1990), p. 3.
127. Interested governments were also notified; for example, the U.S. was notified by a Note of 11 October 1973; F. Francioni "The Gulf of Sirte incident (United States v Libya) and international law" Italian Yearbook of International Law, 5 (1980/81), pp. 85-109, at p. 88.
128. = Sirte.
129. Quoted in: Spinnato op. cit., pp. 67-68; Y.Z. Blum "The Gulf of Sidra Incident" American Journal of International Law, 80 (1986), pp. 668-677, at pp. 668-669.
130. It bears more than a passing resemblance to the claim of the U.S.S.R. to Peter the Great Bay. See: O'Connell op. cit., p. 438.
131. G.S. Westerman "The juridical status of the Gulf of Taranto: a brief reply" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 297-309, at p. 301.
132. S. Youssef L'Affrontation Arabe-Americain du Golfe de Sirt, p. 197. (Nicosia: Fondation Al-Moukif Al-Arabi, 1982)
133. Francioni op. cit., p. 90; Spinnato op. cit., p. 72.
134. O'Connell op. cit., pp. 324-325; Shalowitz op. cit., p. 38.

135. The Court refused to accept Louisiana's argument that an indentation which satisfies the semi-circle test *ipso facto* qualifies as a bay under Article 7(2): ibid., p. 394. However, O'Connell also notes that if the requirement that the bay contain landlocked waters is taken too literally, so as to mean that the waters of a bay may not open directly onto the sea, then few bays in the world would fulfil the conditions of Article 7(2): ibid., p. 393.

136. Westerman op. cit. (1984), p. 302. The semi-circle test is "a mathematical formula intended to serve as a final check on these geographical requirements and to define with more certainty those indentations which are truly inland and not mere curvatures of the coast:" ibid., p. 301.

137. Haerr puts the length of the closing line at 275 miles: R.C. Haerr "The Gulf of Sidra" San Diego Law Review, 24 (1987), pp. 751-767, at p. 751.

138. Strohl op. cit., p. 56.

139. Westerman op. cit. (1987), pp. 90-93.

140. ibid., p. 93. See also pp. 94-98.

141. ibid., p. 170; Shalowitz op. cit., p. 223. See also: supra. note 95.

142. Westerman op. cit. (1987), pp. 216-218, 226.

143. Quoted in: Francioni op. cit., p. 88.

144. Francioni concedes that they might be regarded more as an act of "progressive development" rather than of codification: ibid., p. 93.

145. I.C.J. Repts., (1951), pp. 116, 132.

146. See Spinnato op. cit., p. 70.

147. Spinnato, relying upon the views of Bourquin and Gidel that the exclusion of foreign vessels is an indisputable demonstration of sovereignty, believes that Libya has discharged its obligation to exercise effectively and confirm its sovereignty claim in respect of the Gulf of Sirte: ibid., p. 74.

148. Francioni op. cit., p. 98.

149. Blum op. cit., pp. 668, 672.

150. ibid., p. 672. See also: Spinnato op. cit., p. 76.

151. Quoted in: Blum op. cit., p. 672.

152. ibid.

153. "The failure to assert the claim of sovereignty prior to October 1973, in a situation where such a claim would have been appropriate, severely diminishes any argument of historicity:" Spinnato op. cit., p. 75. At a later point, he adds:

"The fact that the claim was not asserted until 1973 does not necessarily lead to the conclusion that there is insufficient history or usage. However, the fact that no evidence has been brought forward evincing continuous usage prior to that time significantly damages Libya's contention that the bay is historic:" ibid., p. 76.

Thus in Spinnato's view, Libya has failed to meet the burden of proving its historic claim. However, even if it had, there has clearly been no acquiescence in the claim by interested States, the views of which must be related to 1973, it having been shown that there is no evidence that Libya exercised sovereignty over the Gulf before this date.

154. ibid., pp. 66, 75.

155. Blum op. cit., p. 674. Libya is not a party to this Convention, but in its preamble, its provisions were adopted "as generally declaratory of established principles of international law," and thus applicable to Libya: ibid.

156. ibid., pp. 671, 674, 676-677.

157. The Times 26 March 1986.

158. Quoted in: Blum op. cit., p. 674.

159. Quoted in: ibid., p. 669; Francioni op. cit., pp. 88-89.

160. Spinnato op. cit., p. 66.

161. ibid., p. 77.

162. J.R.V. Prescott The Maritime Political Boundaries of the World, p. 298. (London and New York: Methuen, 1985)

163. Francioni op. cit., pp. 85-86.

164. The Times 25, 26 March 1986; The Guardian 25, 26 March 1986. See also: Haerr op. cit., pp. 752-754.

165. See: Francioni op. cit., pp. 86-88.

166. The Times 24 March 1986; The Guardian 24 March 1986.

167. The 1986 attack, in particular, was a reprisal for alleged Libyan involvement in the December 1985 terrorist attacks on Rome and Vienna airports.

168. Blum op. cit., p. 673.

169. Goldie op. cit., p. 223. The protest should be insistently repeated and, according to Barrie, followed up by further action under international law to prevent an historic claim from maturing: Barrie op. cit., p. 61.

170. Haerr op. cit., pp. 762-764, at p. 764.

171. ibid., pp. 764-766. The U.S. was, however, justified in its attack on the Sirte missile battery under the rule of self-defence against armed attack: ibid., p. 766.

172. The Guardian 14 July 1986, 25 August 1986.

173. Prescott op. cit., p. 298.

174. Statement of Mr. Bensi: Italian Yearbook of International Law, 2 (1976), pp. 422-423.

175. Italian Yearbook of International Law, 4 (1978-79), pp. 235-236. "The fact that it was 30 miles from the coast may have caused confusion in so far as no account was taken of the fact that the territorial sea is measured *differently* in this case:" ibid., p. 236 (*italics added*).

176. Cited in: N. Ronzitti "Is the Gulf of Taranto an historic bay?" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 275-296, at p. 285.

177. "Malta's Peace Initiatives at the United Nations" Malta Review No. 5 (1986), pp. 2-5, at p. 4; Official Documents About the Malta/Libya Dispute on the Dividing Line of the Continental Shelf, pp. 40-41. (Malta: Government Press, 8 September 1980)

178. Quoted in: Blum op. cit., p. 675.

179. Quoted in: ibid.

180. Quoted in: ibid., pp. 675-676. See also: Spinnato op. cit., p. 77.

181. Blum op. cit., p. 676.

182. Rousseau "Chronique de faits internationaux" Revue Générale de droit International Publique, 78 (1974), p. 1178.

183. Youssef op. cit., p. 200; M. El Majoub "Les prétentions américaines sur le Golfe de Syrte, 'les golfes historiques,' et la souveraineté des états" in: ibid., pp. 225-238, at p. 236.

184. Blum op. cit., p. 674.

185. Quoted in: ibid., p. 676.

186. ibid.

187. McDougal and Burke op. cit., p. 9. See also pp. 330-331.
188. ibid., pp. 330, 331, 338, at p. 331.
189. ibid., p. 338.
190. ibid., p. 341.
191. Cited in: O'Connell op. cit., p. 435.
192. See, for example, the views of Fauchille quoted in: Barrie op. cit., p. 45.
193. Cited in: Shalowitz op. cit., pp. 48-49.
194. Quoted in: Bouchez op. cit., p. 209 (*italics added*). The majority opinion had also recognised both "the possibility and the necessity of [a bay] being defended by the State in whose territory it is indented," and "the special value which it has for the industry of the inhabitants of its shores." Quoted in: O'Connell op. cit., p. 436.
195. Cited in: A.L.W. Munkman "Adjudication and Adjustment - International Judicial Decision and the Settlement of Territorial and Boundary Disputes" British Yearbook of International Law, 46 (1972-1973), pp. 1-116, at p. 63.
196. Quoted in: O'Connell op. cit., p. 436 (*italics added*).
197. ibid.
198. Quoted in: Munkman op. cit., p. 63.
199. Quoted in: Ronzitti op. cit., p. 286. See also pp. 284-285. He concludes that vital interests such as defence and economic motives can be the basis of a claim to exercise exclusive rights, but only if this exercise has been for a "long" time and is acquiesced in by third States does title come into existence: ibid., p. 288.
200. Quoted in: ibid., p. 286.
201. Quoted in: Bouchez op. cit., p. 297.
202. Spinnato op. cit., p. 78; Yates op. cit., p. 959.
203. See: Francioni op. cit., p. 98.
204. Spinnato op. cit., pp. 78, 80.
205. ibid., p. 78.
206. ibid., pp. 78, 79.
207. McDougal and Burke op. cit., pp. 335-336.

208. Youssef op. cit., p. 96.
209. Spinnato op. cit., p. 66.
210. G.H. Blake "The 1982 United Nations Convention on the Law of the Sea: some implications for Libya" Libyan Studies, 15 (1984), pp. 129-135, at p. 131.
211. El Majdoub op. cit., pp. 232, 233. Youssef claims there is 21-40 trillion cubic feet of gas in the Gulf of Sirte, and that there are also large quantities of oil present: op. cit., p. 204.
212. Quoted in. Italian Yearbook of International Law, 1 (1975), p. 332.
213. Francioni op. cit., p. 96.
214. Strohl puts its width at 75 miles: op. cit., p. 64.
215. N. Ronzitti "New criticism on the Gulf of Taranto closing line: a restatement of a different view" Syracuse Journal of International Law and Commerce, 12 (1985), pp. 465-472, at pp. 465, 469. See also: Ronzitti op. cit. (1984), p. 275. Westerman stresses that the 24 mile rule must also be obeyed. op. cit. (1984), p. 306.
216. Francioni op. cit., p. 99; M.S. Fusillo "Base lines for determining the territorial sea" Italian Yearbook of International Law, 3 (1977), pp. 570 575.
217. Ronzitti op. cit. (1984), pp. 277-281. Fiore identified the Gulf of La Spezia as an historic bay in 1865, but not the Gulf of Taranto: ibid., p. 279. Fontana notes that during the sixteenth and seventeenth centuries the shores of the Gulf of Taranto were defended by Italian populations against Turkish invasion, but this is not sufficient to conclude that Italy has exercised exclusive authority to possess the bay: A. Fontana "Le linee di base del mare territoriale italiano" Revista marittima, 111 (1978), pp. 76-79, at p. 78.
218. Quoted in: Ronzitti op. cit. (1984), p. 276.
219. Quoted in: ibid.
220. ibid., p. 296.
221. ibid., p. 295.
222. supra., note 53.
223. Ronzitti op. cit., p. 282.
224. Francioni op. cit., p. 99.
225. This was exactly the point made in the U.K.'s statement in March 1986, concerning the Gulf of Sirte, when it noted that Libya's

"neighbours" were "the whole international community," as all had a right to navigate in the Gulf of Sirte's waters. Nevertheless, the normal practice is for no State to protest enclosure "until and unless its own vital interests are compromised:" Westerman op. cit (1984), p. 307.

226. Quoted in: Ronzitti op. cit (1984), p. 282.

227. Quoted in: ibid., p. 281.

228. ibid., p. 296 (italics added).

229. ibid., p. 283.

230. Fontana op. cit, pp. 78-79.

231. Cited in: Ronzitti op. cit (1984), p. 281.

232. Strohl op. cit, p. 64.

233. Blum op. cit, p. 671. See also Articles 84(1) and 89 of the 1982 Convention.

234. ibid., p. 676.

235. ibid., p. 677; Francioni op. cit, p. 98. See also: Fusillo op. cit, p. 575.

236. Blum op. cit, p. 677.

237. Bouchez op. cit, p. 298.

238. Strohl op. cit., p. 252.

239. Quoted in: ibid., p. 319.

240. Blum op. cit, p. 676.

241. ibid., p. 677.

242. This runs counter to the U.N. Charter's warning against the unilateral use of force: ibid.

243. Fusillo op. cit, p. 575.

244. Quoted in: Ronzitti op. cit (1984), p. 287.

245. Quoted in: ibid.

246. I.C.J. Repts. (1951), p. 133.

247. T. Kobayashi The Anglo-Norwegian Fisheries Case of 1951 and the Changing Law of the Territorial Sea, pp. 18-19, 32, 57-58. (Coral Gables, Florida: University of Florida Press, Gainesville, 1965). See

also: Spinnato op. cit., p. 74. Ronzitti remains unconvinced: op. cit. (1984), p. 286.

248. Francioni op. cit., p. 100.

249. ibid.

250. McDougal and Burke op. cit., p. 362.

251. ibid., pp. 341, 359, 360.

252. Ronzitti op. cit. (1984), p. 288.

253. Francioni op. cit., pp. 100-101.

254. Bouchez op. cit., p. 293.

255. ibid., pp. 298-299.

256. ibid., p. 300. See also p. 301.

257. Zimmerman op. cit., p. 772.

258. Goldie op. cit., p. 213. See: J.J. Darby "The Soviet Doctrine of the Closed Sea" San Diego Law Review, 23 (1986), pp. 685-699.

259. G. Blake "The Gulf of Sirte and Libya's 'historic waters'" Jamahiriyah Review, No. 16 (September 1981), pp. 12-13, at p. 12.

260. Bouchez states vital interests could only substantiate claims to historic bays if there existed an international authority with compulsory jurisdiction relating to such claims: op. cit., p. 299.

261. Yates op. cit., p. 944.

262. Norway's claim was not to historic waters as such, but rather to a historic *right* to delimit its waters in a certain manner. Since the I.C.J. found that the general rules of international law did not in themselves justify the Norwegian delimitation, it was strictly unnecessary for it to discuss the question of historic rights: Sir G. Fitzmaurice "The law and procedure of the International Court of Justice, 1951-54: General principles and sources of law" British Yearbook of International Law, 30 (1953), pp. 1-70, at p. 27; Fitzmaurice op. cit. (1954), p. 382.

263. Quoted in: Yates op. cit., p. 961.

264. Quoted in: Zimmerman op. cit., p. 776.

265. ibid., p. 777.

266. Quoted in: M.J. Salper "United States v Alaska. Proof of sovereignty exercised by Alaska over Cook Inlet was insufficient to establish the inlet as a historic bay and thus the United States, as

against Alaska, has rights to the oil and gas lands below the lower portion of the inlet" Brooklyn Journal of International Law, 2 (1976), pp. 308-324, at 313.

267. Quoted in: Report of the Special Master United States of America v. State of Maine, et al (Rhode Island, New York), No. 35, Original (October Term 1983), p. 10 (*italics added*) (hereafter Report of the Special Master).

268. Quoted in: Goldie op. cit, p. 244.

269. ibid., p. 238.

270. Report of the Special Master op. cit, p. 8.

271. Zimmerman op. cit, p. 778. The Supreme Court made a similar finding in *U.S. v. Alaska* with respect to Alaska's enforcement of fishing and wildlife regulations in the Lower Cook Inlet and in *U.S. v. Maine et al*, in respect of the pilotage statutes issued by Rhode Island and New York: ibid.; Goldie op. cit, pp. 242, 243; Report of the Special Master op. cit, p. 9, 15-17.

272. See: ibid., pp. 8-11.

273. Quoted in: Goldie op. cit, p. 243. See also: Salper op. cit, p. 319.

274. Quoted in: Goldie op. cit, p. 240.

275. Westerman op. cit (1987), p. 226.

276. For a discussion of this finding, see: ibid., pp. 228-240.

277. The historic claim taking legal precedence.

278. P.T. Barmeyer "Litigation of state maritime boundary disputes," pp. 4-5; M. Reed "Litigating maritime boundary disputes," pp. 8-10. Both papers presented at a symposium "Rights to Oceanic Resources: Deciding and Drawing Maritime Boundaries," Georgia Center for Continuing Education, University of Georgia, Athens, Georgia, 1-2 May, 1987.

279. Zimmerman op. cit, pp. 780, 781.

280. Quoted in: ibid., p. 782.

281. Quoted in: ibid.

282. However, in the *U.S. v. Maine* (Massachusetts Boundary Case (1986), the Court was able to uphold Massachusetts's claim that Vineyard Sound (but not Nantucket Sound) was inland waters prior to American independence, and thus acquired by "ancient title," without distorting its previous decisions: Reed op. cit, pp. 5-8.

283. Zimmerman op. cit., pp. 784, 785.
284. Barmeyer op. cit., p. 6.
285. McDougal and Burke op. cit., p. 372.
286. Quoted in: Zimmerman op. cit., p. 782.
287. ibid., p. 784.
288. Goldie op. cit., p. 229.
289. Cited in: ibid., p. 223.
290. Ruderman op. cit., pp. 777, 778.
291. ibid., p. 779.
292. ibid., p. 783.
293. ibid., p. 785. See also pp. 783, 784.
294. Quoted in: ibid., p. 780.
295. ibid., p. 782.
296. Quoted in: ibid., p. 788.
297. ibid.
298. ibid., p. 789.
299. Goldie op. cit., p. 224.
300. I.C.J. Repts. (1951), pp. 127, 142. See: Ruderman op. cit., p. 787.
301. ibid., pp. 787, 788.
302. ibid., pp. 771, 772.
303. Quoted in: ibid., p. 790.
304. ibid.
305. ibid.
306. In upholding Massachusetts's claim that Vineyard Sound was inland waters prior to American independence, and thus acquired by "ancient title," the evidence, "which may prove conclusive for future litigation," included: (i) 100 year-old maps published by the State and referred to in previous Supreme Court litigation, depicting Vineyard Sound as inland waters; (ii) the inclusion of the Sound within a federal customs zone, similar evidence of which had prompted the

opinion that Delaware Bay was an historic bay in 1793; and (iii) state fisheries enforcement along the entrance to the Sound: Reed op. cit., pp. 5-8.

307. O'Connell op. cit., p. 423. See also pp. 417-418, 421, 422.

308. ibid., p. 424.

309. Quoted in. Ruderman op. cit., p. 786.

310. ibid.

311. In the Massachusetts Boundary Case, Massachusetts asserted its ancient title claim based on a 17th Century English royal charter: ibid.

312. Goldie op. cit., p. 226.

313. Quoted in. ibid., p. 264.

314. ibid.

315. ibid., p. 226.

16. Ruderman argues that the Supreme Court should not allow its states to assert ancient title claims against the federal government, because of the difficulties in conducting foreign relations which the latter would face, should any ancient title claim be upheld: op. cit., pp. 792, 793. However, as the Supreme Court has consistently applied international law rules to its Submerged Lands cases and recognised the legitimacy of the doctrines both of historic title and ancient title, should a state provide proof of evidence of effective occupation from a time prior to the doctrine of the freedom of the seas sufficient to establish a valid claim to a body of water under ancient title, the court will be likely to uphold it as it did with Massachusetts' historic bay claim, irrespective of the complications which such a finding will cause the U.S. in relation to similar claims made by other States.

317. Scovazzi argues that the definition of historic waters is more confused today than ever before, and that because the justifications for their existence are in the main extra-legal:

"A more productive and relevant treatment of historic waters would be to compile a list of the claims actually made and of the protests they have generated rather than dwelling upon the reasons by which such claims are justified:" op. cit., p. 404.

However, unless he envisages the existence of a protest debarring a claim's legality his suggestion is nothing less than an invitation to future abuse. Indeed, without the existence of criteria by which to validate a claim, a protest can be just as self-interested as the claim itself and no basis by which to accept or reject a bay's historicity. His view that "the claims are relevant in themselves and the reasons

attached to them are not to be given much weight" whilst true in terms of understanding a claim's motivation and its effect, does nothing to limit future abuses.

CHAPTER 4 - MEDITERRANEAN STATES AND STRAIGHT BASELINES

"Straight baselines can be identified in virtually all claimed straight baseline systems that probably should not be drawn."¹

"Article 7 was clear in intent.
Years ago we all knew what it meant.
But we've noticed of late
While the straight baselines are straight,
The rules are hopelessly bent!"²

4.1 Straight Baselines in International Law

Article 4 of the Territorial Sea Convention provides that straight baselines may be employed:

- (i) in localities where the coastline is deeply indented and cut into;
- (ii) where there is a fringe of islands along the coast in its immediate vicinity.

However, the employment of these straight baselines is dependent upon the fulfilment of various criteria. Under paragraph 2:

"The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters."

Paragraph 5 provides that the system of straight baselines may not be applied in such a manner as to cut off the territorial sea of another

State from the high seas; and by paragraph 4, where the coast is deeply indented and cut into, or fringed by islands in its immediate vicinity, "account may be taken in determining particular baselines, of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage." In addition, paragraph 3 stipulates that:

"Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them."

At UNCLOS III, there was little discussion of, and no opposition to, the baseline rules of the Territorial Sea Convention.³ Consequently, Article 7 of the 1982 Convention repeats the provisions of Article 4 save for minor amendments to paragraphs 3 and 5. Paragraph 5 now provides that the system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas *or an exclusive economic zone*; paragraph 3, dealing with low-tide elevations, has been amended to read:

"*Straight* baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them *or except in instances where the drawing of baselines to and from such*

elevations has received general international recognition."

(italics added)

In addition, there is a new paragraph which allows straight baselines to be drawn along the furthest seaward extent of the low-water line where, because of the presence of a delta and other natural conditions, the coastline is highly unstable.⁴

Finally, Article 4(6) required that coastal States "clearly indicate straight baselines on charts, to which due publicity must be given." Article 16 of the 1982 Convention goes further by requiring that straight baselines determined in accordance with Article 7 of that Convention be shown "on charts of a scale adequate for ascertaining their position," or alternatively, "a list of geographical co-ordinates of points, specifying the geodetic datum, may be substituted." The coastal State is also required to give such charts or lists "due publicity," and to deposit a copy of each with the U.N. Secretary-General.⁵

4.2 Navigation Rights through Internal Waters created by Straight Baselines

Article 5(2) of the Territorial Sea Convention provides that:

"Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas

which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, ..., shall exist in those waters."

The same provision, which has been repeated as Article 8(2) of the 1982 Convention, originated during the 1956 debates in the Institute of International Law concerning the legal régimes of the territorial sea and internal waters. The British member, Sir Gerald Fitzmaurice, successfully convinced delegates that it would be wrong to allow the establishment of a baseline to convert territorial or high seas waters into internal waters, without providing for the right of innocent passage to be maintained.⁶

He was similarly persuasive at UNCLOS I,⁷ although as a consequence, a uniform legal regime does not exist for all areas of internal waters, i.e. there is no right of innocent passage in the internal waters of a bay.⁸

The Article has been criticised by McDougal and Burke on the grounds that the waters behind straight baselines are treated for all practical purposes as having the legal status of the territorial sea, in which innocent passage is the identifying right:

"If internal waters are intended to allow the coastal state to exercise the comprehensive control necessary to protect access to its territorial base, this provision ... creates doubt as to

whether 'internal waters' fulfil any special function to justify their existence."⁹

Perhaps for this reason, O'Connell concluded that Article 5(2) was only binding on parties to the Convention and could not be regarded as a customary rule of international law, given that:

"Other States cannot be said to have acquired a 'right' to passage over the territorial sea which would avail when waters lose this status."¹⁰

However, the repetition of Article 5(2) as Article 8(2) of the 1982 Convention would appear to suggest that the rule *has* attained customary status.¹¹

4.3 The Origins of the Rules for Straight Baselines: The Fisheries Case (1951)

(a) Background and Pleadings

The provisions contained in Article 4 of the Territorial Sea Convention originated in the Judgement of the I.C.J. in the 1951 Fisheries Case (United Kingdom v. Norway). This concerned the U.K.'s objections to the Norwegian straight baselines north of latitude 66° 28' 48" N proclaimed by Royal Decree of 12 July 1935, and from which Norway delimited a 4 mile exclusive fishing zone. These baselines

linked 48 points "... on the mainland, on islands or rocks," the islands and rocks forming a *skjaergaard* (or rock rampart) along nearly 500 miles of the Norwegian coast. As such they consolidated and extended the long-standing Norwegian practice of employing straight baselines from which to delimit its E.F.Z.¹²

In 1912, a Norwegian Royal Commission recommended that a series of straight baselines be delimited along the entire Norwegian coast; and in 1924, following a fishing incident between Norway and Britain, Norway produced a map showing straight baselines along its Norwegian coast north of 61° latitude, linking the Norwegian mainland with offshore islands and rocks, but following quite closely the general coastal configuration.¹³

The straight baselines drawn in 1935 were, in many places, considerably further offshore than those drawn in 1924 and, in some instances, as far as 12 miles offshore (Figure 11). The longest baseline segment measured 44 miles across LoppHAVet, although the baselines across Vestfjord, SvaerholthAVet, and Varangerfjord were also in excess of 30 miles in length.¹⁴ Enclosed within, or forming part of the straight baseline system were all of the islets and drying rocks off the Norwegian coast.¹⁵

The U.K. Government refused to recognise this delimitation, advising its trawler captains to respect only the 1924 limits. As a result, a number of British trawlermen were arrested and forfeited

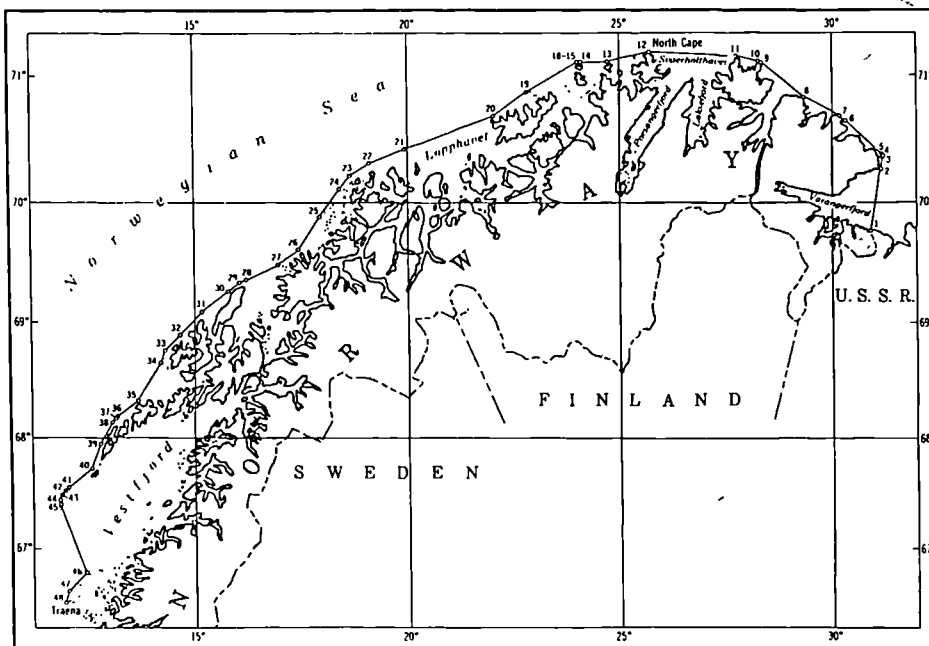


Figure 11 - The Norwegian straight baselines.

their boats.¹⁶ This led the U.K. to submit its objections to the I.C.J., where the U.K. conceded Norway's historic title to certain coastal waters, but protested the straight baseline system as contrary to international law. Relying heavily upon the debates at The Hague Codification Conference, the U.K. held that international law only provided for baselines to be measured from the actual coastline, except insofar as straight baselines were permissible to close historic bays or bays less than 10 miles wide at their mouths. There was no rule allowing for islands to be linked by straight lines.¹⁷ In addition, it contended that certain of the bay closing lines did not connect the natural entrance points, with the result that in many places - notably across LoppHAVET and SvaerholthAVET - the baselines did not follow the configuration of the coast, and, therefore, did not enclose waters with the true character of internal waters.¹⁸

Norway pleaded that there was no established international law concerning methods of baseline delimitation beyond the fact that baselines should follow "the general direction of the coast." Moreover, even if there was, the low-water line rule would be incapable of application to such a complicated coast as Norway's, and would not be binding upon it given Norway's consistent refusal to accept limitations on its offshore jurisdiction.¹⁹ It further argued that the 1935 Decree applied "a traditional system of delimitation," which was merely an adaptation of general law to local conditions;²⁰ its baselines were, therefore, justified by reference to historic title, the exceptional geographical characteristics of the coast, and the

region's special economic conditions.²¹ In particular, Norway stressed that the *skjaergaard* must be viewed as a whole with the mainland, and that the exceptionally long baseline across LoppHAVet was justified by "traditional rights reserved to the inhabitants" of the region.²²

(b) The Judgement of the I.C.J.

In its Judgement of 18 December 1951, the I.C.J. found for Norway and upheld both the method of drawing straight baselines, and the baselines delimited in application of that method. Irrespective of whether they lay along "the deeply indented and cut into" coast of Eastern Finnmark or the *skjaergaard* coast of western Norway, the I.C.J. ruled the baselines were not contrary to international law.²³ Instead, the Court accepted that straight lines might be drawn between islands, islets, and rocks, regardless of whether the intervening sea areas formed bays, and noted that other States had employed straight lines following the general direction of the coast in the delimitation of their territorial seas, without encountering objection, "where it was solely a question of giving a simpler form to the belt of territorial waters."²⁴ Moreover, in the Court's view, the supposed 10 mile rule for bays upheld by the U.K. had "not acquired the authority of a general rule of international law," and was "inapplicable as against Norway," who had always opposed its application to its coast. Nor did the Court agree with the U.K. that straight baselines could only be drawn across bays: thus, far from claiming "recognition of an

exceptional system," the 1935 Decree had merely applied "general international law to a specific case."²⁵

Having discounted the U.K.'s contentions, the Court then relied heavily upon its view that the fringe of islands, islets, rocks and reefs were indeed "an extension of the Norwegian mainland," referring in several places to the unity of the islands and mainland.²⁶ In particular, the Court drew significance from the "more or less close relationship existing between certain sea areas and the land formations which divide or surround them," so much so, that it held that the real question raised in the choice of baselines was, in effect, whether certain sea areas lying within these lines were sufficiently closely linked to the land domain to be subject to the régime of internal waters, given that:

"It is the land which confers upon the coastal State a right to the waters off its coasts."²⁷

The Court decided that this concept, which underlies the closure of bays, was to be more liberally applied along coasts with an unusual configuration such as Norway's.²⁸ However, in approving the Norwegian baselines, the Court emphasised that:

"[W]hile ... a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of straight baselines must not

depart to any appreciable extent from the general direction of the coast."²⁹

Linked with this, the Court rejected the idea that coastal archipelagoes should be subjected to any limit on the length of baseline, (such as were being mooted for bay closing lines), because the coastal State was "in the best position to appraise the local conditions dictating the selection" of the baselines to be drawn, providing such baselines did not depart appreciably from the coast's general direction.³⁰ In the Court's opinion, the "general direction of the coast" concept was more appropriate than any restriction on baseline length, provided it was applied to the coast as a whole rather than to only one sector. Impressions gained from large-scale maps of a single sector were not to be relied upon, except in cases of "manifest abuse."³¹

Insofar as certain of the longer baselines were concerned, the preamble to the 1935 Decree had indicated that an important consideration was the "... safeguard of the vital interests of the inhabitants of the northernmost parts of the country."³² This was taken up by the Court, which, in approving of particular baselines, took account of certain economic interests "the reality and importance of which are clearly evidenced by a long usage," namely, that "in these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing."³³ These economic interests were not, however, a justification by themselves for the establishment of a

straight baseline system: rather, where straight baselines were justified on other grounds, then economic interests might be taken into account in drawing particular baselines.³⁴

Thus, the baseline across the LoppHAVet, which did not have the character of a bay, was not regarded as diverging too far from the general direction so as to be a "distortion" of the coast, and was acceptable to the Court as a liberal application of the standard straight baseline system.³⁵ Indeed, even if the divergence was too great, the historical data produced by Norway provided evidence of "the survival of traditional [fishing] rights reserved to the inhabitants," which could be taken into account in approving of the baseline:

"Such rights, founded on the vital needs of the population and attested by the very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable."³⁶

With respect to SvaerholthAVet, the baseline was upheld because the Court held it had the character of a bay.³⁷

The Court's rulings with regard to these two areas have been heavily criticised.³⁸ For example, Judge McNair held:

"The method of delimiting territorial waters is an objective one and, while the coastal State is free to make minor adjustments in its maritime frontier when required in the interest of clarity and its practical object, it is not authorized by the law to manipulate its maritime frontier in order to give effect to its economic and other social interests. There is an overwhelming consensus of opinion amongst maritime States to the effect that the base line of territorial waters, whatever their extent may be, is a line which follows the coast-line along low-water mark and not a series of imaginary lines drawn by the coastal State for the purpose of giving effect even within reasonable limits, to its economic and other social interests and to other subjective factors."³⁹

Similarly, Verzijl questioned the derivation of the Court's view that the general direction of the coast might be determined by geographical and economic factors;⁴⁰ whilst Judge Hsu Mo demonstrated that the lines across the LoppHAVET and SvaerholthAVET were not justified by reference to the general direction of the coast.⁴¹ On the other hand Judge Alvarez agreed with the Court that each State might determine the extent of its territorial sea on the basis of the particular configuration of its coast and its own economic interests, "provided it does so in a reasonable manner;"⁴² whilst Judge Hackworth considered Norway had proved the existence of historic title over the disputed areas.

c) The Work of the I.L.C. and UNCLOS I

There was no compelling reason for the criteria derived from the Judgement in the Fisheries case to be incorporated in a conventional provision. Article 59 of the I.C.J.'s Statute makes it clear that the Court's decisions are binding only on the parties to a dispute, and only to the specific circumstances of the case between them: they are not legal precedents susceptible to generalisation into rules of international law. Moreover, the Court went out of its way to stress the exceptional features of the case. Nevertheless, the I.L.C., in its Commentary to draft article 5 of its final report of 1956, stated that it regarded the Judgement "as expressing the law in force" upon which it had accordingly drafted an article.⁴³ Thus it is not surprising that some of the language, and many of the concepts, used by the I.C.J., were contained in that article, and subsequently, found expression in Article 4 of the Territorial Sea Convention, and more recently, in Article 7 of the 1982 Convention. However, where the I.L.C. did depart from the Judgement of the I.C.J., was in its refusal to allow low-tide elevations to be used as basepoints, although Article 4 relaxes this provision somewhat by allowing such elevations to be used as basepoints if they have lighthouses or other similar installations permanently above sea level built upon them.⁴⁴

Also of significance are the I.L.C.'s unsuccessful attempts to provide mathematical limits both for the length of straight baselines and for the maximum distance offshore at which such baselines might be

drawn. In 1954, upon the recommendation of the Committee of Experts (1953), the I.L.C. proposed a maximum length of 10 miles for single baseline segments. These baselines might be drawn between headlands on the mainland coast, or between any headland and an island lying not more than 5 miles from the coast, or between fringing islands. Baselines longer than 10 miles were to be permissible provided no point was further than 5 miles offshore.⁴⁵ However, these provisions were objected to as arbitrary and as not in conformity with the I.C.J.'s 1951 Judgement.⁴⁶ As a result, straight baselines were left solely to be validated on the basis of whether or not they departed to any appreciable extent from the "general direction of the coast," despite the fact that the very reason for the 10 mile proposal was because the Committee of Experts had indicated that the "general direction of the coast" was impractical to establish in many situations, e.g. because it would vary according to the scale of chart used, or because it was an arbitrary decision as to how much coast should be looked at to determine its general direction.⁴⁷

At UNCLOS I, further attempts were made by some States to place limits upon the length of baselines and the distance they might lie offshore. Greece and Italy were amongst those States who wished to limit baselines to within 5 miles of the mainland shore, whilst Britain again proposed that no straight baseline should exceed 10 miles in length. After further amendments were introduced, the Swedish suggestion that 15 miles be the stipulated maximum length was accepted, although there remained opposition to the proposal to limit the

distance offshore a baseline might lie. The 15 mile rule was subsequently incorporated in the recommendations of the Conference's First Committee, only for it to fail to gain the necessary two-thirds majority in the Conference's Plenary Session.⁴⁸ However, a Portuguese proposal that straight baselines not be allowed to cut off the territorial sea of a State from the high seas, was accepted.

4.4 Straight Baselines and State Practice

The most fundamental aspect of the Law of the Sea is the baseline, for all the zones of offshore national jurisdiction, both seaward and landward are measured from it. Most coastal States, recognising the importance of the baseline, in particular, to their security, have drawn their baselines "in the most advantageous manner possible using whatever method is most suitable to their coastline and national interests."⁴⁹ However, because of its effects on navigational rights and boundary delimitations, the baseline of a coastal State is of equal importance to non-coastal States; hence, as the coastal State extends its baselines and boundaries seawards, the potential for conflict increases, in particular where marine space is relatively constricted as in the Mediterranean.

In the Fisheries Case, the U.K. argued that international law required that baselines must, in general, follow the sinuosities of the coast, whereas Norway claimed that because adjacent maritime areas were appurtenant to the land, this required only that the baselines

from which these areas were to be measured follow the general trend of the coast. Swayed by the latter argument, the I.C.J. took the view that the U.K.'s alleged rule was but a reflection of a general principle that territorial waters must follow the general direction of the coast, and upheld the Norwegian straight baselines on the basis that such a system was fair and reasonable in the light of the special geographic and economic conditions prevailing in the region.⁵⁰ In particular, the Court recognised that exceptional geographical conditions along the Norwegian coast made the delimitation of territorial waters problematic, requiring a divergence from the general rule of the low-water line:

"Where a coast is deeply indented and cut into, as is that of eastern Finnmark, or where it is bordered by an archipelago such as the 'skjaergaard' along the western sector of the coast here in question, the baseline becomes independent of the low-water mark, and can only be determined by means of geometric construction. In such 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; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, viewed as a whole, calls for the application of a different method [i.e. the method of base-lines which, within reasonable limits, may depart from the physical line of the coast]. Nor can one characterise as exceptions to the rule the very many derogations

which would be necessitated by such a rugged coast. The rule would disappear under the exceptions."⁵¹

Thus the Court considered that the special conditions necessitated that the coastal State's interests outweighed those of the international community sufficient for the creation of a new rule, but that those interests could not legitimise the drawing of baselines which departed from the general coastal direction to any appreciable extent, because:

"The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."⁵²

The I.C.J. continued, however, to stress the atypical characteristics of the Norwegian coast, holding it to possess a "peculiar geography" with a "very distinctive configuration," making Norway unique in Europe.⁵³ Indeed, the I.C.J. noted that:

"The coast of the [Norwegian] mainland does not constitute, *as it does in practically all other countries*, a clear dividing line

between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the 'skjaergaard'."⁵⁴

However, the I.C.J. treated the Norwegian coast as unusual, *but not unique*: its reference to the adaptation of straight baselines "to the special conditions obtaining in different regions," indicates that straight baselines were envisaged as being appropriate to other States' coasts.⁵⁵ Nevertheless, it is clear that the I.C.J. intended its straight baseline provisions to be used only in circumstances where a coast had similar characteristics to that of Eastern Finnmark or western Norway; for example, the coasts of north-west Scotland, Canada and western Northern Ireland, referred to by Judges McNair and Read.⁵⁶ Moreover, the I.L.C. had also made it clear that it envisaged the use of straight baselines as being confined to exceptional circumstances such as existed along the Norwegian coast, and not as being optional to the standard rule of the low-water line, in which case, their use would be infrequent.⁵⁷

Nevertheless, despite the fact that the I.C.J.'s provisions were clearly not intended for widespread application, their virtual verbatim inclusion in both the Territorial Sea Convention (Article 4), and now the 1982 Convention (Article 7), appears to have encouraged States to interpret the rules without reference to the original intent.⁵⁸ As O'Connell has put it:

"State practice has altogether failed to reflect either this limited view of the occasions when the method is available, or the notion that the length of straight baselines is inherently restricted by the concept of 'general direction of the coast.'"⁵⁹

Such aberrant State practice has been encouraged by the fact that any careful analysis of these provisions clearly evidences their vagueness and lack of definition:

"Article 4 gives a series of subjective criteria for deciding on the applicability of straight baselines, but gives practically no objective criterion of any sort."⁶⁰

As a result, States have interpreted the provisions at will, leading O'Connell to conclude that "the attempt to restrict the straight baseline technique to coasts at least as complicated as that of Norway has failed."⁶¹ Indeed, Prescott has stated that:

"Using existing precedents it would now be possible to justify the replacement of the normal baseline by straight lines along any coast in the world,"⁶²

as the baselines drawn along the Algerian and Moroccan coasts bear witness.

In the Fisheries Case, the reason for allowing a departure from the low-water line was related to the problems of delimiting the outer limit of the territorial sea, for where a coastline is deeply indented or fringed by many islands and rocks not only is baseline drawing difficult, but territorial waters can be "penetrated by deep corridors of non-territorial waters" or surround enclaves of water with a different legal status. Allowing for the baseline to be geometrically constructed, simplifies the configuration of both the coast and the outer limit of the territorial sea, thereby benefiting navigators, and securing greater certainty and security for the administration of law by coastal surveillance authorities.⁶³ However, many States now measure their offshore zones of jurisdiction from straight baselines, notwithstanding the fact that their coasts have none of the features which justify a departure from the low-water line.

The prime effect of a *justifiable* straight baseline system should be to increase greatly the internal waters of a State, but to have only a limited effect on the extension of the territorial sea.⁶⁴ Conversely, those coastal State claims which may be regarded as misapplications of the straight baseline rules, may both increase the area of internal waters beyond that which was intended through application of the straight baseline provisions, and have a significant effect upon the extension of the territorial sea.⁶⁵ Moreover, given that all offshore zones of national jurisdiction are measured from the baselines of the territorial sea, as the baselines move further and further away from the shoreline, so too do the other zones of national

jurisdiction such as the continental shelf and the E.E.Z. In a narrow semi-enclosed sea like the Mediterranean, this may be especially important for drawing boundaries between States, as the equidistance line, for example, is so dependent on the baselines for its construction. Therefore, in combination, these two effects of straight baseline delimitation provide considerable motivation for States to claim baselines which either depart to an appreciable extent from the general direction of the coast in order to embrace isolated, and often relatively distant, offshore islands, or which screen coasts that are neither deeply indented nor cut into.

In 1976, Hodgson and Smith argued that the creation of the E.E.Z. would lessen the need for straight baselines, *but only if* UNCLOS III developed restrictive criteria for their delimitation, otherwise there would be a risk of some States using the provisions to extend further their territorial sea and E.E.Z.⁶⁶ If anything, UNCLOS III made the straight baseline provisions less restrictive than those agreed at UNCLOS I, hence contrary to what Bowett envisaged, the institution of the 200 mile E.E.Z. would appear to have *increased* rather than diminished the incentive to adopt straight baselines, given that the desire to extend the area of exclusive fishing, pollution control, etc. is probably best served by employing straight baselines which extend the reach of the E.E.Z. seawards.⁶⁷ As such, therefore, the I.L.C., UNCLOS I and UNCLOS III, have successively failed to formulate straight baseline rules for the international community, which balance the interests of coastal and non-coastal States. O'Connell argues that as

they were originally conceived, the criteria set out in Article 4 were an attempt to limit the ability of a coastal State to extend its maritime frontiers in order to obtain control over local resources, so that had the E.E.Z. concept been available in 1951, there would have been no need for the straight baseline technique, because the original desire and/or need for coastal resource control would have been satisfied. Instead, Article 4's provisions, substantially repeated in the 1982 Convention, have a "semantic ambiguity" and "an inherent logic," dooming them to failure.⁶³

4.5 Straight Baselines in the Mediterranean Sea

(a) Introduction

The use of straight baselines in the Mediterranean Sea has clearly found favour amongst its coastal States, although the majority of baselines claimed appear to have no justification under international law. Twelve Mediterranean States have straight baseline legislation for all or parts of their coasts, which means that, in effect, much of the Mediterranean's shoreline has been artificially straightened with varying degrees of conformity to the rules governing straight baseline delimitation.

In the following chronological analysis of individual Mediterranean States' straight baseline systems, conformity to the law is evaluated using a combination of subjective and objective criteria derived both

from publicists and geographical experts. Notable amongst the latter is Prescott, who has characterised legal straight baseline systems as usually having a number of segments, each composed of several legs to ensure that baselines conform to the general direction of the coast. These baseline segments are interspersed with sections of the low-water line of island and mainland coasts. Individual baseline legs are also short in length. Conforming straight baselines rarely lie farther than 24 miles offshore, and do not usually enclose a high proportion of water to land, nor do they extend the outer limit of the territorial sea very far beyond that which would be used if measured from the normal baseline. Conversely, illegal straight baseline systems generally have only a few baseline segments composed of only a few legs, and are rarely broken by sections of the low-water line. Individual legs may be very long, and lie some distance from the mainland coast, often enclosing a high ratio of water to land, and resulting in the annexation of large areas of what would otherwise be high seas.⁶⁹

(b) Analysis of Mediterranean Straight Baselines

(i) Egypt

By Article 5 of the Royal Decree of 15 January 1951, straight baselines were created for the then Kingdom of Egypt in the following situations:

(i) by joining the flanking headlands where a bay "confronts the open

sea;"

(ii) by lines drawn from the mainland or island and along the outer edge of a shoal, where the shoal - an area covered by shallow water, a part of which is not submerged at lowest low tide - lies within 12 miles of the mainland or island;

(iii) where islands, lie 12 miles or less offshore, by lines from the mainland to the islands' outer shores;

(iv) where there is an island group lying 12 miles or more offshore, by lines not greater than 12 miles long drawn from the mainland and along the outer shores of all the islands of the group if they form a chain, or along the outermost islands of the group if they do not.⁷⁰

As Egypt regards an "island" as including any islet, reef, rock, bar or permanent artificial structure not covered by lowest low tide, Egypt's straight baseline rules are more liberal than those found in Conventions to which it is not a party.⁷¹ However, until Decree No. 27 of 9 January 1990, no straight baselines were delimited by Egypt along its Mediterranean coast and, therefore, did not pose any problems.⁷²

By this Decree, Egypt has delimited no fewer than 52 straight baseline segments along its entire Mediterranean coast,⁷³ which is "relatively featureless and without islands," and therefore not appropriate for straight baseline drawing.⁷⁴ As one might imagine, these baselines are generally short and closely follow the general direction of the coast, although this does not excuse the illegitimacy of their delimitation.⁷⁵

The one exception to this observation is the Nile Delta region, where Egypt may decide to justify its straight baselines under Article 7(2) of the 1982 Convention. This is a new provision which allows for straight baselines to be drawn along the furthest seaward extent of the low-water line, where because of the presence of a delta and other natural conditions the coastline is highly unstable. Prescott and Bird make clear that this provision was included in the Convention for the benefit of Bangladesh, but it may also benefit Egypt given the rapid erosion of the Nile Delta, the coast of which in areas near Damietta has receded at rates of 40 metres per year.⁷⁶

Previous to the Egyptian Decree, only Bangladesh had drawn baselines along a highly unstable coast (in 1974). In justifying such baselines, it will be interesting to see whether States interpret Article 7(2) as providing an independent criterion for straight baseline construction, (as originally conceived by Bangladesh's draft articles), or whether the provision is restricted to those conditions in which a highly unstable coast is deeply indented or fringed with islands, as put forward recently by the U.N. Office for Ocean Affairs and the Law of the Sea.⁷⁷ On the basis of the latter view, very few highly unstable coasts, Egypt's included, would seem likely to qualify for straight baselines. It will also be interesting to see whether States will interpret Article 7(2) as enabling them only to draw straight baselines around the delta or also around those coastal areas adjoining the delta.

The Article also provides that "notwithstanding, subsequent regression of the low-water line" the straight baselines shall remain effective until changed by the coastal State in accordance with the Convention.⁷⁴ It is not clear, therefore, how long the baselines drawn may remain effective after regression of the low-water line, although the U.N. Office for Ocean Affairs and the Law of the Sea has said that:

"This will presumably take place when the low-water line has significantly and permanently advanced or retreated from the position originally used."⁷⁵

This should perhaps be combined with Scholz's suggestion that the article should have allowed for periodic revisions "at intervals of sufficiently long duration as not to be burdensome."⁷⁶

(ii) Albania

Albania first proclaimed straight baselines by Decree No. 4650 of 9 March 1970, by which seven baseline segments totalling 87.8 miles in length, and running continuously north-south, were drawn along the Albanian coast from the mouth of the Bojana River at the land boundary with Yugoslavia to Cape Gjuhëzës (Figure 12). Commenting on this legislation, the Geographer noted that of the three islands existing in the immediate vicinity of the straight baselines, only Sazan is used as basepoint.⁸¹ As a single, isolated island lying at the mouth of the Gulf of Vlones, Sazan can hardly be held to qualify as "a fringe of

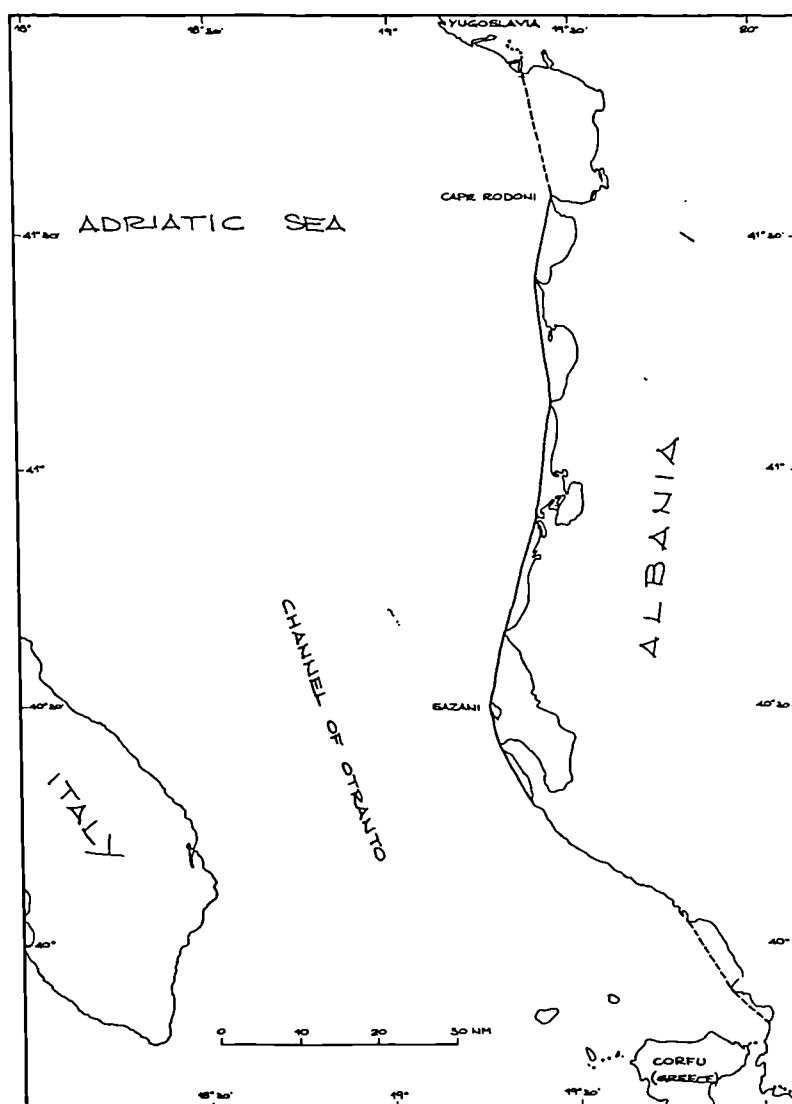


Figure 12 - Albania's straight baselines.

Source: G. Francalanci, S. Mongardini, D. Romano and T. Scovazzi Atlas of the Straight Baselines: Part I: Art. 7 of the Convention of the United Nations on the Law of the Sea, p. 3. (Milan: Giuffrè, 1986)

islands along the coast in the immediate coastal vicinity," and thus its use as basepoint is illegitimate.

Of greater significance, however, is the Geographer's statement that:

"The coastline covered by straight baselines is markedly indented but ... is not deeply incised according to the Norwegian example."⁸²

Prescott also regarded the Albanian baselines as of "debatable validity," because the Albanian coastline is "gently embayed,"⁸³ and not "deeply indented and cut into." However, other commentators find Albania's drawing of straight baselines "in conformity with the existing law of the sea."⁸⁴

This illustrates how the rules for drawing straight baselines are open to opposing interpretations. Part of the problem is one of scale: a large-scale map of a particular coastline may tend to enhance the view that a coast is "deeply indented or cut into", whereas a small-scale map may tend to smooth out any irregularities in the coast. Thus, on a large-scale map the Albanian coast appears to have some deep curved indentations, whereas the small-scale map gives the impression of Prescott's "gently embayed" or "smooth coast with shallow embayments."⁸⁵ Nevertheless, on closer inspection, the legality of the Albanian straight baselines must be viewed with some scepticism,

because although the Albanian coastline enclosed under the 1970 legislation is "irregular," it is nonetheless characterised by "smooth bays," which do not penetrate deeply into the coastline.⁸⁶

Beazley suggests that the requirement that a coast be "deeply indented and cut into," must refer to "a coastline in which the number and intricacy of the indentations would make the application of Article 7 [of the Territorial Sea Convention] on bays tedious and largely irrelevant."⁸⁷ hence, the coast must not have just one or two indentations, otherwise Article 7 would become redundant. Moreover, to fulfil the condition of being deeply indented, it also would appear that most, but not all, of the indentations along a coast penetrate deeply enough to satisfy the semi-circle test laid down in Article 7 on bays.⁸⁸ Therefore, while the Albanian coast can be seen to fulfil the second condition, it does not have so many complicated indentations as to make application of Article 7 inappropriate, and thus under Beazley's criteria the Albanian coast cannot be viewed as being deeply indented and cut into.

The same conclusion results from applying the objective criteria for assessing straight baseline claims put forward by Bernhardt *et al.* Following on from the work of Beazley, these experts suggest that for a straight baseline system to be justified on the grounds that, in a particular locality, the coast is deeply indented and cut into, each of the following criteria must be fulfilled.⁸⁹

Firstly, within any particular "locality"⁹⁰ at least 70 per cent of the total length of straight baseline segments should enclose indentations with at least a 6:10 ratio of coastal penetration to segment length. The length of coastal penetration to segment length is to be measured along a perpendicular from the normal baseline (the low-water line) at the point of deepest coastal penetration to the baseline segment or its theoretical extension. The 6:10 ratio is chosen because it expresses a relationship between the depth of penetration of the indentation and the surface area of water greater than the 5:10 ratio by which, under the semi-circle test, an indentation changes from being a mere curvature of the coast to a juridical bay. Consequently, as required by Beazley, to fulfil the condition of being deeply indented, most, but not all, of the indentations along a coast must penetrate more deeply into the coast than juridical bays.⁹¹

That not all the indentations in any "locality" should meet the stated ratio derives from the fact that even in the Fisheries Case only 60 per cent of the total distance traversed by the Norwegian straight baselines enclosed fjords. Hodgson and Alexander therefore concluded that this figure should provide the benchmark by which to measure similarly configured coasts.⁹² However, Bernhardt *et al* feel it appropriate to apply the harsher qualification of 70 per cent coverage, given that the shallowest fjord penetration along Norway's coast was of the order of 15:10, whilst of the two-fifths of non-fjord coast many indentations qualified as juridical bays.⁹³

The second criterion to be fulfilled is that within a given "locality" there must be at least three significant indentations to apply the 70 per cent requirement. Again, this accords with the view of Beazley and others that a straight baseline system cannot be employed in a "locality" where there is but one or two bay-like indentations, otherwise the limiting criteria for the closure of bays would become redundant.

For the purpose of applying these rules, a "locality" is defined as any area in which a coastal State has an uninterrupted, and thereby *contiguous*, series of straight baselines. In other words, a "locality" is determined by the return of the coastal State's baseline to the low-water line along the coast. Consequently, unless a coastline is deeply indented along its entire length, it will be made up of several "localities." Each locality must fulfil the aforementioned 70 per cent requirement to ensure that a coastal State is not tempted to apply straight baselines to enclose shallow indentations, merely because nearby on the coast there are one or more indentations fulfilling the 6:10 ratio. However, in order that this might not debar a State from an otherwise legitimate use of straight baselines (or more precisely, bay closing lines), where a State's contiguous straight baseline system includes juridical bays which do not meet the 6:10 penetration ratio, the 70 per cent requirement is waived. Instead, an optional rule is applied, whereby a legitimate bay closing line may be included for the purpose of determining contiguity, but excluded for all other purposes.

Finally, Bernhardt *et al* require that no individual baseline should exceed 48 miles in length.

Applying these criteria to the Albanian straight baselines, although no single baseline exceeds 48 miles in length, there are no localities in which there are at least three indentations having a ratio of coastal penetration to segment length of at least 6:10. Indeed, only the Gulf of Vlones has this ratio, and both it and the Bay of Drinit are juridical bays.⁹⁴ Straight baselines enclosing their waters as internal are permissible under Article 7 of the Territorial Sea Convention and Article 10 of the 1982 Convention in one of two ways. Paragraph 6 of each Article allows for bays to be enclosed under the rules for straight baselines where the appropriate conditions exist; alternatively, they may be enclosed simply as juridical bays, where there would be no right of innocent passage.⁹⁵ Whichever rules, however, one chooses to close the Gulf of Vlones under, (and from the above discussion, it is clear that enclosure under the rules for juridical bays is the only available option), the baseline joining Cape Semanit to the island of Sazan is inappropriate, either because Sazan is inadmissible as a basepoint in a straight baseline system, or because the Gulf's northern natural entrance point is not used to enclose the juridical bay. As to whether Sazan can be used as part of the Gulf's closing line, this would seem debateable given that the island lies outside of a closing line linking the two natural entrance points.

Further additions to the Albanian straight baseline system were made under Decree No. 5384 of 23 February 1976, by which three baseline segments were drawn across shallow indentations along the Albanian coast. One of these segments continues the baselines delimited in 1970 for a further 8.3 miles. The other two segments lie further to the south, north of Corfu and close to the Greek border. In total these two baselines measure 17.3 miles.

Doubt must be cast upon any revision of a straight baseline system, for although there is no restriction on States drawing baselines along their coast more than once, it would appear logical to assume that where appropriate straight baseline conditions exist all straight baselines will be drawn at the same time, as there should be no advantage in withholding the legislation for some parts of the coast. On the other hand, the continued reluctance of the international community to restrict straight baselines to coasts which can truly be regarded as "deeply indented and cut into" during the period between the two Albanian decrees, may have encouraged Albania to draw straight baselines along parts of its coast which even it did not regard as "deeply indented" at the time of the original legislation. As a result, Albania has straight baselines along its coast wherever the coast's configuration takes on a curved appearance, with only two sections, or approximately twenty per cent, of the Albanian coast not being subject to straight baseline legislation.

The Geographer comments that because the baselines generally join headlands, they follow "the general trend of the coast,"⁹⁶ but this, of itself, is insufficient to validate the Albanian baselines in international law. Moreover, one may question whether the baseline linking Cape Semanit to the island of Sazan can be said to follow the general coastal direction. However, because only one island is used as a basepoint and because the bays concerned do not, with the exception of the Bay of Drinit and the Gulf of Vlones, penetrate deeply into the coastline, the effect of this legislation on the outer limit of the territorial sea is not significant.⁹⁷

(iii) Yugoslavia

Yugoslavia's straight baseline system (Figure 13) is generally upheld as a classic example of the correct use of the straight baseline rules for fringing islands.⁹⁸ These baselines were defined in Article 11(3) of "The Law on the Coastal Sea, the Outer Sea Belt and the Epicontinental Belt" of 22 May 1965, and consist of 26 legs which are combined in three segments interrupted twice by island coasts. The first segment consists of three legs which run from Cape Zarubaca to Cape Gruj on the island of Mljet, a total distance of 22.9 miles; the second segment runs from Cape Korizmeni on the island of Mljet to a specified point on the island of Dugi Otok, a distance of 129 miles in 15 legs; and the final segment links Cape Veli Rat on Dugi Otok with Cape Kastanija on the Istrian Peninsula via 8 baseline legs totalling

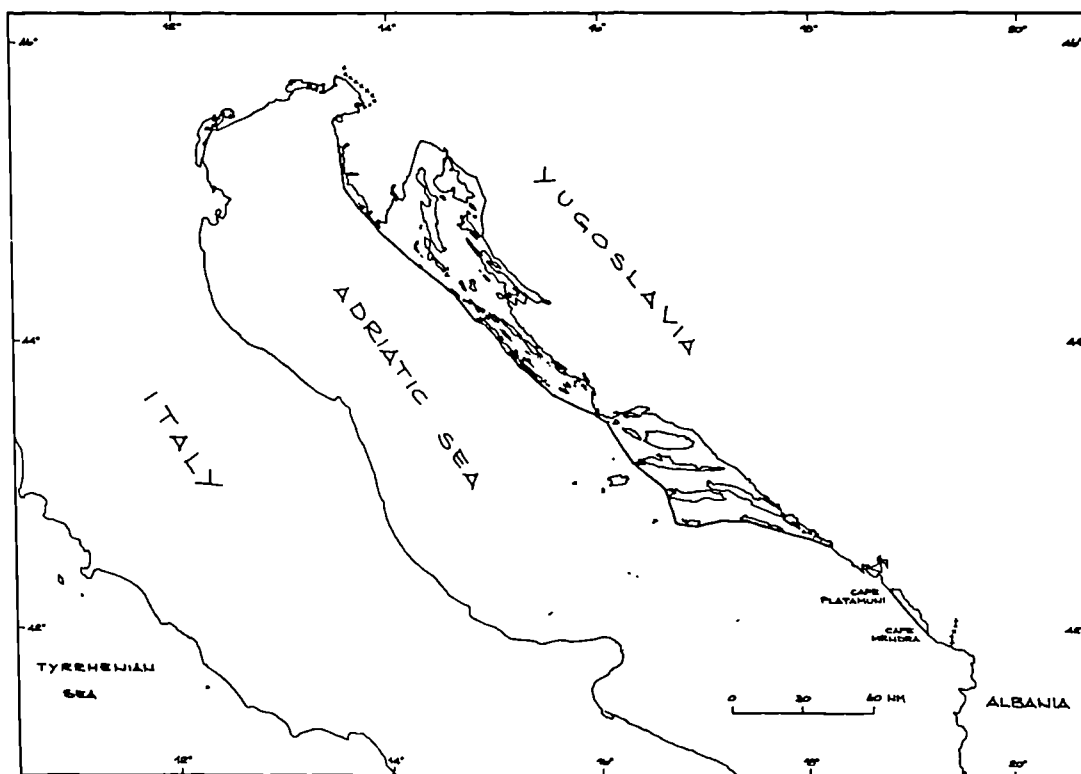


Figure 13 - Yugoslavia's straight baselines.

Source: G. Francalanci, S. Mongardini, D. Romano and T. Scovazzi Atlas of the Straight Baselines: Part I: Art. 7 of the Convention of the United Nations on the Law of the Sea, p. 137. (Milan: Giuffrè, 1986)

92.8 miles in length. Thus, the combined length of all these straight baselines is approximately 244.7 miles.⁹⁹

Bowett notes that it is significant - even praiseworthy in the light of divergent State practice - that Yugoslavia made no attempt to include the islands of Vis, Andrija, Pelagruz or Kajola, which lie some distance offshore, within these baselines,¹⁰⁰ although many islands are, nevertheless, incorporated as part of, or enclosed within, the straight baseline system. No international navigation routes are affected by this legislation, and, in the main, the lines closely follow the general direction of the coast, with the average deviation from the mainland coast being 5°, and even less from the general trend of the offshore islands.¹⁰¹

This is important, because the requirement that "baselines must not depart to any appreciable extent from the general direction of the coast" is linked in Article 4(2) of the Territorial Sea Convention with the additional requirement that "the sea areas lying within the lines must be sufficiently linked to the land domain to be subject to the régime of internal waters." Both requirements originated in the 1951 Fisheries Case, where the I.C.J. observed that however justified the "general direction of the coast" rule may be, "it is devoid of any mathematical precision."¹⁰² Consequently, the concept is open to subjective interpretation, with evaluation depending largely upon the scale of charts used.¹⁰³

Hodgson and Alexander upheld the I.C.J.'s view that except in cases of manifest abuse, one should not rely upon impressions gained from large-scale charts. Instead, to gather an overall picture of the trend of the coast in question, one should determine the general direction "for a reasonably extensive coastal length" by examining small-scale charts, e.g. 1:1 000 000.¹⁰⁴ However, Hodgson also allowed for the fact that special conditions, e.g. geographical or historical, might necessitate a local departure from the general direction of the coast, in which case, large-scale charts of the locality should be consulted.¹⁰⁵ By examining the general trend of the coast over long distances, Hodgson and Alexander believed that it was not difficult to identify those baselines which could be regarded as a "manifest abuse" of the rule, e.g. the baseline across Vestfjord in the Fisheries Case.¹⁰⁶

Judge Hsu Mo took a different view: in his Separate Opinion in the Fisheries Case, he advocated examination of each sector of the coast using relatively large-scale charts, in order that the concept of "general direction of the coast" was not applied so liberally that a State could draw straight baselines in any way it pleased, provided they were not a distortion of the *overall* coastline when considered as a *whole*.¹⁰⁷

Nevertheless, whether one starts with individual sectors or with the coast as a whole, the problem remains one of subjective opinion and interpretation. This is indicated by Article 4(2)'s use of the word

"appreciably" in suggesting how far departure from the general coastal direction would bear upon the legality of any specific system, for, as O'Connell notes:

"A departure would be appreciable without distorting the general direction of the coastline only in relation to the sector of coastline under consideration and the size of chart being employed."¹⁰⁸

This problem of appreciation becomes more difficult when looking at "localities",¹⁰⁹ not only because it is a subjective decision as to how far a locality extends, but also because:

"Each straight line, unless closing a bay, must be part of a system, for it is only when the coastline is taken as a whole that the straight baseline method may be used."¹¹⁰

Thus, it must be whether the waters enclosed are sufficiently closely linked to the land domain to be subject to the régime of internal waters which really matters.

Some authors have measured straight baseline systems against mathematical standards derived from the Norwegian example.¹¹¹ For example, Hodgson and Alexander proposed that no single segment of a straight baseline system should depart more than 15° from the general direction of the coast, based upon their finding that only one baseline

varied from the general direction of the Norwegian coast by a greater degree.¹¹² More recently, Bernhardt *et al* have taken this further, proposing that one of several criteria to be fulfilled to legitimise the use of straight baselines in the case of fringing islands¹¹³ should be that the directional trend of the outermost islands on which the turning points are to be situated, should not deviate more than 20° either from the opposite mainland coast (including baselines enclosing single coastal features), or from the general direction of that coast, whichever more nearly parallels the relevant islands.¹¹⁴ However, directional deviations in excess of 20° are permissible in respect of those baselines linking the fringing islands to the mainland coast.¹¹⁵

Clearly, using either the 15° or 20° rules, the Yugoslavian baselines do not depart appreciably from the general direction of the coast, except in one sector.¹¹⁶ The baseline segments enclosing the parallel islands off Central Dalmatia closely respect Article 4(2), as they remain within 4° to 7° of the general direction of the coast. Likewise, the northern baseline segments, as "the range of the variation between the angle of the straight baselines and the general direction of the coast decreases to a range between 2° and 5°."¹¹⁷ The Geographer has, however, drawn attention to several baseline segments which depart from the average:

"The first straight baselines [sic.] from the Dalmatian shore to the island of Mljet is approximately 15° from the general trend of the mainland. The straight baseline, in contrast, is virtually

identical with the trend of the offshore islands. In the sector, where the major island of Mljet and Lastovo are enclosed the straight baselines are within 15° of the general trend of the northern coast. However, the straight baseline deviates nearly 45° from the trend of the coast from which it diverges. The straight baselines from Kopiste island to Korcula converges toward the coast but varies at an angle of 35°. The northward extension to Mali Drvenik to an extent of approximately 14°."¹¹⁸

However, Hodgson and Alexander recognised that the "reasonableness" of straight baselines along island fringed coasts was to be determined not only by reference to the general direction of the coast: the baselines must also be capable of being regarded as enclosing waters which partake of the character of territory. Therefore, they proposed that a water to land ratio of 3.5:1, derived from analysis of the Norwegian straight baselines in the Fisheries Case, be applied to the area between the normal baseline (i.e. the mainland) and the straight baselines. This ratio would represent a mathematical test of the requirement that the sea areas lying within straight baselines "be sufficiently closely linked to the land domain to be subject to the régime of internal waters," and, in combination with a restriction upon the length of baseline, would form "the best basis for evaluating a system of straight baselines to determine its conformity with the spirit of Article 4 and the Norwegian example."¹¹⁹

In formulating these mathematical constructs, Hodgson was keen to outlaw what he regarded as the "outrageous" attempts to determine the general direction of the coast by using the "outermost points of the outermost islands," given that any line connecting any two islands could then be considered to follow the general coastal direction.¹²⁰ Prescott, however, rejects the mathematical conceptualisation of Article 4(2) as both impractical and inappropriate. Insofar as determining the general direction of the coast is concerned, Prescott draws attention to the difficulty in securing agreement upon the length of coast to be considered, or upon the weight to be attached to specific basepoints. In particular:

"Where offshore islands exist the matter appears to be complicated beyond hope of a successful conclusion, e.g. the segment of the baseline which links the mainland to the first fringing island may be a perpendicular to the coast and still be a legitimate line. Individual segments along fringing islands might differ from the general direction of the coast by 20° or more, simply because the line has to reflect the alignment of the rampart of islands as closely as possible. As the number of outer basepoints increases so does the difficulty of fixing a generally acceptable general direction."¹²¹

He, therefore, suggests that the general direction of the coast criterion be largely ignored in favour of testing straight baselines against the other geographical criteria of Article 4.¹²²

On this basis, densely packed island fringes such as exist off the Yugoslavian coast, would be approved as legitimate conditions for the delimitation of straight baselines, not because the baselines follow the general direction of the coast, or because the water to land ratio is not greater than 3.5:1, but because, as in the original Norwegian example, the presence of the screening islands along the coast results in the Yugoslavian mainland not constituting a clear dividing line between the land and sea.¹²³ In other words, although compliance to the general direction of the coast may be the one immutable rule of straight baseline drawing,¹²⁴ it is not of primary importance in approving of straight baseline systems, for it is both difficult and unnecessary to compute a water to land ratio for a coast such as Yugoslavia's which so clearly resembles the original Norwegian example.

Yugoslavia has strictly followed the rules for fringing islands, so that where the conditions for straight baseline drawing cease to exist, the baseline returns to the low-water line.¹²⁵ Moreover, where low-tide elevations are used as basepoints in Yugoslavia's straight baseline system, their use is in accord with Article 4(3) of the Territorial Sea Convention (Article 7(4) of the 1982 Convention); lighthouses exist on all the low-tide elevations used by Yugoslavia as basepoints in its straight baseline system.

Unfortunately, however, the straight baseline connecting Cape Platamuni and Cape Mendra, established by a Law of 27 March 1979, must be the subject of criticism. This line is approximately 23.6 miles

long, and encloses an indentation which does not penetrate at any point further than 3.6 miles into the coast. It is not, therefore, a juridical bay, and thus it can only be enclosed as part of a straight baseline system. However, the coast enclosed by this baseline is not deeply indented and cut into. Furthermore, given that this baseline is detached from those drawn in 1965 and encloses a single indentation, the rules governing the enclosure of bays must apply.¹²⁶ As result, this baseline is illegal.

(iv) Turkey

The straight baselines claimed by Turkey were drawn on a small-scale chart (1:1 100 000) published by the Turkish Hydrographic Service on 17 May 1965. These run from the boundary with Greece in the northern Aegean along the entire Turkish Aegean coast as far as Av Burun on Turkey's southern coast (Figure 14). They were apparently drawn in accordance with Turkish Law No. 476 of 15 May 1964, Article 4 of which states:

"The normal base line from which the width of the territorial waters is measured, is the lowest ebb tide extending along the coast.

In indented coasts, or in areas with islands located close to the shore, the method of the straight base line connecting the foremost points of the shore and the islands does apply."¹²⁷

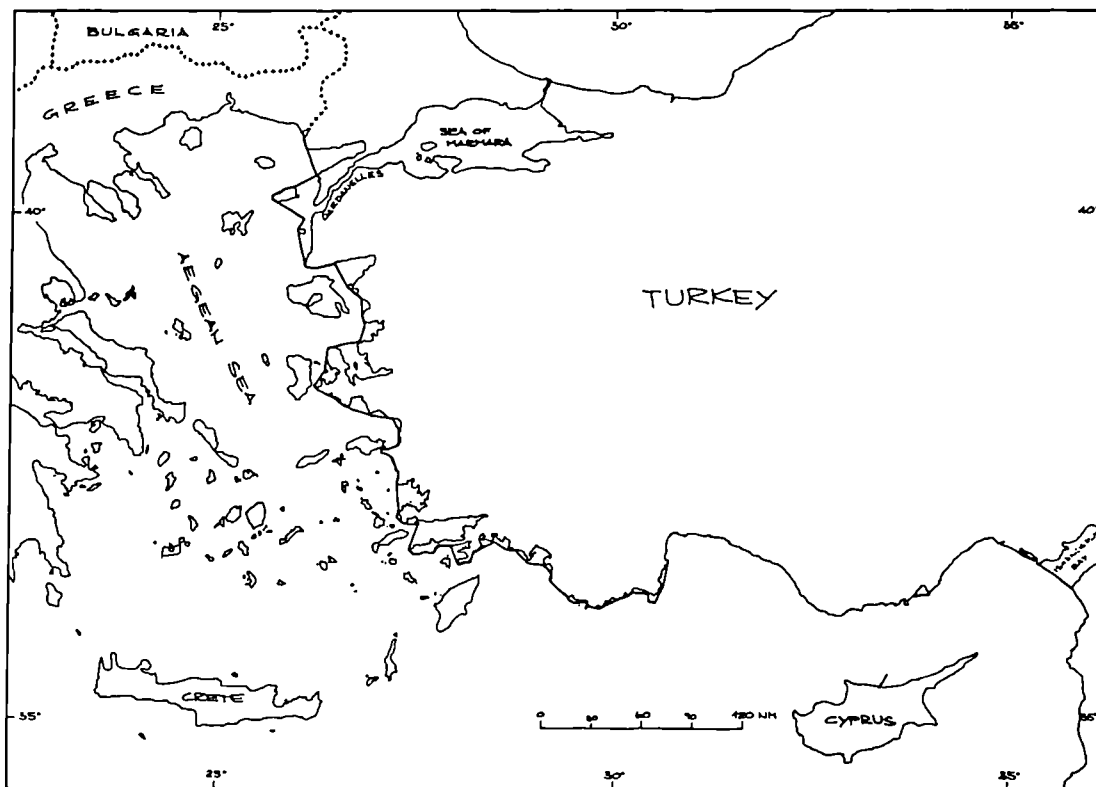


Figure 14 - Turkey's straight baselines.

Source: G. Francalanci, S. Mongardini, D. Romano and T. Scovazzi Atlas of the Straight Baselines: Part I: Art. 7 of the Convention of the United Nations on the Law of the Sea, p. 131. (Milan: Giuffrè, 1986)

Article 7 of that Law stated that the baselines used for measuring the width of the territorial sea would be shown on large-scale charts and released to interested parties.¹²⁸ However, the subsequent depiction of the Turkish baselines on a small-scale chart did not permit the Geographer to carry out an accurate and detailed analysis of the straight baseline segments, the coordinates of which have never been published. Nevertheless, the Geographer was able to estimate that the system comprises at least 119 segments, and measures in total approximately 621 miles, although these estimates include the baseline which closes the eastern end of the Bosphorus in the Black Sea, as well as the closing lines of the Bay of Iskenderun and of the bay southwest of Silifke, both of which are juridical bays.¹²⁹ None of these baselines can properly be regarded as part of the Turkish straight baseline system, which therefore runs continuously for 590 miles.¹³⁰

Notwithstanding the fact that Turkey is not a party to the Territorial Sea Convention, (which it did not even sign), and that its legislative provision with respect to straight baselines along "indented coasts" is somewhat more liberal than that envisaged by Article 4(1)'s reference to a coast "*deeply indented and cut into*," most of the Turkish straight baselines along the Aegean coast appear to fulfil this conventional requirement.¹³¹ This is confirmed by applying the criteria developed by Bernhardt *et al.* In general, the straight baselines along the Aegean coast are drawn in localities where at least 70 per cent of their total length encloses three or more indentations with a ratio of coastal penetration to segment length of at least 6:10.

(although in order to reach this conclusion one has to break the Turkish coast into several localities, rather than the single locality defined by the unbroken baselines). However, the same cannot be said of those baselines drawn along Turkey's southern coast east of Rhodes, where there are no significant indentations. The legitimacy of Turkey's use of the islands of Imbros, Bozcaada (or Tenedos) and the Rabbit Islands as "fringing islands" is also regarded as doubtful.¹³²

The Turkish legislation refers to "areas with islands located close to the shore," where straight baselines connecting the foremost points of the islands may be drawn, rather than the stricter requirement of the Territorial Sea Convention of a fringe of islands in the immediate coastal vicinity. Imbros and Bozcaada lie nearly 30 miles apart, a distance which was regarded by Hodgson as too great to be regarded as "a fringe of islands,"¹³³ although neither the Territorial Sea Convention nor the 1982 Convention define what distance may separate islands in order to identify the islands as "a fringe." Neither do the Conventions define how many islands constitute "a fringe," although it may be thought that two islands is the minimum number required,¹³⁴ whilst remembering that in the Fisheries Case, Norway had approximately 120 000 islands, islets, rocks and low-tide elevations off its coast.¹³⁵

Addressing these questions, Bernhardt *et al* have proposed that islands considered part of "the fringe" should not be separated by more than 24 miles, that being the maximum distance between islands that

would permit 12 mile territorial seas to overlap.¹³⁶ More significantly, these experts also require that the islands concerned do not deviate more than 20° either from the opposite mainland coast or its general direction, and that they mask 50 per cent of the same. On both counts, the Turkish straight baselines fail.

Imbros deviates from the general coastal direction by approximately 60°. Although Bernhardt *et al* regard this as permissible if, as here, the baseline links a fringing island with the mainland coast, the fact that there are but two islands would seem to deny their status as "a fringe," although these experts are largely silent on this point. However, in the discussion of their masking criterion, they do quote Beazley's view that:

"... 'fringe of islands' must mean a number of islands although the exact number will depend partially on size; three large islands might constitute a fringe where three islets over the same area would not."¹³⁷

The point here is that, in its original conception in the Fisheries Case, the condition of fringing islands was intended to cover those cases in which the islands had such a unity with the mainland coast that from the navigational point of view they appeared to constitute the mainland coast, i.e. that the sea areas lying behind the islands were sufficiently closely linked to the land domain as to be subject to the régime of internal waters. Consequently, in order that the concept

of island screened coasts not be lost, Bernhardt *et al* require that 50 per cent of the opposite mainland coast be screened by the fringing islands for straight baselines to be permissible.¹³⁸ This is ascertained by drawing perpendiculars from artificially constructed general direction lines: where these intersect offshore islands the coast is considered to be masked. The relative lengths of masked and unmasked coast are then computed to determine the proportion screened by the fringing islands.¹³⁹

Applying this methodology to the islands of Imbros and Bozcaada, one finds that less than 50 per cent of the coast is screened by the two islands, and thus, straight baselines may not be drawn.¹⁴⁰

On 20 May 1982, Turkey issued new legislation concerning the delimitation of its territorial sea limits. Article 3 of Law No. 2674 stated that the territorial sea would be measured from baselines "to be determined by the Council of Ministers," such baselines to be shown on large-scale naval maps prepared for this purpose (Article 5).¹⁴¹ In the absence of such maps, it must be presumed that the Turkish straight baselines are unchanged, and that the above analysis remains valid.

(v) France

On 19 October 1967, France issued a Decree by which it defined "the straight baselines and the closing lines of bays serving to determine the baselines from which the breadth of the territorial

water is measured" (Figure 15). However, this Decree is problematic because it does not distinguish between bay closing lines and straight baselines and, therefore, it is not clear whether juridical bays are enclosed as bays or as part of the straight baseline system. Thus, for the purposes of this discussion, it is assumed that juridical bays are enclosed as part of the French straight baseline system, largely because Article 2 of the Decree repeals that of 9 July 1888, by which bay closing lines were previously established.¹⁴⁷

Exceptions to the above are those indentations which are closed by single straight lines, detached from the continuous straight baselines which run along the French mainland coast and the western and the eastern coasts of Corsica. The legitimacy of these single closing lines is measured against the rules for bay enclosure contained in Article 7 of the Territorial Sea Convention, and as such, those baselines which close the Golfe d'Aigues Mortes,¹⁴⁴ the Golfe des Saintes Maries (Golfe de Beauduc), the Baie de Anges and the Baie de Villefranche (enclosed together by a single line), are invalid, as none of these indentations is a juridical bay. On the other hand, the Baie de Roquebrune and the Baie de St. Hospice (Baie de Beaulieu) are examples of juridical bays, and are enclosed as such.¹⁴⁵

As for the straight baselines drawn along the remainder of France's Mediterranean mainland coast, Prescott regards the enclosed coast as sufficiently indented,¹⁴⁶ although whether the French mainland coast can really be regarded as "deeply indented and cut into" is

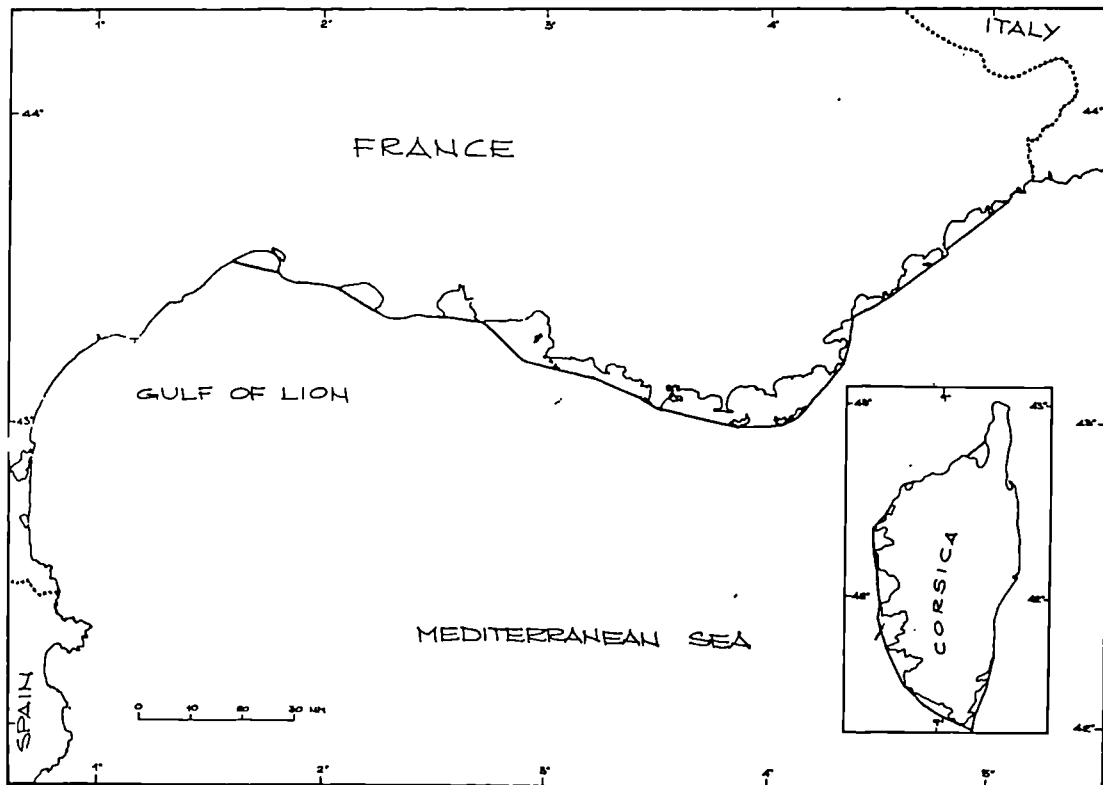


Figure 15 - France's straight baselines.

Source: G. Francalanci, S. Mongardini, D. Romano and T. Scovazzi Atlas of the Straight Baselines: Part I: Art. 7 of the Convention of the United Nations on the Law of the Sea, p. 60. (Milan: Giuffrè, 1986)

questionable. Applying the aforementioned criteria for deeply indented coasts developed by Bernhardt *et al*,¹⁴⁷ the French mainland coast is not deeply indented, for none of the enclosed indentations meet the required 6:10 ratio of coastal penetration to segment length, although perversely this means that the baselines do not depart appreciably from the general coastal direction.

With respect to the use of offshore islands, from a point east of the Rhône delta in the Golfe de Fos until the Toulon roadstead, eight baseline segments "enclose embayments of a rugged coastal region utilizing offshore islands as basepoints."¹⁴⁸ These baselines are not continuous, but only "minor" sections of insular or mainland coast serve as the territorial sea baseline. East of Toulon and as far as Golfe Juan, eleven baseline segments cover more than 75 miles of similar coastline.¹⁴⁹

Of the fringing islands used as basepoints, (e.g. Riou, Planier, Grand-Rouveau and Embiex), Prescott considers the Isles d'Hyeres to be sufficiently numerous and close to the coast to constitute a fringe of islands in the immediate coastal vicinity.¹⁵⁰ O'Connell, however, is critical of this use of offshore islands as basepoints, commenting that the French practice "demonstrates that little attention is paid to the limitations of the word 'fringe' when considering the inclusion of coastal islands in straight baselines." Even so, he takes the view that State practice has liberalised the fringing island requirement:

"Logically 'fringe' excludes the mere existence of islands, but the view that there must be a continuous fringe sufficiently solid and close to the mainland as to form a unity with it, or an extension of it in a seaward direction, can no longer be sustained."¹⁵¹

Bernhardt *et al*'s criteria for fringing islands are an attempt to deny this assertion. The application of these criteria to the French mainland coast would deny the French use of straight baselines to all but the Isles d'Hyeres. Indeed, use of the Ile du Planier in the approaches to Marseille depends solely on the light placed upon it, as do the turning points of la Cassidaigne and the Ile du Grand Rouveau. The solitary Ile de la Boute conveniently forms part of the baseline illegally enclosing Golfe Juan.

France has also drawn straight baselines along the south-east and west coasts of Corsica from Cap de la Marsetta to the northeastern point of the Golfe de Pinarello, where there are a series of deep indentations and offshore islands and islets. In all, there are sixteen continuous baseline segments along the Corsican coast totalling approximately 108 miles in length. In addition, on the west coast, the Golfe de St. Florent and the Golfe de Calvi are juridical bays, and are enclosed as such.¹⁵²

Applying the criteria for deeply indented coasts developed by Bernhardt *et al*, the baselines running from Ilôt de Gargalo to Pointe

de Senetose would appear to enclose indentations with a 6:10 ratio of coastal penetration to segment length permitting straight baselines to be drawn. However, there are insufficient deep indentations along other parts of the coast for straight baselines to be employed.

As to the use of offshore islands, the isolated Ilôt de Gargalo and the Iles Sanguinaires are used as basepoints along Corsica's western coast without truly fulfilling any of the objective criteria for fringing islands. However, those islands lying in the Bonifacio Strait such as Les Moines, and the Iles Cerbicales, which are also linked by straight baselines to the Corsican mainland, may be regarded as a "fringe of islands" in the immediate coastal vicinity.

Fortunately, taken as a whole, although the straight baseline system has significantly increased French internal waters, it "has a limited effect on the extension of the seaward limit of the French territorial sea."¹⁵³

(vi) Syria

By Article 5 of Legislative Decree No. 304 of 28 December 1963, Syria provided for straight baselines to be drawn along its Mediterranean coast. Article 4 provided that the Syrian territorial sea be measured:

"...from the straight base line, or from the lowest tide of the circumscribed islands extending along the sea coast, as shown on the large scale map; and approved by the Syrian Arab Republic."¹⁵⁴

To date, however, no such map has been published, which makes it difficult to locate precisely where such baselines may be in operation, although given that the Syrian coastline is neither deeply indented nor fringed with many islands, the Geographer has found it possible to suggest the "general areas" where Syria *might* draw straight baselines.¹⁵⁵

Nevertheless, this is a problematic exercise because Article 2 of the Decree defines internal waters as including the waters over the land in any "shoal" lying no farther than 12 miles from land or any Syrian island, a "shoal" being defined as a region within the territorial sea "covered with shallow water, part of which remains uncovered with water at the lowest level reached by the low tide." The Decree further provides that the baseline of the territorial sea may be formed by lines "drawn from the land all along the external edge of the shoal." The Geographer suggests that this use of the seaward edge of a shoal would seem to imply that Syria permits straight baselines to be drawn to and from low-tide elevations, which is forbidden by Article 4(3) of the Territorial Sea Convention "unless lighthouses or similar installations which are permanently above sea level have been built upon them."

Syria is neither a party nor a signatory to either the Territorial Sea Convention or the 1982 Convention. Nevertheless, the Geographer notes that "customary state practice" does not sanction the use of submerged features for straight baseline drawing,¹⁵⁶ whilst Prescott refers to Article 4(1) of the Territorial Sea Convention which requires that straight baselines connect "appropriate points." He believes this to mean that the "appropriate" basepoints be located on or above the low-water line, rather than below the sea surface,¹⁵⁷ for to enable basepoints to be located in the sea would not only make a mockery of the requirement that basepoints be visible to navigators, (the underlying principle of Article 4(3)), but also encourage States to use basepoints lying far offshore.¹⁵⁸

Article 5 of the Syrian Decree provides that straight baselines of up to 12 miles in length may be drawn between islands less than 12 miles apart. These lines are to be drawn "from the land, then along the external shores of the group of islands if they are in the form of a range or lines to be drawn on the prominent shores of the islands if they do not form a range," all such lines, whether to islands, or along shoals, being drawn "in a way not to depart from the general direction of the seashore." Applying these provisions, the Geographer describes how straight baselines may be drawn along the southern Syrian coast linking various islands and islets less than 12 miles apart. These baselines might then be extended northward to include shoal waters near al Marqab, Ra's Balat al Malik, and Jablah, and along the peninsula of Ra's ibn Hani', to terminate at the small offshore island of Pigeon.

The "total effect" upon the delimitation of Syria's territorial sea of this hypothetical straight baseline system would, however, be small, given that the appropriate geographical features for its construction are limited in extent.¹⁵⁹

By Law No. 37 of 16 August 1981, the Syrian territorial sea was extended to 35 miles. Where this Law conflicts with previous Syrian legislation, it is to prevail. However, there is no mention of the baselines from which the new territorial sea limit is to be measured and, therefore, it must be assumed that the baselines defined in 1963 are still in operation.¹⁶⁰

(vii) Spain

By Act No. 20 of 8 April 1967, Spain defined its baseline as "the low-water mark along all coasts under Spanish sovereignty," but added that it might, "in places where it considers this advisable, permit straight baselines to be drawn joining appropriate points on the coast, in accordance with the relevant international standards."¹⁶¹ Such baselines were duly drawn for its Atlantic and Mediterranean coasts under Decree No. 627 of 1976, geographical co-ordinates defining the appropriate turning points.¹⁶² Certain of these co-ordinates were subsequently amended by Royal Decree No. 2510 of 5 August 1977.¹⁶³

Insofar as Spain's Mediterranean coast is concerned, 39 straight baselines have been drawn along almost the entire length of this

coastline. Straight baselines have also been drawn along the northern shore of the Strait of Gibraltar, and to enclose the separate Balearic Island archipelagoes (Figure 16). Prescott criticises these baselines on two separate counts:

(a) he does not regard the Spanish mainland coast as being deeply indented;

(b) he denies the right of coastal States to surround their offshore archipelagoes with straight baselines.¹⁶⁴

An examination of the Spanish mainland coast shows it to be gently curved. There are but two short sections of this coast which have not been "straightened" - between Cabo de Salou and Barcelona, and between Arenys de Mar and Cabo Bagur¹⁶⁵ - and these seem only marginally less curved than some other sections of coast that have had straight baselines drawn along them. Indeed, Prescott states that "the Spanish coast is too smooth and lacking in islands to justify the use of straight baselines;" however, he implies that there exist exceptions in the promontories near Javea and the Ebro river delta,¹⁶⁶ references which are both unclear and misleading.

Various small islets which lie along the Spanish coast in its immediate vicinity, such as Hormigas, Tabarca and Portichol, have also been used as basepoints,¹⁶⁷ although there is little evidence to suggest that they have any screening effect upon the Spanish mainland coast sufficient to regard them as fringing islands. Similarly, applying the criteria for deeply indented coasts developed by Bernhardt

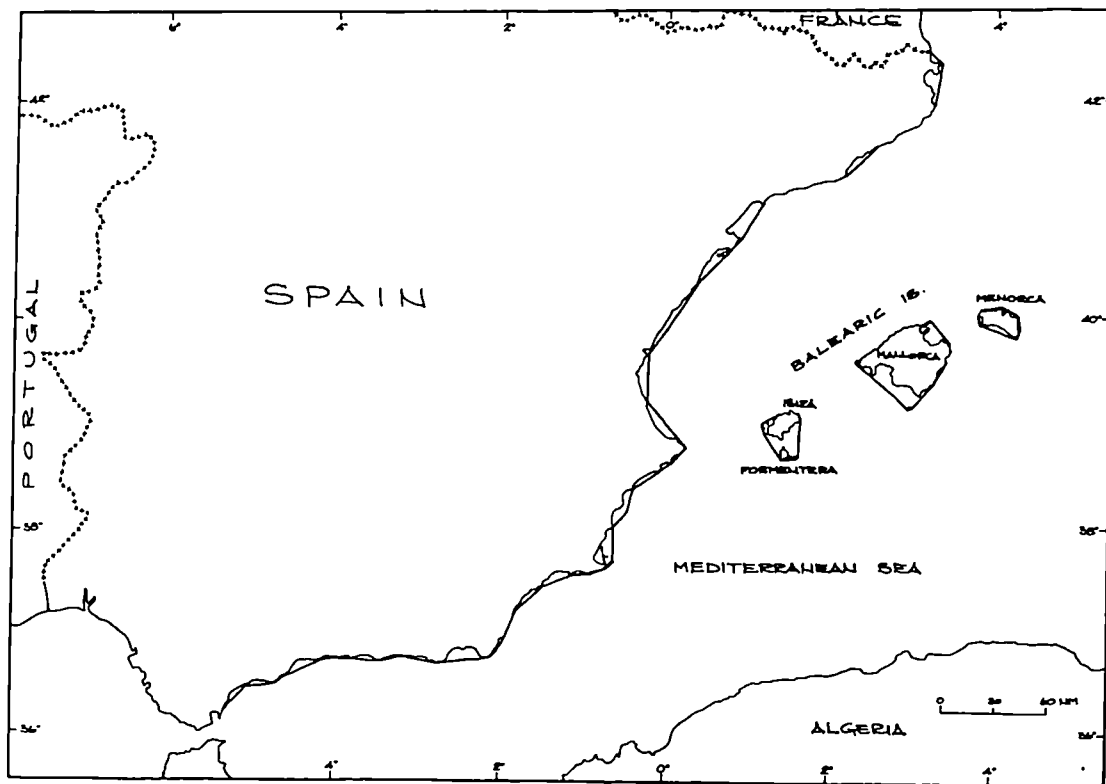


Figure 16 - Spain's straight baselines.

Source: G. Francalanci, S. Mongardini, D. Romano and T. Scovazzi Atlas of the Straight Baselines: Part I: Art. 7 of the Convention of the United Nations on the Law of the Sea, p. 120. (Milan: Giuffrè, 1986)

et al only serves to confirm the visual impression of a coast insufficiently indented for straight baselines *throughout* its length. Indeed, of the many bays closed, it is assumed that their enclosure has been under the rules for straight baselines rather than the rules for bay closure, as none of them appear to have juridical bay status.

As to the Balearic Islands: straight baselines link together Ibiza and Formentera, along with several other tiny offshore islands such as Conejera off the north-west coast of Ibiza. At the 1974 Caracas session of UNCLOS III, several States maintained that the right to establish archipelagic waters should not extend to those continental States which possessed offshore archipelagoes. Amongst them was Algeria, whose delimitation of maritime boundaries with Spain stood to be affected if the latter were to claim archipelagic baselines for the Balearic Islands, (although the major motivation for confining the archipelagic concept to island States appears to have been a fear that a loose definition of what constituted an archipelago would lead to a proliferation of claims which could severely curtail the freedom of navigation).¹⁶⁸ Spain, on the other hand, was amongst those States which called for a special régime to govern offshore archipelagoes of mainland States; together with France, it complained that the sovereign equality of States did not justify the arbitrary distinction between an offshore archipelago and an archipelagic State.¹⁶⁹

UNCLOS III's rejection of this view may have prompted Spain to claim archipelagic baselines for the Balearic Islands in 1977. These

baseline claims are conservative, given that there has been no attempt to join Ibiza, Formentera, Mallorca and Menorca within a single archipelagic baseline system: nevertheless, under Article 47 of the 1982 Convention, only archipelagic *States*, not offshore *archipelagoes* are entitled to draw straight baselines around their outermost islands. Mainland States may only employ straight baselines for their offshore archipelagoes if the archipelagoes *themselves* are "fringing islands" of the mainland coast. Alternatively, if the smaller islands in a mainland State's offshore archipelago can be said to be a fringe of islands in the immediate vicinity of the archipelago's largest island, then Article 7(1) may be applicable,¹⁷⁰ i.e. if Formentera and the other islands off Ibiza can be said to "fringe" Ibiza - the largest island - then straight baselines may be drawn.

The tiny islands off Ibiza do seem to constitute a "fringe" in the immediate coastal vicinity, but Formentera is but one island off Ibiza's southern coast, and therefore not legitimately linked to it. Similarly, if one takes the term "fringe of islands" to indicate the presence of two or more islands near to each other and in the immediate coastal vicinity, then the straight baselines that have been drawn around Mallorca, (using the islands of Cabrera and Dragoneras as basepoints off its southern and western tips respectively), are illegitimate, for Cabrera and Dragonera are but isolated islands rather than island "fringes" of Mallorca.

Straight baselines have also been drawn around parts of the coasts of Mallorca and Menorca on the basis that they are deeply indented: however, apart from a couple of possible small juridical bays on the north-east coast of Menorca, their coasts cannot be regarded as sufficiently indented for straight baselines, whether by subjective evaluation or objective analysis.¹⁷¹

The reasons why Spain has chosen to promulgate straight baselines along most of its coastline have been made clear in the preamble to the relevant legislation. For example, Act No. 10 of 4 January 1977 states that:

"In view not only of the technical advantages which the system of straight baselines and bay closing lines presents for the purpose of determining the outer limit of the territorial sea in the case of an irregular coastline like that of Spain, but also of its importance for the purpose of drawing the equidistance lines to delimit maritime spaces in relation to those of other States, the Act opts for application of that system and, as regards the outer delimitation of the territorial sea, contains the only provision which can be adopted unilaterally, namely, that our waters shall not, failing agreement between the States concerned, extend beyond the median line between the respective baselines, provided that the latter are in accordance with international law."¹⁷²

Moreover, these advantages are not confined to the territorial sea, but also apply to its maritime zones, as confirmed by Law N. 15 of 20 February 1978, by which Spain established an E.E.Z. off its *Atlantic* coasts, measured from "straight base lines joining the outermost points of the islands and islets forming the archipelagos" of the Canary Islands.¹⁷³ It is, therefore, somewhat ironic that in the Mediterranean context, "because the coast is so *regular*, the baselines do not push Spain's maritime claims seawards."¹⁷⁴

Finally, it should be noted that Spain's mainland straight baseline system is broken in the region of Gibraltar, the sovereignty of which it disputes with the United Kingdom. Although Spain refuses to recognise the U.K.'s territorial sea claim for Gibraltar, it has refrained from confirming its view of Gibraltar's ineligibility for offshore jurisdiction through the placing of Gibraltar behind its straight baselines. Such an action would not only have been provocative, but would also perhaps be in violation of Article 4(6) of the Territorial Sea Convention, which states that a system of straight baselines may not be so applied as to cut off the territorial sea of another State from the high seas.

(viii) Malta

The existence of straight baselines along the Maltese coasts does not appear to have come to light until the submission of the Maltese Memorial to the I.C.J. on 26 April 1983, although it appears that such

baselines have been in existence since at least 12 July 1972, when Malta produced a draft agreement defining its continental shelf boundary with Libya as an equidistance line based on "the nearest points of the baselines from which the territorial sea of each country is at present measured." The accompanying map indicated that this boundary was constructed from the low-water line along the Libyan coast, and from Maltese straight baselines,¹⁷⁵ presumably drawn in accordance with the Territorial Waters and Contiguous Zone Act of 10 December 1971, by which Malta defined its territorial waters as extending 6 miles "from low-water mark on the method of straight baselines joining appropriate points."¹⁷⁶ However, in its Memorial to the I.C.J., Libya claimed that it had been unable to determine precisely what these "appropriate points" were,¹⁷⁷ suggesting that no map or co-ordinates of the Maltese straight baselines had ever been supplied to Libya before the I.C.J. proceedings.

Malta's straight baseline system, as depicted on the map submitted to the I.C.J., includes drawing baselines from the island of Malta to Gozo to its north-west, and to the tiny uninhabitable rock of Filfla to its south (Figure 17). The island of Comino is enclosed within the straight baselines system, although no baselines are actually drawn to it.

As early as 13 July 1972, Libya challenged the "appropriateness" of using Filfla as a basepoint in the development of a median line,¹⁷⁸ notwithstanding its subsequent rejection of a median line delimitation.

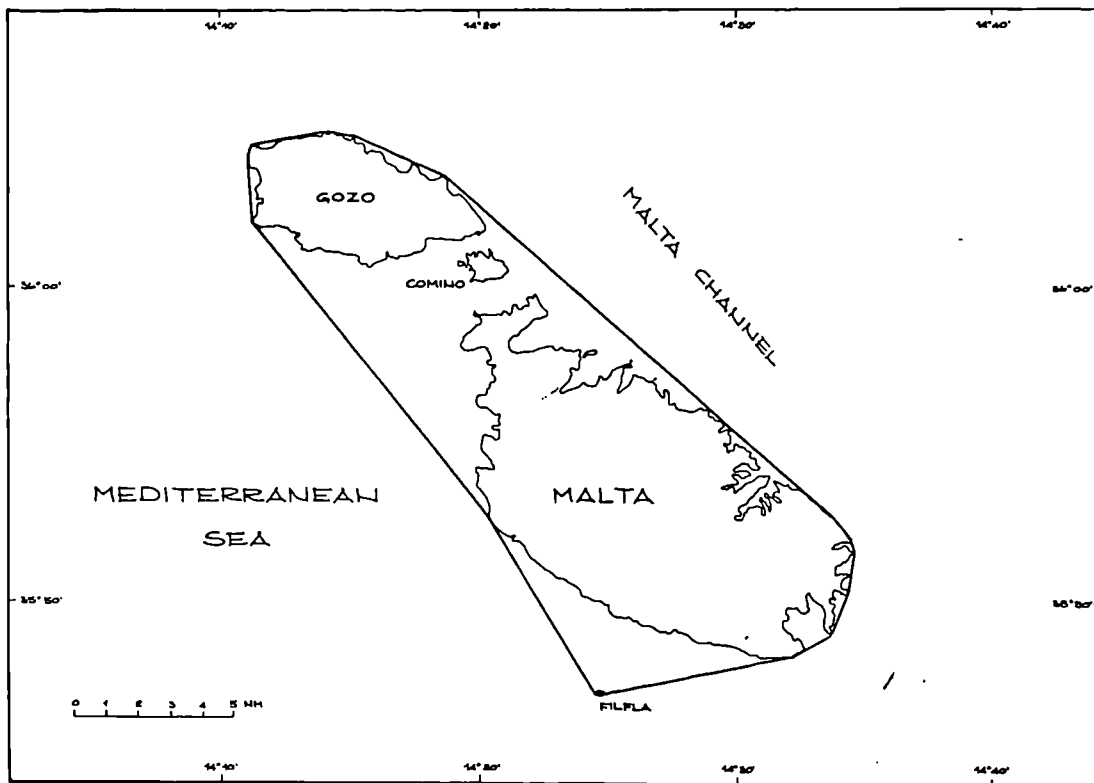


Figure 17 - Malta's straight baselines.

Source: G. Francalanci, S. Mongardini, D. Romano and T. Scovazzi Atlas of the Straight Baselines: Part I: Art. 7 of the Convention of the United Nations on the Law of the Sea, p. 95. (Milan: Giuffrè, 1986)

In the subsequent Libya-Malta Continental Shelf Case, the I.C.J. did not express an opinion as to whether the inclusion of Filfla in the Maltese baselines "was legally justified,"¹⁷⁹ although Prescott is clear that Malta's use of Filfla is illegal.¹⁸⁰ The I.C.J. did, however, refuse to countenance its use as basepoint in the development of a provisional median line boundary between the two States.¹⁸¹

Malta cannot legitimise its straight baselines by reference to the provisions of Article 47 of the 1982 Convention, which concern straight *archipelagic* baselines, because it cannot fulfil paragraph 1, which states that the ratio of the area of water to the area of land enclosed by archipelagic baselines must be between 1:1 and 9:1.¹⁸² Thus, as with Spain's offshore archipelagoes, the smaller Maltese islands must be found to "fringe" the largest island of Malta for the baselines to be valid, which it would appear they do, with the exception of the isolated rock of Filfla.¹⁸³ However, in accepting that the appropriate geographical conditions exist for Malta to draw straight baselines on this basis, their actual use must be criticised as departing from "the general direction of the coast" in several places. In particular, those straight baselines which link Gozo to the main island depart appreciably from the general direction of the coast.

Similarly, although it may be permissible for straight baselines to link the fringing islands to the main island, those baselines drawn along the coast of Gozo, and indeed, along the main island's coast, can only be approved if the relevant coasts are deeply indented. Applying

the criteria for deeply indented coasts developed by Bernhardt *et al*, two sections of the baselines drawn along the coast of the main island enclose at least three indentations with a ratio of coastal penetration to segment length of at least 6:10. However, one cannot approve of linking these two sections of the south-eastern coast which are virtually straight; nor indeed, can one approve of those baselines which fringe the northern and eastern coasts of Gozo.

(ix) Italy

Under Presidential Decree No. 816 of 26 April 1977, Italy made "exaggerated" straight baseline claims (Figure 18), which are open to considerable criticism.¹⁸⁴ The lines along the coast of the Gulf of Genoa, from approximately La Spezia to Sanremo, enclose a relatively smooth coast, rather than one which is deeply indented. Other relatively smooth coasts which have been enclosed include the south coast of Sicily from Licata to Cape Granitola, the north coast of Sicily between Cape Zafferano and Cape Calava, and the east coast of Sardinia south of the Gulf of Orosei. On the Adriatic coast, the baseline running northwest of Termoli borders a very smooth coast, whilst in the Ionian Sea, the coast south-west of Roccella is not deeply indented, although Ronzitti takes a different view. It is also debateable whether the baselines linking Alice Point, the mouth of the River Neto, and Cape Colonna, border anything other than a gently curved coast, although again Ronzitti takes a different view. He also upholds the straight baseline drawn across the Gulf of Squillace, as

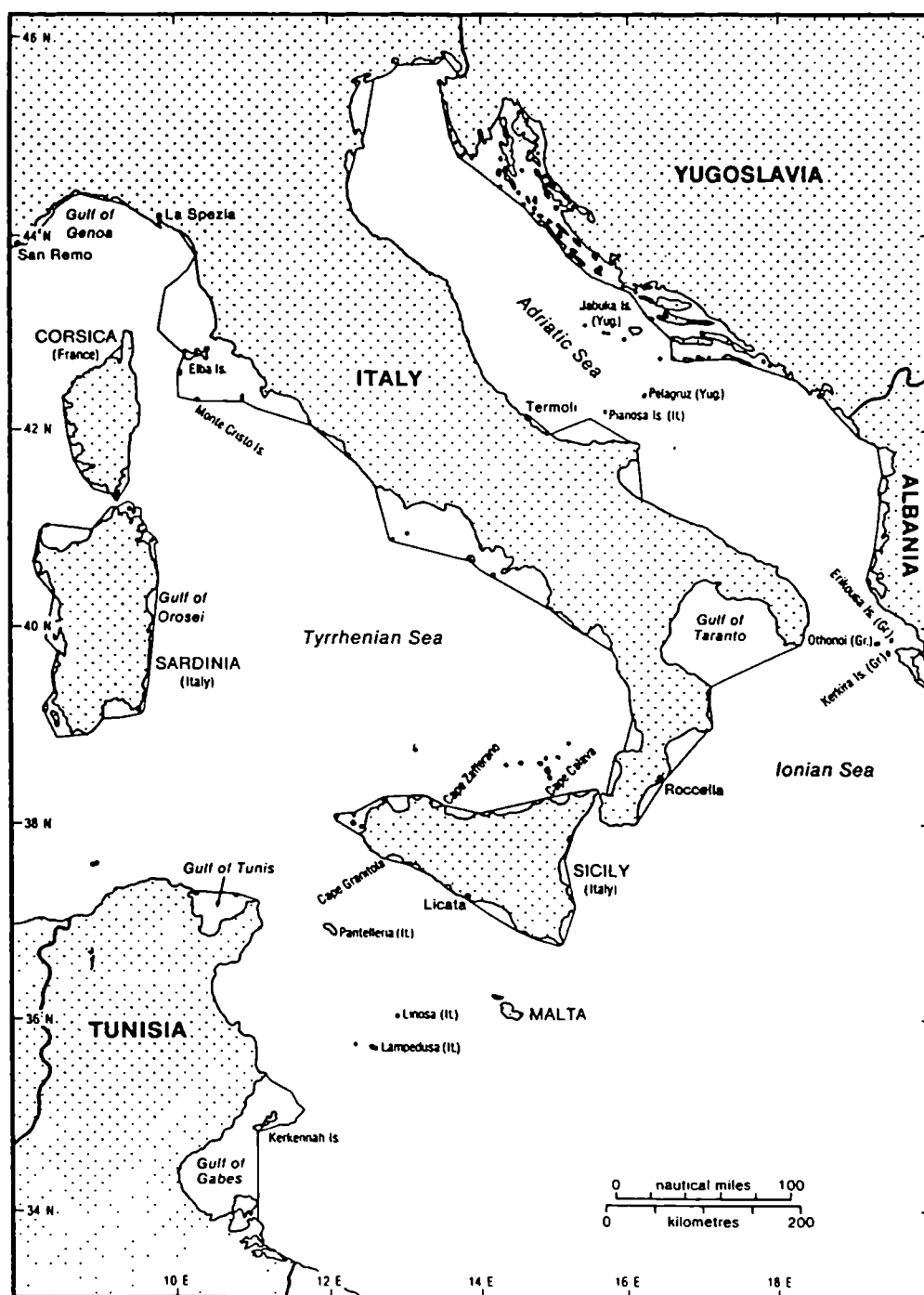


Figure 18 - Italy's straight baselines.

Source: S.R. Langford "Internal Waters as Extensions of State Sovereignty in the Mediterranean Sea: The Claims of North African States to Straight Baselines and Historic Bays" in G.H. Blake and R.N. Schofield (Eds.) Boundaries and State Territory in the Middle East and North Africa, pp. 135-146, at p. 146. (London and Sydney: Croom Helm, 1987)

does Adam,¹⁸⁵ but if the other baselines in this region are held to be illegitimate - as they are - then this Gulf may only be enclosed if it is a juridical bay, which it is not. Thus, one is forced to agree with Westerman that this portion of the Ionian coast is not an example of a coast "deeply indented and cut into," in the sense in which Article 4 was intended to apply.¹⁸⁶

Interestingly, Ronzitti is willing to concede that this is the case. However, he relies upon O'Connell's observation that State practice has liberalised Article 4(1)'s requirements, to state that:

"A strict interpretation of the expression 'deeply indented and cut into' cannot resist the test of subsequent [State] practice that Article 31 (3)(a) of the Vienna Convention on the Law of Treaties mentions among the general rules of treaty interpretation."¹⁸⁷

He argues that if States had wished to outlaw liberal interpretations of Article 4, its qualitative provisions would have been replaced by mathematical formulae in Article 7 of the 1982 Convention, thereby providing objective criteria by which to declare certain straight baselines illegal. That they were not, is evidence that liberal interpretations of Article 4's rules were not taken into account in formulating Article 7, which repeated the Territorial Sea Convention's rules regardless.¹⁸⁸ Therefore, Ronzitti almost goes so far as to say that customary and conventional international law are at variance with

regard to the rules for straight baselines; but this cannot be the case, as Article 7's repetition of the 1958 rules represents a restatement of both conventional and customary norms.

Even so, as a result of State practice, the language used in Article 7 *may* be subject to a different *interpretation* to that intended in 1958, in which case liberal State practice *was* taken into account in formulating Article 7. Alternatively, Article 7 may be read as the international community reiterating that straight baselines should be drawn under their original strict intent; or that the original rules were sufficiently precise to fulfil their objectives. However, the latter two views would be hard to substantiate, given the evidence of State practice, and the fact that the rules for baselines were paid scant attention at UNCLOS III.

Regardless of the above, the fact nevertheless remains that Italy has abused the spirit if not the letter of the law regarding the application of straight baselines to deeply indented coasts. Prescott is willing to concede that straight baselines have been legitimately applied to parts of the southeast and west coasts of Sicily, and to all but the western coast of Sardinia south of the Gulf of Orosei; but application of Bernhardt *et al*'s criteria for deeply indented coasts would deny the application of straight baselines to *any* part of Italy's mainland or island coasts. Nowhere are there baselines which enclose at least three indentations with the critical 6:10 ratio of coastal

penetration to segment length, although there are isolated indentations which might qualify as juridical bays.

Italy has also liberally interpreted the rules for fringing islands. In the Adriatic Sea, Italy uses the isolated island of Tremeti as a basepoint,¹⁸⁹ and so encloses a considerable area of internal waters; in the Tyrrhenian Sea, the baselines depart from the coast to enclose the Archipelago of Tuscany in the north, and to link other small islands such as the Pontine Islands further to the south. In addition, the Egada Islands are linked by straight baselines to each other and to the Sicilian coast off whose western tip they lie. However, where islands are arranged like "stepping stones" at right angles to the general direction of the coast, as to a certain extent the Egada Islands are, it would not appear that they fulfil the requirement of being located "along the coast."¹⁹⁰ For this reason, Bernhardt *et al* devised the rule that except in the case of a baseline linking fringing islands to the mainland, the directional trend of the outermost fringing islands should not deviate more than 20° from the opposite mainland coast or its general direction, whichever was the more parallel.¹⁹¹ On this basis, not only the Egada Islands but also the Pontine Islands and the Archipelago of Tuscany fail to qualify as fringing islands.

Nevertheless, the relative proximity of the Egada Islands to both the coast and to each other renders them more appropriate than the other island groups used as basepoints by Italy. Prescott states that:

it is "Ltraining credulity" to consider Africa Island and the island of Go gona as fringing islands,¹⁹² whilst several Italian authors have questioned their Government's straight baselines incorporating the Archipelago of Tuscany.¹⁹³ However, De Guttry holds that even if the baseline was fixed as the low-water line, "the regime of waters around this archip lago would be very similar to that pursuant to the adoption f the 1977 Decree."¹⁹⁴

The implication of De Guttry's comment is that where islands ate overlapping territorial waters forming a continuous seaward b lt, a State is justified in viewing them as a "fringe" of islands in h imm diate coast l vicinity.¹⁹⁵ However, in the Fisheries Case, the I.C.J was impressed by the fact that the islands, islets, rocks and r efs, formed *an extension of the mainland*; and indeed, it was the *c eening effect* of the *skjaergaard* which prompted the Court to rule that in such geographical circumstances, "the baseline becomes independent of the low-water mark, and can only be determined by means of g om tric construction."¹⁹⁶ Consequently, several commentators have as erted that what must be present is a continuous fringe of islands sufficiently solid and close to the mainland to form a unity with it,¹⁹⁷ and indeed, it sh uld be only in those *exceptional* instances where the pattern of offshore islands complicates the delimitation of the outer limit of the territorial sea that straight baselines should be employ d. The accidental fact of a few islands lying close to the coast is not sufficient to warrant straight baseline use.¹⁹⁸ Thus, M D gal and Bu ke believed that the situations "in which the presence

of a few islands creates a very intense concentration of coastal interests in the waters adjacent to them and the mainland" sufficient to warrant the authority of internal waters would not only be rare, but require the claimant State to carry a heavy burden of proof.¹⁹⁹

The I.L.C. lost sight of this when it provided that a special régime was required necessitating departure from the low-water mark in the *unexceptional circumstance of islands in the immediate vicinity of the coast*: no longer was there any need for a coastal archipelago to screen the coast with which it was intimately linked. Thus, what remains is simply a weak provision that there must be a fringe of islands in the offshore vicinity.²⁰⁰ To redress this, Bernhardt *et al* require that fringing islands should mask at least 50 per cent of the opposite mainland coast (measured along its general direction) to qualify for straight baselines.²⁰¹ However, the fulfilment of this criterion alone is insufficient,²⁰² and is clearly made more difficult where the islands concerned are far apart.

Several of the Italian islands used as basepoints lie several miles off the mainland or Sicilian coasts, and in the case of some of the islands of the Archipelago of Tuscany, close to the French coast of Corsica, (where, according to Kliot, they have provoked a dispute between Italy and France).²⁰³ The requirements that a fringe of islands lie in "the immediate coastal vicinity" and that "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters" seem to have

been ignored. These provisions would appear to require islands to be located within a certain restricted distance offshore, although none is stipulated. Indeed, at both the I.L.C. and UNCLOS I, the proposal that fringing islands lie within 5 miles of the coast was rejected as arbitrary, but a limit of 12 miles would seem reasonable, as it would require all islands used as basepoints to lie within the territorial sea as measured from the mainland. They would also then be within sight of land, as recommended by Hodgson and Alexander, and thus sufficiently closely linked to the land to be regarded as internal waters.²⁰⁴

For this reason, the suggestion of Bernhardt *et al* that a 48 mile limit apply, seems ill-considered. It is justified on the basis that with a 12 mile territorial sea measured from both islands and mainland, "there would be as wide an expanse of high seas between the two hypothetical territorial sea areas as there is territorial sea itself."²⁰⁵ However, as the authors acknowledge, the establishment of straight baselines converts the intervening waters from territorial waters into internal waters: hence there would be no intervening high seas area to consider! Moreover, notwithstanding the retention of the right of innocent passage through waters so converted, the accretion of waters under the complete sovereignty of the coastal State which the operation of such a principle would allow, would appear a manifest abuse of the legal requirements that a fringe of islands lie in "the immediate coastal vicinity" and that the sea areas lying within the lines " be sufficiently closely linked to the land domain to be subject

to the régime of internal waters." Bernhardt *et al* are only willing, however, to go so far as to say that "in certain circumstances" 48 miles, or less, may be "too broad and cut off waters that should not be given internal status."²⁰⁶

Application of a 12 mile offshore limit to the islands used as basepoints by Italy would cast doubt upon the legitimacy of using basepoints in the Pontine and Tuscan island groups, although Prescott stresses that any such limit must be applied to the *inner edge* of the fringe of islands:

"Providing islands on the landward side of the fringe are in the immediate vicinity of the coast there can be no objection to the baseline being drawn around the seaward edge of the fringe. Further, providing that the territorial waters claimed from the fringing islands overlapped with the territorial waters claimed from the mainland, it would be difficult to argue that the fringe was outside of the immediate vicinity of the coast."²⁰⁷

Even on this basis, however, the Pontine Islands lie too far offshore to be regarded as being within the immediate vicinity of the coast, whilst Beazley might discount them as fringing islands on account of their small size.²⁰⁸

Insofar as the Tuscan Archipelago is concerned, the island of Elba lies within the Italian 12 mile territorial sea and may qualify the

rest of the archipelago as being sufficiently close to the mainland to be recognised as a fringe of islands in its vicinity. However, the distances between certain of the islands in this group are relatively large - although nowhere greater than the 24 mile limit proposed by Bernhardt *et al*²⁰⁹ - and this, combined with their small size - which reduces their screening effect on the mainland coast - casts doubt as to whether straight baselines can be drawn about them as a coastal fringe. As Prescott wryly comments:

"When navigators enter internal waters and cannot see land, the legality of the straight baselines is highly questionable!"²¹⁰

Nevertheless, it is interesting to note in this respect that Italy has not used the Eolie Islands to the north of Sicily as basepoints, given that they appear no less far from the coast than the other island groups utilised for straight baseline purposes.

A more legitimate Italian use of fringing islands occurs off the north-east and south-west coasts of Sardinia.

Fontana and Fusillo each attempt to defend the Italian legislation in terms of the straight baseline rules and, in Fusillo's case, by analogy with the Fisheries Case. Fontana states that straight baselines are appropriate to the Italian coast, "because the morphology of the coastline is one in which bays, coves and gulfs follow one after another and where archipelagos of islands exist in fairly close

proximity to the mainland." Consequently, in his view, the baselines "are in complete conformity with international law."²¹¹

Similarly, Fusillo argues that a "glance at a map," shows that all the islands used as basepoints conform with the requirement that they be a fringe in the immediate coastal vicinity, on the basis that these islands are to be considered (together with their respective archipelagoes) as being "very near" each other and "adjacent to the coast," if the distance between individual islands, and between those islands and the coast, rarely exceeds 24 miles, equivalent to twice the Italian territorial sea breadth. Where small areas of high seas remain within these island groups - an apparent admission that the islands within particular groups are not closely spaced - Fusillo utilises arguments concerning the geological, historical and economic links between the coast and the islands, to suggest that the sea areas lying within the baselines drawn from the mainland to the islands fulfil the requirement of being "sufficiently closely linked to the land domain to be subject to the regime of internal waters." In particular, she makes reference to:

- (i) the islands being a geological and geomorphological extension of the Italian landmass;
- (ii) the fact that the surrounding waters are not more than 20 metres deep;
- (iii) the "uninterrupted exercise of sovereignty by states which throughout centuries have held sway over the coast;"
- (iv) the administrative dependence of the islands upon the mainland.²¹²

However, the geological, geomorphological, and bathymetric arguments do not prove that the waters *geographically* have the character of territory sufficient to approve the baseline system, whilst the fact that the islands have long been under Italian sovereignty is not sufficient to prove a historic title over *the waters* in question.

Most Italian authors believe that their Government's straight baseline legislation was enacted not in terms of adherence to conventional rules, but for reasons of national security;²¹³ indeed, Fontana notes that the "simplification brought about by new baselines helps the activities of the police, and the surveillance of the vital interests of national defence, the struggle against smuggling, the preservation of marine life against pollution, the preservation of biological resources and the control of fishing."²¹⁴ Moreover, whilst the right of innocent passage is preserved through internal waters enclosed by straight baselines, there is no corresponding right of foreign overflight, and specifically within Italian internal waters, foreign merchant ships do not have the right of innocent passage, unless directed by a pilot. In addition, foreign military and naval vessels must give seven days prior notice for permission to enter Italian internal waters.²¹⁵ Coastal States also have a legal right both to protect their internal waters, subjacent seabed, and superjacent airspace "by whatever means they deem necessary," and "to implant or emplace in their internal waters active or offensive weapons and weapons systems," where they may be less detectable than upon land.²¹⁶ Likewise, where straight baselines extend the territorial

sea, there is a consequent reduction in the areas in which submarines may navigate beneath the sea surface.

Fontana states, however, that the application of straight baselines to Italian coasts was initiated as a consequence of the negotiation of continental shelf boundaries with neighbouring States, as straight baselines provided a better opportunity of upholding some of Italy's more determined positions with respect to boundary delimitation.²¹⁷ It is, therefore, somewhat curious to note that in none of continental shelf boundary agreements with neighbouring States have the Italian baselines had any effect upon the boundary as delimited.²¹⁸ Nevertheless, no doubt with delimitation in mind, Malta, by a Note Verbale of 24 June 1981, objected to Italy's straight baseline legislation stating that "it continues to consider that the baselines for the delimitation of Italian territorial waters and the continental shelf are those which were internationally recognised prior to April 26, 1977."²¹⁹

(x) Tunisia

By Law No. 73-49 of 2 August 1973, Tunisia established a 12 mile territorial sea measured from the low-water mark. However, this Law also allowed for straight baselines to be drawn in the shoal areas lying off Chebba and the Kerkennah Islands, where there are "fixed" fisheries.

The baselines referred to are those defined by geographic coordinates in Decree No. 73-527 of 3 November 1973 (Figure 19). Prescott appears to uphold these baselines as a legitimate use of fringing islands,²²⁰ a view with which Gioia concurs.²²¹ Elsewhere, however, Prescott states that it would not be reasonable so to regard them,²²² the position adopted by Libya, who vigorously protested the Tunisian straight baselines during their continental shelf dispute.²²³ In Libya's opinion, the Kerkennah Islands were not "part of an island fringe" but merely "two localised and isolated islands,"²²⁴ although the Tunisian Memorial in that case makes clear that the Kerkennah Islands comprise two main islands and a number of smaller islands.²²⁵

However, for Gioia, the decisive factor in considering the lawfulness of a straight baseline system is whether the system follows the general direction of the coast. On this basis, she finds it "incontrovertible" that the baselines in the Gulf of Gabès region follow the general coastal direction;²²⁶ and yet, because the baselines are drawn around the drying reefs which lie seaward of the Kerkennah Islands, De Guttry points out that "it has been held that the lines drawn around the Kerkennah Islands depart to a considerable extent from the general direction of the coast."²²⁷ That this is the case cannot be disputed - Gioia excepted - but Tunisia legitimises her claims by invoking both the legal doctrine of "historic waters" - about which the 1982 Convention is silent - and the rules of customary international law concerning straight baselines,²²⁸ Tunisia being only a signatory and not a party to the Territorial Sea Convention.

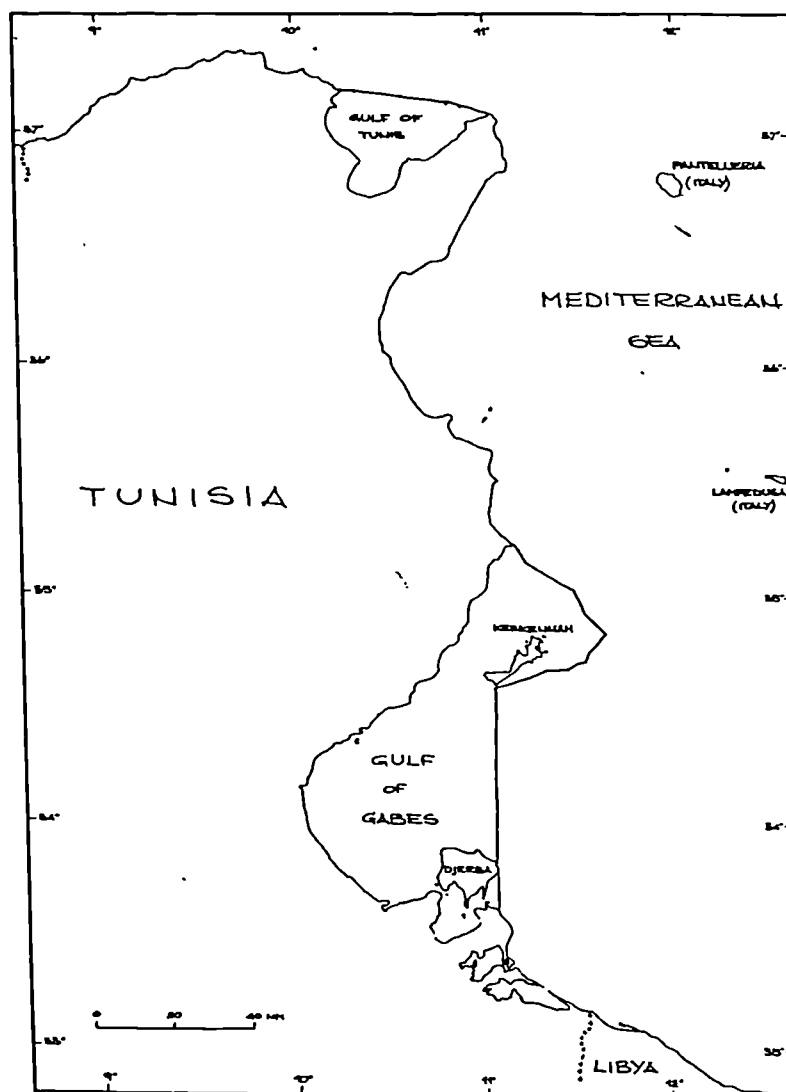


Figure 19 - Tunisia's straight baselines.

Source: G. Francalanci, S. Mongardini, D. Romano and T. Scovazzi Atlas of the Straight Baselines: Part I: Art. 7 of the Convention of the United Nations on the Law of the Sea, p. 129. (Milan: Giuffrè, 1986)

Insofar as the straight baseline argument is concerned, if the baselines followed the general direction of the coast then the linking of the Kerkennah Islands to the mainland might well be a legitimate use of fringing islands. However, considerable doubt surrounds the Tunisian case, not only because the baselines undoubtedly depart from the general coastal direction, but also because several of the basepoints utilised by Tunisia are "drying rocks" or "low-tide elevations" upon which Tunisia has sited light buoys.

The Norwegian straight baseline system approved by the I.C.J. in 1951 used three low-tide elevations as basepoints, the continuous use of which for this purpose was sanctioned by the Court.²²⁹ However, the I.L.C. diverged from the I.C.J. in not allowing low-tide elevations to be used as basepoints in straight baseline systems, because:

(i) "... otherwise the distance between the base-lines and the coast might be extended more than is required to fulfil the purpose for which the straight baseline method is applied;"

(ii) "... it would not be possible at high tide to sight the points of departure of the base-lines."²³⁰

On the other hand, where such elevations lay wholly or partly within the territorial sea as measured from an island or mainland, the I.L.C. sanctioned their use as basepoints for the extension of the territorial sea.²³¹

The controversy concerning the use of low-tide elevations as part of straight baseline systems may be traced to the 1930 Hague

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Codification Conference, where a number of delegations had been in favour of treating low-tide elevations in the same way as high-tide elevations, (i.e. as "islands"), but the I.L.C. emphatically denied that low-tide elevations could generate a territorial sea:

"Even if an installation is built on such an elevation and is itself permanently above water - a lighthouse for example - the elevation is not an 'island' as understood in this article."²³²

However, the I.L.C. did follow the compromise suggested in the Report of the Second Committee at The Hague, which held that low-tide elevations might be taken into consideration for the purpose of determining the outer limit of the territorial sea.²³³ As a result, Article 11 of the Territorial Sea Convention as adopted at UNCLOS I reads:

"1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own."²³⁴

This article is repeated as Article 13 of the 1982 Convention. A distinction is thus made between the right of a low-tide elevation to generate a territorial sea, and the use of low-tide elevations for the limited purpose of drawing baselines when they lie wholly or partly within the territorial sea.²³⁵

However, the effective assimilation of low-tide elevations to "islands" when they lie within the territorial sea does not occur when they are to be used as basepoints in a straight baseline system. At UNCLOS I, Norway and Iceland proposed the deletion of the I.L.C.'s paragraph, stating that baselines could not be drawn to and from low-tide elevations due to its inconsistency with the I.C.J.'s Judgement, but this was rejected. Instead, it was retained as Article 4(3) of the Territorial Sea Convention, but including an amendment proposed by Mexico to the effect that:

"Baselines shall not be drawn to and from rocks, shoals or other elevations which are above water at low tide only, unless lighthouses or similar installations which are permanently above sea level have been built on them."

As a result, there is an inconsistency between allowing low-tide elevations to be used as part of the normal baseline, but not as part of straight baseline systems,²³⁶ despite the fact that the territorial sea and all other offshore zones are measured from the baselines of the

territorial sea whether these be the low-water line or straight baselines. The I.L.C. explained this inconsistency by stating that:

"The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are assimilated to islands does not imply that such rocks and shoals are treated as islands in every respect ... If they were so treated, then where straight baselines are drawn, and particularly in the case of shallow waters off the coast, the distance between the base-line and the coast might be far greater than that required to fulfil the purpose for which the straight base-line method was designed."²³⁷

This would appear to be the situation with respect to the Tunisian straight baselines, although Tunisia might have believed that customary international law *permitted* low-tide elevations to be used as basepoints irrespective of whether they have lighthouses or similar installations permanently above sea level built upon them. This is because both Norway and Sweden,²³⁸ (who like Tunisia are not parties to the Territorial Sea Convention), have used as basepoints low-tide elevations without installations built on them; or alternatively, because Tunisia relied on the fact that the I.C.J.'s Judgement reflected customary international law and pre-dated the Territorial Sea Convention.²³⁹

However, the Geographer has stated that customary State practice *does not* sanction the use of submerged features without installations

permanently above sea level as basepoints in straight baseline systems,²⁴⁰ a view which would appear to have been confirmed by Article 7(4) of the 1982 Convention. This repeats the provisions of the Territorial Sea Convention, whilst adding the qualification that straight baselines may not be drawn to and from low-tide elevations without lighthouses or similar installations, "except in instances where the drawing of baselines to and from such elevations has received general international recognition." This qualification was proposed by Norway to cover the use of low-tide elevations as basepoints in its straight baseline system, a delimitation which received international recognition by the I.C.J. in 1951.²⁴¹ No baselines drawn to low-tide elevations since 1958 were intended to be covered by this provision, although its inclusion may have made it easier for some States to argue that the unprotested use of low-tide elevations as basepoints in their straight baseline systems for a certain period of time implied acquiescence in their method of baseline delimitation.²⁴² This argument cannot, however, be used by Tunisia, whose baselines have been protested by both Libya and Malta.²⁴³

The fact that UNCLOS I rejected any limit on the distance at which a straight baseline might depart from the mainland coast appears to mean that any low-tide elevation permanently above sea level, which has a lighthouse or similar installation built upon it - whether operational or not - may be used as basepoint from which to measure the territorial sea, irrespective of whether or not it lies beyond the territorial sea as measured from the mainland or an island. On the

other hand, Marston argues that insofar as the measurement of the territorial sea is concerned, the situation of a low-tide elevation basepoint in a straight baseline system lying within the territorial sea is not contemplated by Article 11 of the Territorial Sea Convention; and where such an elevation lies beyond the territorial sea limit - as is the case for many of the Tunisian basepoints - it might be argued that a baseline drawn to this feature would depart from the general direction of the coast, or enclose sea areas which were not "sufficiently closely linked to the land domain to be subject to the régime of internal waters."²⁴⁴ However, these matters are subsidiary to the bigger question of whether light buoys can be considered as "lighthouses or similar installations," upon which the validity of the Tunisian baselines depends.

Prescott includes beacons as among the navigational aids envisaged by the reference to "similar installations" in Article 4(3),²⁴⁵ thereby approving of the basepoints used by Tunisia seaward of the Kerkennah Islands. However, in its Memorial to the I.C.J. in the Tunisia-Libya Continental Shelf case, Libya characterised the basepoints defined in the 1973 Decree as "low-tide elevations the use of which as base-points is prohibited by law."²⁴⁶ Unfortunately, in its 1982 Judgement, the I.C.J. found it unnecessary to rule on the legitimacy of the Tunisian straight baselines in delimiting the continental shelf boundary, although the Parties' judicial nominees each expressed opinions on the validity of the Tunisian straight baselines. In his Separate Opinion, Judge Jiménez de Aréchaga, the Libyan nominee, held that:

"These baselines are, to say the least, of doubtful legality since they do not conform to the only restriction established by the Court's Judgment of 1951 in the Norwegian *Fisheries* case, namely, that the baselines should follow the general direction of the coast. These baselines, with a seaward point going as far as El-Mezbla, form a triangle which lies against the concavity of the Gulf of Gabes and which is not just different but opposite to the general direction of the coast. Furthermore, baselines are drawn on the basis of low-tide elevations, some of which are always below water while the applicable rules of international law forbid their use unless light houses or similar installations have been built upon them. It is obvious that lightbuoys on the water cannot fulfil this requirement nor is there any record of stationary fishing gear that far out to sea."²⁴⁷

Not surprisingly, in his Dissenting Opinion, Judge Evensen, the Tunisian nominee, took a contrary view:

"The baselines laid down in the Act of 2 August 1973 are not contrary to the prevailing rules of international law."²⁴⁸

Judge Evensen's argument was based upon linking together several different legal rules concerning baseline delimitation. In the first place, he noted that Article 6 of the draft United Nations Convention, (now the 1982 Convention), allowed for the baseline of the territorial sea "of islands having fringing reefs" to be "the seaward low-water

line of the reef." He then quoted Article 7(4) of the draft Convention, (which repeated the provisions of Article 4(3) of the Territorial Sea Convention), noting that light buoys had been positioned on most of the low-tide elevations concerned, and implying that these qualified them as basepoints in Tunisia's straight baseline system. Finally, he added that "in any event, the stationary fishing gear which has been placed on them in abundance and which is permanently above sea level should be taken into consideration in this context,"²⁴⁹ although it is difficult to see its relevance.

Judge Evensen also quoted Article 7(5) of the draft Convention (Article 4(4) of the Territorial Sea Convention), which states that:

"Where the method of straight baselines is applicable under paragraph 1, [i.e. where the coast is deeply indented and cut into, or where there is a fringe of islands along the coast in the its immediate vicinity], account may be taken in determining particular baselines, of economic interests peculiar to the region concerned."²⁵⁰

According to Judge Evensen, the historic and economic facts of the region fully meet these requirements,²⁵¹ and, therefore, leads to a consideration of the primary factor used by Tunisia to support its straight baselines off the Kerkennah Islands, namely its supposed "historic rights."

The Kerkennah Islands lie 11 miles offshore, "but are virtually a continuation of the mainland by virtue of the extreme shallowness of the waters separating them from the mainland."²⁵² The strait separating the Islands from the mainland is navigable with difficulty and is only possible for small craft. Seaward of the Islands lies an extensive area of low-tide elevations, which both geographically and historically have been linked to them. For centuries, the local population have exploited these low-tide elevations as owners, tending and harvesting the numerous fixed fisheries' installations which are accessible on foot.²⁵³ Thus, the Tunisian offshore would appear to be the unique situation envisaged by McDougal and Burke, in which low-tide elevations might be used as basepoints from which to measure the territorial sea. They held that, in general, such elevations should not be used as basepoints from which to measure the territorial sea because:

- (i) they may not be inhabited;
- (ii) they are unreliable landmarks;
- (iii) they have no use for the local population;
- (iv) they do not enhance the local interest in adjacent waters.

However, McDougal and Burke did accept that it was "not impossible that a series of closely adjacent low-tide elevations, coupled with unique local conditions relating to the use of an area, might create a water area of such considerable import to the adjacent inhabitants that the territorial sea might be measured therefrom."²⁵⁴ These conditions would appear to be present off the Kerkennah Islands.

Gioia notes that at first public authorities "only sanctioned and regulated private deeds of possession, but later attempted to gradually bring the shoals under the regime of state property."²⁵⁴ This characterisation of the area of fixed fisheries as under State authority appears to have matured into an explicit claim of exclusive sovereignty in 1904, when the "Instructions on Navigation and Sea Fisheries" were issued by the Tunisian Director of Public Works. Indeed, Gioia comments that:

"Although these instructions were not free from ambiguity with regard to the exact legal status of the area of Tunisian sedentary fisheries, they seemed to distinguish between the region of fixed fisheries, which did not extend beyond 10 to 12 miles from the coast and which was regarded as 'comme faisant partie du Domain public maritime de la Régence' and the much wider region of sponge fisheries, which was regarded as an area over which 'un usage immémorial reconnu par les principales Puissances, attribue à la Tunisie l'exploration et la police des bancs d'éponges situés sur le littoral, même en dehors de la mer territoriale.'"²⁵⁵

Thus, it would appear that the area of fixed fisheries was regarded as part of the Tunisian "territorial sea," whereas the wider area of sponge fisheries was a high seas area over which Tunisia had acquired "historic rights."²⁵⁷

No protests appear to have been filed against these actions and, indeed, several writers have long recognised Tunisia's "historic rights" over offshore areas.²⁵⁸ It would, therefore, appear that Tunisia's inclusion of the drying reefs seaward of the Kerkennah Islands may be approved by the doctrine of historic waters, *if it can be verified that the area over which Tunisia had historically acquired sovereignty corresponds to that delimited by the straight baselines promulgated in 1973.* Alternatively, if it is accepted that the Kerkennah Islands constitute a fringe of islands in the immediate coastal vicinity,²⁵⁹ one might agree with Judge Evensen that the particular geographical and historical conditions of this region qualify as "economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage," sufficient to allow them to be taken into account in approving those baselines drawn seaward of the Kerkennah Islands.

However, both the I.C.J., and subsequently, the I.L.C., made it clear that economic considerations alone could not be used to justify the use of straight baselines, but only the alignment of *particular* baselines:

"The application of the straight baseline system should be justified in principle on other grounds before purely local economic considerations could justify a particular way of drawing the lines."²⁶⁰

Therefore, as several authorities have pointed out, the nature of the coastline must be established as meriting the use of straight baselines before economic factors can be used to influence the alignment of particular baselines.²⁶¹ Thus, if it is established that the Kerkennah Islands constitute a fringe in the immediate coastal vicinity, the peculiar and longstanding fishing activities off of these Islands would appear to justify baselines which depart from the general direction of the coast to include waters which are otherwise insufficiently linked to the land domain to be subject to the régime of internal waters.

Finally, Tunisia has also drawn a straight baseline linking Sidi Garus on the Island of Jerba to Ras Marmor on the Tunisian mainland. Gioia believes the lawfulness of this baseline to be "incontrovertible,"²⁶² a view with which it appears difficult to disagree.

(xi) Morocco

Morocco's straight baseline system, established by Decree No. 2-75-311 of 21 July 1975,²⁶³ and extending along the entire length of its Mediterranean coast (Figure 20), clearly places the five Spanish "plazas de soberanía" - Ceuta, Melilla, and three sets of islands, on or near the coast of Morocco - behind its straight baselines, thereby denying them any maritime zones to which they (theoretically) may be entitled.²⁶⁴ Indeed, the Spanish Chafarinas Islands are used as basepoints, despite the fact that the I.L.C. had made clear that

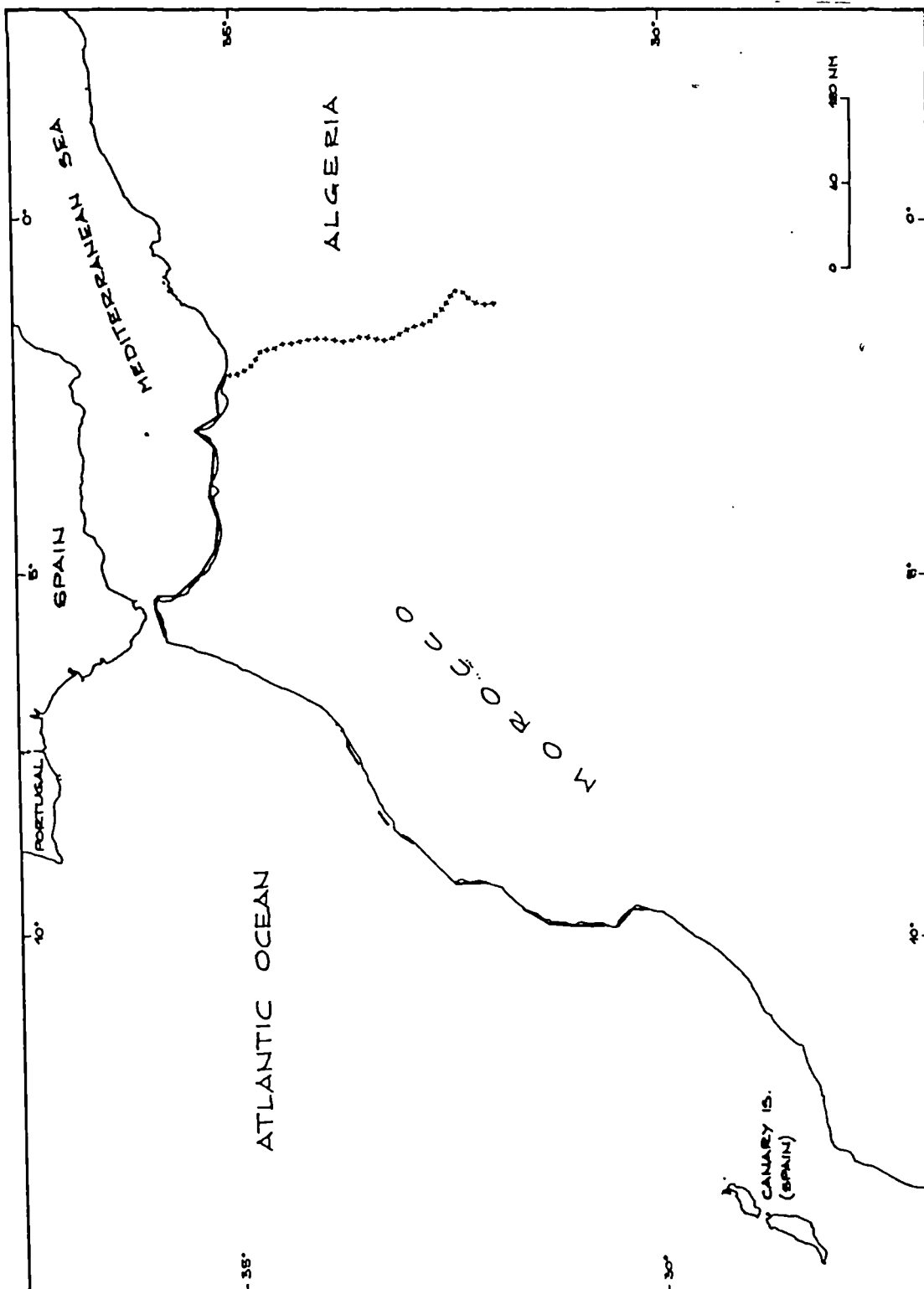


Figure 20 - Morocco's straight baselines.

Source: G. Francalanci, S. Mongardini, D. Romano and T. Scovazzi Atlas of the Straight Baselines: Part I: Art. 7 of the Convention of the United Nations on the Law of the Sea, p. 99. (Milan: Giuffrè, 1986)

straight baselines could not use basepoints lying in more than one State.²⁶⁵ Thus, the Moroccan straight baselines directly contradict both Article 4(5) of the Territorial Sea Convention and Article 7(6) of the 1982 Convention, the latter of which states that:

"The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone".

The justification for Morocco's action seems to be paragraph 10 of the Organisation for African Unity's 1972 "Declaration on Issues of the Law of the Sea." This concerned the non-recognition of E.E.Z. régimes in the case of territories under colonial domination. At the Caracas session of UNCLOS III, Morocco stated it also included non-recognition of the territorial sea in cases of territories under colonial domination,²⁶⁶ seemingly a direct reference to its viewpoint on the Spanish enclaves and islets.

If Morocco was able to secure sovereignty over the Spanish islets off her coast, it would appear perfectly appropriate for it to have drawn straight baselines claiming the islands as a fringe in its immediate coastal vicinity, as each of the sets of islands appear to fulfil the criteria for fringing islands laid down by Bernhardt *et al.* However, at present, Morocco utilises the Chafarinas Islands as turning points in its straight baseline system, notwithstanding the fact that the islets are under Spanish sovereignty.

As to the baselines drawn along other parts of the coast, though apparently not departing to any appreciable extent from its general direction, they do not appear to be legal, as the coastline is not deeply indented or cut into, but generally smooth.²⁵⁷ As result, the straight baselines as drawn have a limited effect upon the extension of the Moroccan territorial sea, or other offshore maritime zones.

Several bays have been enclosed by the Moroccan baselines, which raises the question of their legal status with respect to innocent passage, given that the Dahir of 30 June 1962 had previously enclosed Morocco's bays with 12 mile closing lines. It is to be presumed that the new straight baseline legislation abandons this practice, permitting innocent passage in their waters.

(xii) Algeria

Algeria is the most recent Mediterranean State to delimit a straight baseline system, having done so by Decree No. 84-181 of 4 August 1984. The Algerian straight baselines extend along the entire length of the Algerian coast (Figure 21), although like neighbouring Morocco, the coast is not deeply indented or cut into.²⁵⁸ Several bays previously enclosed by French Presidential Decree of 9 July 1888 form part of this baseline system, although there is no question of this Decree still being applicable, given that it established 10 mile closing lines which did not always link the natural entrance points of the bays concerned. The new straight baseline legislation abandons

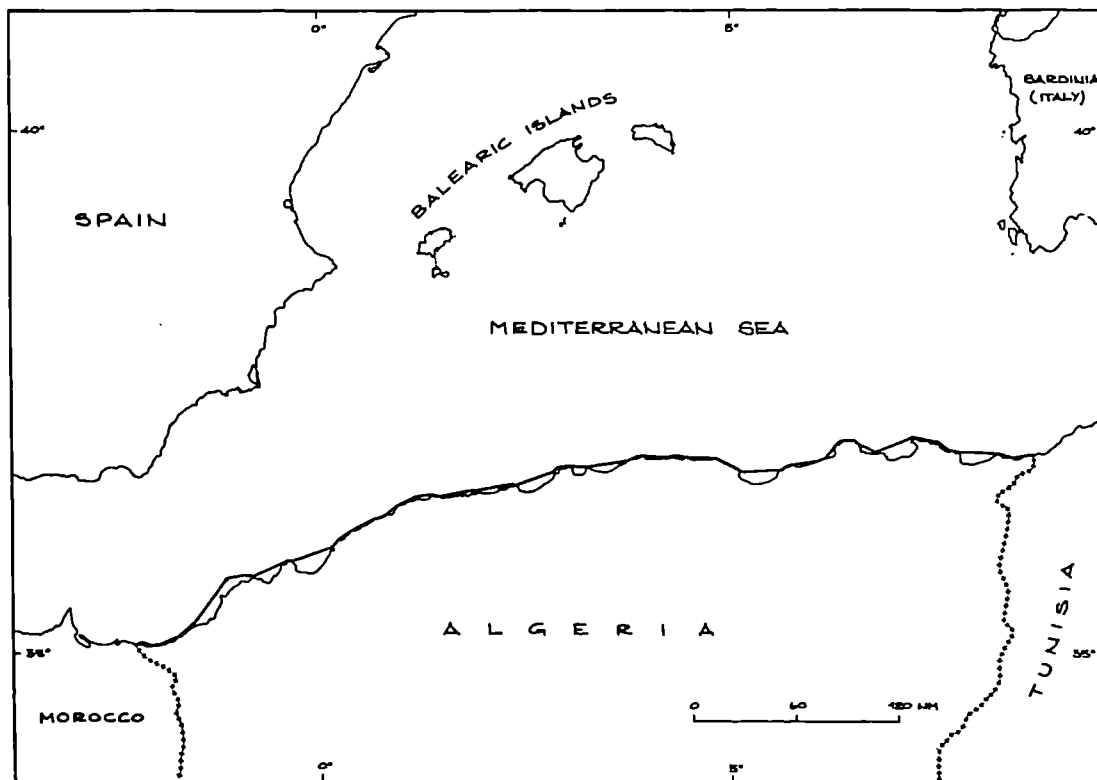


Figure 21 - Algeria's straight baselines.

Source: G. Francalanci, S. Mongardini, D. Romano and T. Scovazzi Atlas of the Straight Baselines: Part I: Art. 7 of the Convention of the United Nations on the Law of the Sea, p. 5. (Milan: Giuffrè, 1986)

this practice, explicitly defining the waters so enclosed as internal, and thus permitting innocent passage in their waters.

Among the basepoints used by Algeria are tiny islets such as Kalah, Tobikt Indich and Tazerout, and numerous rocks, even though several of these are isolated and cannot be said to constitute a "fringe" of islands in the immediate coastal vicinity.²⁶⁹ In addition, between Ras Ferrat and Ras Cabon an unnamed low-tide elevation is used as basepoint, directly contradicting both Article 4(4) of the Territorial Sea Convention and Article 7(4) of the 1982 Convention.

(xiii) Cyprus, Greece, Israel, Lebanon, Libya and Monaco

The reference to the *normal* baseline in Article 3 of the Territorial Sea Convention makes it clear that, in the absence of exceptional conditions, the low-water line is the baseline to be used by coastal States. Where exceptional geographical conditions exist, straight baselines *may* be drawn by the coastal State, but the existence of such permissive conditions does not create an obligation upon a State to delimit its territorial sea from straight baselines.

Of those Mediterranean States which do not have straight baseline legislation, the coasts of Israel, Lebanon, Libya, and Monaco lack the geographical characteristics to sustain a straight baseline claim. The Lebanese and Israeli coasts are quite straight and regular, with only minor indentations, whilst the Libyan coast is gently curved, with only

one major indentation - the Gulf of Sirte - which has been the subject of an historic bay claim. The Monegasque coast is very short, making straight baselines unnecessary.

However, because of the large number of islands which fringe its coast in the immediate vicinity, several authors have noted the appropriateness of the Greek Aegean coast for straight baseline drawing.²⁷⁰ A straight baseline system along the outermost Greek islands would effect an increase in the territorial sea (and hence continental shelf) area accruing to Greece, but because of the political and legal problems attending maritime boundary delimitation in the Aegean it is impossible for Greece to proclaim straight baselines without antagonising Turkey, who threatens war in the event of Greece adding to its present territorial sea claim. As a result, Greece maintains a baseline drawn upon the traditional low-water mark, notwithstanding the fact that Turkey has a straight baseline system along its entire Aegean coast.

The Aegean situation appears unlikely to be resolved in the near future, although there were rumours in 1987 that Turkey was finally willing jointly to submit its maritime boundary disputes with Greece to the I.C.J. for jurisdiction. However, while the situation remains as at present, Greece appears unlikely to proclaim straight baselines: indeed, in ratifying the Continental Shelf Convention on 6 November 1972, Greece made a reservation to Article 6, concerning the delimitation its continental shelf boundaries, to the effect that:

"In such cases, the Kingdom of Greece will apply, in the absence of international agreement, the normal baseline system for the purpose of measuring the breadth of the territorial sea."²⁷¹

This would appear to indicate that Greece has no desire to draw straight baselines at present, although at UNCLOS III Greece submitted draft articles on straight baselines modelled on Article 4 of the Territorial Sea Convention.²⁷² If a continental shelf boundary between Greece and Turkey is ever established, it will be interesting to see how the negotiators/adjudicators resolve the problem of Turkey having straight baselines and Greece none.

De Guttry believes that the Cypriot coast is also sufficiently deeply indented for straight baselines to be drawn,²⁷³ but this conclusion appears ill-founded, and Cypriot sources give no indication of the intention to draw such baselines.²⁷⁴

4.6 The Relationship between the Rules for Bays and Straight Baselines in Mediterranean State Practice

In a comprehensive study, Westerman concluded that because Article 7 of the Territorial Sea Convention was "[w]ell drafted and remarkably unambiguous" it would resolve "for some time at least, the issue of unreasonably expansive bay claims."²⁷⁵ However, O'Connell has criticised these same conventional rules for bay enclosure as being

"too general and indiscriminatory to be satisfactory," and therefore, to be subject to avoidance in State practice:

"It may be expected that Governments, when defining seaward boundaries of their countries will pay scant attention to the rules in Article 7 if the results would appear to be anomalous. In fact, imaginative uses of the straight baseline method by several countries portends a general exploitation of an escape device to avoid an often artificial framework into which a coastal complex would be forced by strict application of Article 7."²⁷⁶

These remarks reflect the fact that the 1982 Convention (Article 10(6)) has not made any clearer the relationship between bays and straight baselines as expressed in the Territorial Sea Convention (Article 7(6)), which states:

"The foregoing provisions [relating to bays] shall not apply to so-called 'historic' bays, or in any case where the straight baseline system provided for in article 4 is applied."

Therefore, before reaching any conclusions about straight baselines, it is important to draw attention to this relationship, as it has been used to validate certain Mediterranean baselines enclosing large bays.

Article 7(6) has been largely interpreted as meaning that bays which do not qualify for enclosure under the rules for bays (including

historic bays), may nevertheless be enclosed under the rules relating to straight baselines. This is best illustrated by the statement of Mr. Bowen, the Commonwealth Attorney-General, on 31 October 1967: in discussing Australian policy regarding the enclosure of bays, he stated:

"The [Territorial Sea] Convention authorizes the drawing of straight baselines up to 24 miles in length across bays that meet the criteria specified in the Convention, and the Government has decided to apply this principle wherever relevant, around the coasts of Australia and of the Territories. Three deep indentations around the Australian coast - Shark Bay, St. Vincent Gulf and Spencer Gulf - all of which are 'bays' under the criteria specified in the Convention would not be completely enclosed by baselines 24 miles in length. ... But ... the Convention authorizes the drawing of straight baselines exceeding 24 miles in length, where a coastline is deeply indented or cut into, provided that no appreciable departure from the general direction of the coast is involved. Straight baselines will be accordingly drawn across the entrances to Shark's Bay and the two South Australian Gulfs."²⁷⁷

In the case of Mediterranean bays, this interpretation of Article 7(6) has been evidenced by widespread State practice and, in particular, has been cited by Ronzitti as validating the enclosure of the Gulf of Taranto, and by Gioia in respect of the Gulfs of Tunis and

Gabès, all of which have been claimed as historic bays. Moreover, Tunisia itself used Article 7(6), in combination with historic title, to justify its enclosure of the Gulf of Gabès, an interpretation upheld by Judge Evensen in his Dissenting Opinion in the Tunisia-Libya Continental Shelf Case.²⁷⁸

In respect of the Gulf of Taranto, Ronzitti held that:

"Whereas the characterisation of the Gulf of Taranto as an historic bay is open to contest, *it is beyond all doubt* that the baseline enclosing the Gulf is in compliance with Article 4 [of the Territorial Sea Convention] on straight baselines."²⁷⁹

He argues that the Gulf of Taranto is but the largest indentation along the Ionian Sea coastline which is "deeply indented and cut into," its closing line forming but one segment of the Italian straight baseline system along that coast.²⁸⁰ This closing line does not depart from the general direction of the coast to any appreciable extent, because, in the absence of its definition, Ronzitti presumes the general coastal direction to be represented by the entrance points of an indentation, or by those promontories closest to its entrance.²⁸¹ For this reason, he considers that Italy has conservatively interpreted the notion of general coastal direction in respect of the enclosure of non-juridical bays as part of straight baseline systems, because the closing line of the Gulf could have been drawn from Cape Santa Maria di Leucia to Cape Colonna, rather than to Alice Point.²⁸² Consequently, Italy has

enclosed only a segment of the Gulf, whose waters, lying as they do within the general direction of the coast, must fulfil the criterion of being "sufficiently closely linked to the land domain to be subject to the regime of internal waters." Thus, on both legal and practical grounds, the enclosure of the Gulf of Taranto under the rules of Article 4 is "reasonable," the navigational interests of third States being unaffected under Article 5(2) of the Territorial Sea Convention (Article 8(2) of the 1982 Convention).²⁸³

This thesis may, however, be criticised on several grounds: in the first place, the Ionian Sea coast, of which the Gulf of Taranto forms a part, cannot be regarded as "deeply indented and cut into." As such, the application of a straight baseline system to that coast is inappropriate; and in its absence, the Gulf could only be enclosed under the rules for bays.²⁸⁴ A closing line drawn from Cape Santa Maria di Leucia to Cape Colonna, held by Ronzitti to represent the general direction of the coast, would be even more excessive than that actually drawn to Alice Point, and difficult to justify, given that Alice Point is more obviously the natural entrance point of the Gulf than Cape Colonna. However, perhaps the most pertinent question is why Italy should decide to justify its enclosure of the Gulf of Taranto by claiming historic title, if it was so easy to enclose it under the rules for straight baselines?

Gioia's arguments in respect of the Gulf of Tunis are similar to those of Ronzitti, although more explicitly reliant upon a liberal

interpretation of Article 4. She validates its enclosure upon State practice that has employed straight baselines along coasts not as deeply indented and cut into as Norway's, and utilising islands which do not strictly form "a continuous fringe ... sufficiently solid and close to the mainland to form a unity with it, or an extension of it in the seaward direction."²⁸⁵ Thus she concludes that:

"The coast of Tunisia is as deeply indented and cut into as coasts of other states in the same region which have adopted a system of straight baselines,"²⁸⁶

at the same time implying that the islands of Plane and Zembra constitute a fringe of islands in the immediate coastal vicinity, which they patently do not.

Gioia also uses Ronzitti's argument that the general direction of the coast in the case of a bay should be represented by a line drawn between its natural entrance points to establish that the Gulf of Tunis's closing line does not depart from the general direction of the coast to any appreciable extent, thereby rendering the waters enclosed as "sufficiently closely linked to the land domain to be subject to the regime of internal waters." In addition, it is argued that a close link to the land domain is established by the fact that Tunisia has exercised sovereign rights over the coral reefs in the area from time immemorial. Thus, like Ronzitti, Gioia concludes that because the navigational interests of third States remain unaffected, the enclosure

of the Gulf of Tunis is reasonable. Consequently, in her opinion, Tunisia has no need to claim the Gulf of Tunis as an historic bay.²⁸⁷ However, as the Gulf of Tunis is a *juridical bay*, there should be no need for Tunisia to justify its enclosure under either the rules for straight baselines, or as an historic bay.²⁸⁸

With respect to the Gulf of Gabès, the Libyan Memorial in the Tunisia-Libya Continental Shelf Case rightly complained that unlike the Norwegian coast, the Tunisian coast was "not deeply indented." However, it argued more dubiously that the Kerkennah Islands were not "part of an island fringe" but merely "two localised and isolated islands."²⁸⁹ The I.C.J. declined to rule on the validity of Tunisia's straight baselines, which makes it difficult to agree with Gioia's view that the Libyan objections have been made "untenable" by liberalised State practice.²⁹⁰

Both she and Judge Evensen uphold Tunisia's claim that the closing line of the Gulf of Gabès is "a natural continuation of the system of straight baselines drawn outside the Archipelago of Kerkennah continuing to the Island of Jerba and then on to the mainland."²⁹¹ Thus, in Gioia's opinion, if the natural entrance points of the Gulf are taken as Jerba and the southernmost tip of the Kerkennah Islands, then the closing line of the Gulf does not depart to any appreciable extent from the general direction of the coast.²⁹² However, this is a view based upon the assumption that a closing line between a bay's natural entrance points is indicative of general coastal direction.

*

This would appear a valid presumption in the case of juridical bays, given that the semi-circle test - allied to the 24 mile rule - has the effect of enclosing waters already *geographically* withdrawn by virtue of their landlocked character. Thus it is only logical that the general coastal direction be viewed as a line drawn between such indentations' natural entrance points. However, in the case of an indentation which does not have juridical bay status *because it does not fulfil the semi-circle test*, a line drawn between the natural entrance points does not, by legal definition, include landlocked waters, and thus cannot be viewed as being indicative of the general coastal direction. Hence the general direction of the coast in an indentation too "open" to qualify as a juridical bay must follow the low-water line along its shore. Article 4(2) states that the drawing of straight baselines "must not depart to any appreciable extent from the general direction of the coast;" therefore, if the general direction of the coast is represented by the low-water line, a line linking a non-juridical bay's natural entrance points would depart from the general coastal direction to an appreciable extent, and would make straight baseline drawing inappropriate. On the other hand, if the indentation concerned fails as a juridical bay because of its length of closing line, but fulfils the semi-circle test - as is the case with the Gulf of Gabès - there would appear more reason to suppose that a line linking its natural entrance points would represent the general direction of the coast. However, although the Gulf fulfils the semi-circle test with its 1973 closing line, there has been some controversy concerning the natural entrance points used by Tunisia.

As defined, the closing line uses the Samoun light buoy (lying to the south of the Kerkennah Islands) and Ras Turques as the Gulf's natural entrance points.²⁹³ In the case before the I.C.J., Libya disputed both the use of light buoys as basepoints, and the Tunisian definition of the Gulf of Gabès, considering the Gulf's natural entrance points to be Ras Yonga and the northwestern tip of Jerba.²⁹⁴ There seems good reason to accept the Libyan interpretation, given that the island of Jerba lies both adjacent and proximal enough to the mainland coast to be regarded as a headland, whereas the Kerkennah Islands are too detached from the mainland coast to be regarded as its geographical natural prolongation. In the absence of agreement upon the natural entrance points, it is impossible to establish what represents the general direction, although this author favours the closing line suggested by Libya. Thus, although the "general direction of the coast" criterion may be decisive in establishing where straight baseline systems may be employed, it does not make individual baselines legal, or the possibility of employing such baselines in the Gulf of Gabès region "incontrovertible".²⁹⁵

Gioia also believes that the Gulf of Gabès waters are "sufficiently closely linked to the land domain to be subject to the régime of internal waters," because of the Gulf's natural and historical characteristics: its waters are very shallow; there has been a centuries-old exploitation of the Gulf's sedentary fisheries, which represent an important economic resource; and there have been constant acts of State authority exercised for the purpose of regulating fishery

exploitation. Consequently, although insufficient to establish a historic title, they together justify the enclosure of the Gulf of Gabès under Article 4(4), which states that:

"[In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in the immediate vicinity], account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by a long usage."

However, the Tunisian coast cannot be regarded as deeply indented and cut into, or as possessing a fringe of islands in its immediate vicinity, sufficient to bring this paragraph into operation.

Therefore, the Tunisian claim to enclose the Gulf of Gabès both as an historic bay and under the rules for straight baselines, appears simply a double justification for a dubious legal practice. Perhaps, the hope was that if the Gulf was to be denied historic status, it might still be upheld as a legitimate enclosure under Article 4. Thus, although posited as a joint validation of the claim, these two justifications appear to be alternatives.

In all these cases, however, the problem remains as to whether Article 7(6) can be interpreted as permitting the enclosure of those bays which lack either juridical or historic bay status by means of the

rules concerning straight baselines. Westerman believes the drafting history of Article 7(6) makes it clear that it should not be read as permitting the use of the rules on straight baselines as an alternative method of bay enclosure, *where an indentation meets neither the criteria for juridical nor historic bay status*. Rather, the Article:

"... was intended to address the possibility that certain coasts to which states might apply the straight baseline system of Article 4 would also contain bays. In that case, the straight baseline system would be drawn in such a way as to subsume the entire bay within the larger area of internal waters created under Article 4."

Thus, relying on Fitzmaurice, one of the drafters of the Territorial Sea Convention, Westerman understands them to have concluded that because Article 4 is a much broader concept than Article 7 - which is limited to a single geographic feature - "should a straight baseline be drawn covering the coast of the bay, the special rule relating to bays would no longer be applicable." Indeed, she notes that the I.L.C. made it clear that the semi-circle test was provided for "in order to prevent the system of straight baselines from being applied to coasts whose configuration does not justify it, on the pretext of applying the rules for bays." Therefore, concludes Westerman:

"... to posit Article 4 as an alternative basis for bay enclosure would make the carefully drafted rules of Article 7 completely

superfluous, ... [and] since all indentations must of necessity 'indent' the coast, this promiscuous reading of Article 4 would mean every indentation, might yet be enclosed: the very expansionist tendency Article 7 was designed to prevent."²⁹⁹

Westerman would appear, therefore, to view Article 7(6) as allowing for the enclosure of *juridical* bays as part of a straight baseline system, where a coastal configuration makes this appropriate, but not *non-juridical* bays. Ronzitti, on the other hand, correctly points out that Article 7(6) must permit a State to enclose a bay which is neither juridical nor historic under the rules for straight baselines, *where the bay concerned forms part of a coast which is deeply indented and cut into*. It cannot be limited in application to juridical bays as Westerman postulates.

For this view, Ronzitti relies on the same paper by Fitzmaurice published in 1959, wherein it is stated that the object of Article 7(6) was to make clear both that:

"... where a general baseline system is justified because of the general configuration of the coast, baselines may legitimately be drawn across certain indentations, formations or curvatures that would *not* rank as bays, ... [and] ... by implication that the limit of twenty-four miles applicable to the closing line of a bay as such, does not apply where a longer line can be justified as

part of a baseline system on a coast possessing the configuration warranting the use of such system."³⁰⁰

Indeed, Fitzmaurice noted that the fact that Article 7(6):

"... could perhaps be read simply as meaning that the mere fact that a curvature or indentation is not actually a bay proper ... does not prevent a baseline being drawn across it where the general configuration of the coast justifies it. If this were all the paragraph meant, then it could be maintained that when the formation is a bay proper, the twenty-four mile limit of closing applies in all cases, on whatever kind of coast the bay is situated. This interpretation would, however, be difficult to reconcile with the generality of the phrase 'The foregoing provisions' with which paragraph 6 opens, and which must include the one on the twenty-four mile limit. In short, where a baseline justifying situation exists, it is governed by baseline principles: where such a situation does not exist, but there are nevertheless configurations that are bays according to the proper definition of that term, these are governed by the rules for bays."³⁰¹

Thus, under this interpretation, any non-juridical bay which forms part of a coast which is deeply indented and cut into may be enclosed under the rules for straight baseline drawing. Where a coast does not fulfil the conditions for straight baselines, then indentations must be

looked at individually to see if they can be enclosed as juridical bays. This leads to the conclusion that Article 7(6) *does* permit enclosure of the Gulf of Taranto, and the Gulfs of Tunis and Gabès, as part of the respective Italian and Tunisian straight baseline systems, *if* appropriate conditions for such baselines exist, which they do not.

In respect of the Gulf of Taranto, Italy's preference for its enclosure as an historic bay rather than as part of its straight baseline system, (if it ever considered the latter), is probably explained by the fact that innocent passage would be permitted by enclosure under the rules for straight baselines. It thus seems strange that Tunisia should justify the enclosure of the Gulf of Gabès *both* as an historic bay *and* as a part of its straight baseline system, given that different legal régimes pertain to each method of closure. However, this would appear to confirm that the two justifications were alternatives rather than a joint validation.

Finally, one should draw attention to those States such as Algeria and France, which have closed juridical bays under the rules for straight baselines, as this would appear to cause some ambiguity with respect to the right of passage through the waters so enclosed. Logically, as Ronzitti has pointed out, Article 5(2), permitting innocent passage, would apply, but:

"Such an interpretation would not only deprive Article 7(6) of any practical meaning and make it superfluous, since coastal States

can always enclose bays that are not greater than 24 miles wide at their entrance, but would also lead to an absurd result, i.e. the application of article 5(2) to juridical bays."³⁰²

Thus to posit Article 4 as an alternative method of bay enclosure would not make Article 7's rules "superfluous," since they do not entail the same legal consequences.³⁰³

Therefore, although a State may evade the 24 mile closing line rule by enclosing non-juridical bays as part of a straight baseline system, it cannot deny the innocent passage of vessels through their waters as it could if they had been juridical bays. On the other hand, the waters of bays which qualify as juridical bays, but which are enclosed under Article 4, would be subject to innocent passage. Consequently, States should be required to declare explicitly under which rules their bays are enclosed, and to find some means of indicating such on their official large-scale charts, for at present the knowledge that a straight baseline has been drawn across a bay is not sufficient to indicate whether innocent passage in its waters is permitted or not. Alternatively, in order to remove this important contradiction, it would seem necessary that Article 10 of the 1982 Convention be amended to provide that juridical bays be enclosed under that Article alone. This would also have the advantage of enabling large bays to be enclosed solely as part of straight baseline systems where they are neither juridical nor historic.

4.7 Straight Baselines: The Way Forward?

Writing in 1954, Fitzmaurice lamented the fact that in the Fisheries Case so much attention was, in his view, focussed unnecessarily upon the difficulties faced by States with highly indented coasts, that comparatively little attention was paid to the enormous advantages that might accrue to such States in using straight baselines:

"... not merely in regard to the process of delimitation as such, but in regard to the extent of the waters passing under the dominion of the coastal State, whether as territorial or internal waters."³⁰⁴

Indeed, as the U.K. pointed out, although superficially the case concerned a simplification of the outer limit of the territorial sea, the underlying issue was a desire to extend offshore jurisdiction. Consequently, Fitzmaurice concluded that:

"In short, a straight baseline system was, and is, simply a disguised method of claiming additional waters, or of altering in favour of the coastal State the status of various stretches of water off its coasts. ... [F]or it is clear that were it not for the positive advantages in the matter of exclusive fishery rights, and in certain other ways, to be derived from the possession of extended territorial waters, or in some cases from the creation of

new internal waters, no State would bother to institute a straight baseline system"³⁰⁵

This conclusion is of even more pertinence today, particularly since countries may utilise straight baselines to minimise the effect of predicted rises in sea levels.³⁰⁶ Therefore, it is with some dismay that one notes a growing legal view that liberal interpretation of the straight baseline rules is an accepted norm.³⁰⁷ Only geographers have expressed an interest both in providing objective means of testing the validity of straight baseline régimes, and in pointing out the existence of apparently non-conforming baseline systems. Although from the legal point of view, mathematically conceptualising the rules for straight baselines might appear to impose a false rigidity in an otherwise flexible set of provisions,³⁰⁸ the maintenance of the status quo provides for their continued abuse. Undoubtedly, the current rules allow a considerable degree of subjectivity to enter the law, for subjective tests determine whether a baseline system or particular baselines are legally valid. This clearly works to the advantage of the claimant State, for although it can never be certain that its delimitation is not open to challenge, equally other States cannot be certain whether they have good grounds to challenge.³⁰⁹ Hence, the burden of proof is upon the contesting State rather than upon the defending State.³¹⁰

How then might the international community respond to these difficulties? One way forward would appear to be to place some

restriction on baseline length. This is not a new idea, for a number of commentators have noted that:

"A restriction on segment length could be the single most important factor in preventing the abuse of the system inherent in Article 4's vague language, where no maximum is specified,"

given that, in general, the longer the length of a baseline, the greater the chance of including water areas in violation of the Article's intent.³¹¹ Indeed, writing in 1972, Hodgson and Alexander indicated that in order to avoid excessively long baselines, the new Law of the Sea Convention should prescribe a maximum baseline length, for which the only potential yardstick was that provided by the Fisheries Case where the longest baseline approved by the Court was the 44 miles across LoppHAVET. However, in recognition that this long baseline was at least in part approved because of the historic waters it enclosed, they proposed the limit be 40 miles.³¹²

More recently, Bernhardt *et al* have proposed combining a 48 mile limit on baseline length with their other proposals for testing the legitimacy of straight baselines along deeply indented and island fringed coasts.³¹³ They reason that such a limit is reasonable both in the light of the Judgement in the Fisheries Case, and because it is double the maximum length for a bay closing line, thereby preserving the significant differences between the articles on bays and straight

baselines, "without according coastal states unrestrained license in drawing baselines."³¹⁴

A more radical solution was proposed by Beazley. He suggested that if the new Convention provided for a maximum baseline length, the article regarding bays could be disposed of and straight baselines be employed along any coast, regardless of its configuration. Although this might increase the overall area of a State's internal waters, it would not significantly extend the territorial sea. It would also dispense with the vague and subjective criteria governing both bay closure and straight baselines.³¹⁵ Analysing the straight baseline legislation of 24 States, he proposed that 48 miles - equivalent to four times the territorial sea breadth - was an appropriate limit.³¹⁶ However, in order not to lose the notions of baselines following the general direction of the coast, and of the enclosed waters having sufficient linkage with the land to be characterised as internal waters, Beazley further provided that "a straight baseline could not be drawn from the mainland to an island or from one island to another, unless they were enclosed within the same continuous or overlapping belt of territorial sea."³¹⁷

Given that States appear to draw baselines along their coasts in disregard of either the rules for bays or straight baselines, these proposals have more than superficial appeal. Although they go beyond the original conception of baselines departing from the low-water mark only when geographical conditions require such a deviation, it is

nevertheless true that straight baselines enable the outer limit of the territorial sea to be determined with greater ease than other methods of baseline construction. Moreover, all of the world's coastlines would be simplified by the use of straight lines to define them, leading to a uniformity in State practice, whilst it is undeniable that many non-conforming straight baseline systems along gently concave or convex coasts, (e.g. the straight baseline systems of Algeria and Morocco), do not either greatly add to the area of internal waters or push the territorial sea significantly seaward.

However, the real problem of non-conforming straight baselines concerns the use of non-fringing islands, because these have the greatest effect both on accretions to internal waters, and in extending the territorial sea limit. In the Mediterranean there are many non-conforming straight baseline systems, but few exceptionally long baselines;³¹⁸ of more importance is the distance offshore such baselines lie (e.g. Italy's straight baseline system). Consequently, the abuse of the rules for fringing islands is of more concern than the establishment of straight baselines along coasts lacking deep indentations. Hence, although Beazley's 48 mile rule has merit, it does not account for the problem of offshore islands, unless combined with other criteria, such as those put forward by Bernhardt *et al.* In particular, there is a need to limit the distance offshore at which islands may be used as basepoints, otherwise the universal use of straight baselines would favour inequitably those States with offshore

islands. Clearly, this must be less than the 48 miles favoured by Bernhardt *et al* for reasons already outlined above.

An alternative non-mathematical solution is that suggested by McDougal and Burke, who held that each baseline should be tested by its conformity to the local interest it seeks to fulfil. For example, if the system is used to ease the determination of the outer limit of the territorial sea:

"... fair regard for the community interest would seem to demand that the base points chosen reduce the total area of territorial sea and internal waters as much as possible by locating such points as close together and as close to the mainland as possible."

A baseline "which goes beyond what can be demonstrated to meet the legitimate local needs should not be considered permissible if a shorter line is practicable."³¹⁹ However, although theoretically this proposal has the advantage of both being flexible and strict enough to prevent abuse, in practice it would doubtless lead to lengthy disputes and litigation.

Many extremely long straight baseline segments have been employed worldwide, largely because although proposals to restrict baseline length were put forward at both the I.L.C. and UNCLOS I, there was insufficient support for a restriction to be included in Article 4.³²⁰

Furthermore, at UNCLOS III, no attempt was made to arrest this practice, despite the fact that it is clear that many of the longer baselines do not screen coasts which are deeply indented or where there is a fringe of islands in the immediate coastal vicinity. On the other hand, Article 47(2) of the 1982 Convention specifies that archipelagic baselines "shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles." That there is no corresponding provision in Article 7 of the Convention is not, however, surprising.

No fixed baseline length is stipulated, because quite simply State practice would not observe such a limit. Indeed, any attempt to introduce a limit on baseline length at UNCLOS III would have been doomed to failure, because both the weight of existing State practice against such a limit and the variety of geographical circumstances worldwide make agreement upon a specific distance difficult, if not impossible. Moreover, to specify a maximum baseline length would require many States to revise their legislation reducing the length of certain baselines, whilst at the same time encouraging others to delimit baselines up to the specified limit. However, perhaps the main reason why no limit is defined is that the rules as they stand should be sufficient to keep baselines to a reasonable length: baseline length should be a reflection of the conformity of baselines to the general direction of the coast; to the enclosed waters' territorial character; to the distance between the islands which constitute a fringe in the

immediate coastal vicinity; and to a coast's indented nature.³²¹ The need for a specified baseline length has arisen simply because State practice has abused the spirit, if not the letter, of the rules for straight baseline drawing.

Consequently, in the absence of the codification of well-defined objective criteria for assessing straight baseline claims, subjective perceptions governed by cursory visual inspection of charts of varying scales - and hence geographical detail - govern a part of the law of the sea whose importance is not always appreciated.

Notes:

1. R.W. Smith "Global Maritime Claims" Ocean Development and International Law, 20 (1989), pp. 83-103, at p. 89.
2. E. Bird and V. Prescott "Rising Global Sea Levels and National Maritime Claims" Marine Policy Reports, 1 (1989), pp. 177-196, at p. 189.
3. This is regrettable. See: R.R. Churchill and A.V. Lowe The Law of the Sea, p. 26. (Manchester University Press, 1983)
4. This dealt with the concern of Bangladesh. For a discussion of this provision, see: V. Prescott and E. Bird "The Influence of Rising Sea Levels on Baselines from which National Maritime Claims are Measured and an Assessment of the Possibility of Applying Article 7(2) of the 1982 Convention on the Law of the Sea to Offset Any Retreat of the Baseline" in C. Grundy-Warr (Ed.) International Boundaries and Boundary Conflict Resolution, pp. 279-300, especially pp. 288-298. (Durham: International Boundaries Research Unit, University of Durham, 1990); Office for Ocean Affairs and the Law of the Sea The Law of the Sea: Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, pp. 21, 23. (New York: United Nations, 1989) (hereafter Baselines: An Examination) See also: R.D. Hodgson and L.M. Alexander Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls, pp. 1-54, at p. 2. Law of the Sea Institute Occasional Paper No. 13. (Kingston, Rhode Island: Law of the Sea Institute, University of Rhode Island, 1972).
5. This may introduce greater precision and certainty into the drawing of baselines, and help prevent abuse: Churchill and Lowe op. cit., p. 232.
6. "The coastal State may have the right to establish base lines where they did not previously exist, and thereby to cause certain waters, which were previously territorial (or even high seas), to assume the general character of internal waters. But I believe it would be an abuse of this right if the *full* regime of internal waters were applied, and if exceptions were not made in favour of certain rights (such as the right of innocent passage) which are indispensable to freedom of navigation and the movement of shipping ... [At the very least it would seem that in an area which has customarily been used for passage by international shipping, passage rights cannot be defeated by the sudden conversion of the waters into interior waters by reason of establishing a base line..." Quoted in: V.D. Degan "Internal Waters" Netherlands Yearbook of International Law, 17 (1986), pp. 3-44, at pp. 37-38.
7. "[W]aters enclosed by a straight baseline are *in front of* the coast. and though ranking as internal waters as a matter of status, are not physically internal in the same way as rivers, lakes, estuaries, and other true inland waters situated within the body of land and behind

the line of the coast. Such 'outer' or 'frontal' internal waters, are waters which, before the drawing of the straight baseline, were ordinary territorial sea through which foreign shipping had a right of innocent passage, and of access to ports and rivers, etc. Although the drawing of the baseline changes the legal status of these waters, it in no way alters their physical or geographical character:" Sir G. Fitzmaurice "Some Results of the Geneva Conference on the Law of the Sea - Part I - The Territorial Sea and Contiguous Zone and Related Topics" International and Comparative Law Quarterly, 8 (1959), pp. 73-121, at pp. 78-79.

8. Degan op. cit., pp. 4, 7.

9. M.S. McDougal and W.T. Burke The Public Order of the Oceans: A Contemporary International Law of the Sea, pp. 64-65. (New Haven and London: Yale University Press, 1962)

10. D.P. O'Connell International Law Vol. 2, (1965), p. 551 quoted in: Degan op. cit., pp. 38-39.

11. ibid., p. 39.

12. For example, by Royal Resolutions of 1869 and 1889, Norway had drawn five straight baselines, totalling 82 miles in length, between islets off the coasts of Søndmøre and Romsdal: T. Gihl "The Baselines of the Territorial Sea" Scandinavian Studies in Law, 11 (1967), pp. 119-174, at p. 150; D.H.N. Johnson "The Anglo-Norwegian Fisheries Case" International and Comparative Law Quarterly, 1 (1952), pp. 145-180, at p. 150; H.A. Smith "The Anglo-Norwegian Fisheries Case" The Yearbook of World Affairs, 7 (1953), pp. 238-307, at p. 287. For a discussion of these baselines, see: C.H.M. Waldock "The Anglo-Norwegian Fisheries Case" British Yearbook of International Law, pp. 114-171, at p. 119. The 1869 and 1889 baselines were regarded as a particular application of a general principle applicable on all Norway's coast: ibid., pp. 120-122.

13. ibid.

14. J. Evensen "The Anglo-Norwegian Fisheries Case and Its Legal Consequences" American Journal of International Law, 46 (1952), pp. 609-630, at pp. 610, 615.

15. L.M. Alexander Offshore Geography of Northwestern Europe: The Political and Economic Problems of Delimitation and Control, p. 51. (Chicago: Rand McNally and Company; London: John Murray, 1963); J.M. Auby "Problems of Territorial Waters Before the International Court of Justice: Case of the Anglo-Norwegian fisheries, judgement of the 18 December 1951" Journal du Droit International, (1953), pp. 24-55, at p. 39; D.W. Bowett The Legal Regime of Islands in International Law, p. 21. (Alphen aan Rijn: Sijthoff and Noordhoff; Dobbs Ferry, New York: Oceana Publications, Inc., 1978)

16. V. Prescott "Straight Baselines: Theory and Practice" in E.D. Brown and R.R. Churchill (Eds.) The U.N. Convention on the Law of the Sea

Impact and Implementation, pp. 288-318, at p. 288. (Honolulu: Law of the Sea Institute, William S. Richardson School of Law, University of Hawaii, 1987); Waldock op. cit., p. 122. See also pp. 123-124.

17. See: Evensen op. cit., pp. 612-613; G. Marston "Low-Tide Elevations and Straight Baselines" British Yearbook of International Law, 46 (1972-73), pp. 405-423, at pp. 405, 406; D.P. O'Connell The International Law of the Sea. Vol. 1, p. 201. (Oxford: Clarendon Press, 1982); R. Young "The Anglo-Norwegian Fisheries Case" American Bar Association Journal, 38 (1952), pp. 243-245, at p. 243; Auby op. cit., p. 37; T. Kobayashi The Anglo-Norwegian Fisheries Case of 1951 and the Changing Law of the Territorial Sea, p. 17. (Gainesville, Coral Gables, Florida: University of Florida Press, 1965); Waldock op. cit., pp. 125, 146; Gihl op. cit., p. 160. See also the view of Gidel and the debate at the 1930 Hague Codification Conference: G. Gidel Le Droit international public de la mer, p. 509. (Châteauroux, 1934); L.A. Teclaff "Shrinking the High Seas by Technical Methods - From the 1930 Hague Conference to the 1958 Geneva Conference" University of Detroit Law Journal, 39 (1962), pp. 660-684, at p. 663. For a discussion of the use of islands and the coastline rule, see: Waldock op. cit., pp. 132, 133, 137, 142-145.

18. Alexander op. cit., p. 52; O'Connell op. cit., p. 201; Hodgson and Alexander op. cit., p. 27; Waldock op. cit., p. 125; R.O. Wilberforce "Some Aspects of the Anglo-Norwegian Fisheries Case" The Grotius Society, Transactions for the Year 1952, 38 (1953), pp. 151-168, at p. 166. For a full discussion, see: Sir G. Fitzmaurice "The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law - I" British Yearbook of International Law, 31 (1954), pp. 371-429, at pp. 408-409.

19. Evensen op. cit., p. 610; Waldock op. cit., p. 125, 151-152; O'Connell op. cit., p. 202; Gihl op. cit., pp. 132-135.

20. International Court of Justice "Fisheries Case (United Kingdom v Norway), Judgment of 18th December 1951" Reports of Judgements, Advisory Opinions and Orders, p. 133. (Leyden, 1951) (hereafter I.C.J. Repts. (1951)); M.O. Hudson "The Thirtieth Year of the World Court; (Anglo-Norwegian Fisheries Case)" American Journal of International Law, 46 (1952), pp. 1-39, at p. 28.

21. Evensen op. cit., pp. 616, 618; Waldock op. cit., p. 125.

22. Alexander op. cit., p. 52.

23. Young op. cit., p. 243; Waldock op. cit., pp. 166-167. The method was approved by a majority of 10 to 2, the precise baselines by a majority of 8 to 4; Evensen op. cit., p. 609. See also: O'Connell op. cit., p. 39; Johnson op. cit., pp. 161-163; Auby op. cit., p. 55. Fitzmaurice argues that Norway's position as defendant put it in a strong position in the litigation, a position which would have been reversed had it had been the plaintiff: "... what the I.C.J. really found was that there existed a positive rule of international law permitting the use of such baselines, in circumstances such as

Norway's:" Sir G. Fitzmaurice "The law and procedure of the International Court of Justice, 1951-54 - General principles and sources of law" British Yearbook of International Law, 30 (1953), pp. 1-70, at p. 14. See also: pp. 8, 9, 11, 12.

24. I.C.J. Repts. (1951), pp. 129, 130. "At best, the Court seems to have made a minority practice the basis of a general rule of customary law:" Waldock op. cit., p. 148. See also: ibid., pp. 131, 146-148, 168; J.H.W. Verzijl "Territorial controversies before the International Court of Justice" Netherlands International Law Journal, (1953-1954), pp. 234-268, at p. 261; Gihl op. cit., pp. 162-164; Fitzmaurice op. cit. (1954), p. 387.

25. I.C.J. Repts. (1951), p. 131. See also: Verzijl op. cit., p. 260; Evensen op. cit., p. 622; Hudson op. cit., p. 27; Young op. cit., pp. 243, 244; Waldock op. cit., p. 131; Fitzmaurice op. cit. (1954), pp. 388, 390.

26. I.C.J. Repts. (1951), pp. 116, 127, 128, 132. See also: Bowett op. cit., pp. 21, 76; Young op. cit., p. 244; Waldock op. cit., p. 145.

27. I.C.J. Repts. (1951), p. 133. See also: Waldock op. cit., pp. 148-149; Fitzmaurice op. cit. (1954) p. 404; Kobayashi op. cit., p. 25.

28. Fitzmaurice doubts whether this concept can be applied liberally: either waters do have the character of internal waters or they do not: op. cit. (1954), p. 408. See also: Waldock op. cit., pp. 149, 153.

29. I.C.J. Repts. (1951), p. 133. See also: Fitzmaurice op. cit. (1954), p. 404; Waldock op. cit., p. 148; O'Connell op. cit., p. 204; Alexander op. cit., p. 52. For a discussion of this point, see: Gihl op. cit., pp. 154-156. Wilberforce is critical of the Court's views: op. cit., pp. 162-164.

30. I.C.J. Repts. (1951), p. 131. See also: Hudson op. cit., p. 27; Evensen op. cit., p. 622; O'Connell op. cit., p. 203; Young op. cit., p. 244; Kobayashi op. cit., p. 29; Waldock op. cit., p. 147.

31. I.C.J. Repts. (1951), pp. 131, 142. See also: Hodgson and Alexander op. cit., p. 36.

32. I.C.J. Repts. (1951), pp. 125, 142. See also: Kobayashi op. cit., p. 21; Gihl op. cit., p. 151; Auby op. cit., p. 35; Waldock op. cit., p. 116; Fitzmaurice op. cit. (1953), p. 70.

33. I.C.J. Repts. (1951), pp. 128, 133. See also: Waldock op. cit., p. 161; Fitzmaurice op. cit. (1953), p. 70.

34. O'Connell op. cit., p. 207. For a discussion of this point, see. Gihl op. cit., pp. 151-157.

35. See: O'Connell op. cit., p. 206; Waldock op. cit., p. 152. Judge Hsu Mo was critical of the way the baselines were drawn in the areas of Lopphavet and Svaerholthavet: Fitzmaurice op. cit. (1954), p. 408.

36. I.C.J. Repts. (1951), pp. 141, 142. See also: L.C. Green "The Anglo-Norwegian Fisheries Case, 1951" Modern Law Review, 15 (1952), pp. 373-377, at p. 375; Waldock op. cit., pp. 142, 149, 150, 161; Evensen op. cit., p. 625; Verzijl op. cit., p. 264; Gihl op. cit., pp. 165, 166. Kobayashi op. cit., p. 29; Fitzmaurice op. cit. (1954), p. 410; Hodgson and Alexander op. cit., p. 32.

37. "[W]ithout recourse to Norway's historic title:" Waldock op. cit., p. 150. See also: ibid., pp. 141-142; Kobayashi op. cit., pp. 29, 30; Johnson op. cit., pp. 167-168; Verzijl op. cit., p. 264. Judge McNair disagreed: I.C.J. Repts. (1951), p. 167; Johnson op. cit., p. 178.

38. The rulings were rejected by Judge Hsu Mo in his Separate Opinion: Evensen op. cit., p. 626. Johnson and Verzijl are critical of the historical data relied on by the Court: Johnson op. cit., pp. 169, 170; Verzijl op. cit., pp. 264, 265. See also: Wilberforce op. cit., p. 167; Waldock op. cit., pp. 161-162; Johnson op. cit., pp. 168, 169. Several commentators have criticised the Court for the paucity of the evidence on which its decision was made: Green op. cit., pp. 375-376; Johnson op. cit., pp. 164, 165. Even the Court admitted that it was "not always clear to what specific areas" the historical data applied, but nevertheless, it refused to attach importance to the "uncertainties" or "contradictions" upheld by the U.K.: I.C.J. Repts. (1951), pp. 138, 142. See also: Teclaff op. cit., p. 665; J.R.V. Prescott Boundaries and Frontiers, p. 143. (London: Croom Helm; Totowa, New Jersey: Rowan and Littlefield, 1978)

39. I.C.J. Repts. (1951), p. 161. See: Johnson op. cit., pp. 177-178.

40. Verzijl op. cit., pp. 266-268.

41. I.C.J. Repts. (1951), pp. 155-157. See: Verzijl op. cit., p. 261; Wilberforce op. cit., p. 167; Green op. cit., p. 376; Johnson op. cit., pp. 168, 172.

42. I.C.J. Repts. (1951), pp. 146, 149, 150. See also: Kobayashi op. cit., pp. 25-26. This was very close to the view expressed by Norway at the Hague Codification Conference: H.A. Smith "The Anglo-Norwegian Fisheries Case" The Yearbook of World Affairs, 7 (1953), pp. 283-307, at pp. 291-292. For a summary and comment on Judge Alvarez's Opinion, see: ibid., pp. 295, 296; Johnson op. cit., pp. 172-176.

43. Yearbook of the International Law Commission, 2 (1956), p. 267 (hereafter I.L.C. Yearbook) quoted in: Bowett op. cit., pp. 21-22. Gihl finds this a dubious conclusion: op. cit., p. 168. See also: I.L.C. Yearbook, 2 (1953), p. 33 cited in: O'Connell op. cit., p. 207; Teclaff op. cit., p. 665.

44. See, for example: Marston op. cit., pp. 410-418.

45. Alexander op. cit., p. 54; Marston op. cit., pp. 411, 412 citing I.L.C. Yearbook, 1 (1954), p. 83; McDougal and Burke op. cit., p. 403; Teclaff op. cit., p. 666.

46. S.P. Jagota Maritime Boundary, p. 17. (Dordrecht: Martinus Nijhoff Publishers, 1985); A.L. Shalowitz Shore and Sea Boundaries Vol. 1, pp. 215-216. (Washington: U.S. Government Printing Office, 1962); Revue Egyptienne de droit international, 11 (1955), p. 201.

47. Bowett op. cit., pp. 23-24. See also: Waldock op. cit., pp. 149-151; McDougal and Burke op. cit., p. 403; Teclaff op. cit., p. 666.

48. Bowett op. cit., p. 24. See also: McDougal and Burke op. cit., p. 406; Teclaff op. cit., p. 668; Kobayashi op. cit., p. 52.

49. D.L. Larson "Naval Weaponry and the Law of the Sea" Ocean Development and International Law, 18 (1987), pp. 125-198, at p. 134.

50. K. Hjertonsen The New Law of the Sea; Influence of the Latin American States on Recent Developments of the Law of the Sea, p. 162. (Leiden: A.W. Sijthoff; Stockholm: P.A. Norstedt and Söners Förlag, 1973) See also: A.L.W. Munkman "Adjudication and Adjustment - International Judicial Decision and the Settlement of Territorial and Boundary Disputes" British Yearbook of International Law, 46 (1972-1973), pp. 1-116, at pp. 65-66.

51. I.C.J. Repts. (1951), pp. 128-129. See also: Gihl op. cit., pp. 160, 161. The U.K. argued that the only effect of the complexities of the coast would be to bring into play very frequently the exceptions to the low-water line rule: Waldock op. cit., p. 152.

52. I.C.J. Repts. (1951), pp. 132. See: O'Connell op. cit., p. 33; Shalowitz op. cit., p. 74; Waldock op. cit., p. 129; Young op. cit., p. 244.

53. I.C.J. Repts. (1951), pp. 139, 127. See also p. 133.

54. I.C.J. Repts. (1951), p. 127 (*italics added*). See: Hodgson and Alexander op. cit., p. 37; Waldock op. cit., pp. 116, 152.

55. ibid., p. 116; Hodgson and Alexander op. cit., pp. 29, 41; Bowett op. cit., p. 89; P. Bernhardt, R.W. Smith and G. Greiveldinger "Developing Standard Guidelines for Evaluating Straight Baselines" Limits in the Seas, No. 106 (31 August 1987), p. 6. (Office of Ocean Law and Policy, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State). Gihl accuses the Court of exaggerating the uniqueness of the Norwegian coastline: op. cit., p. 132. The Court also held that the "general direction of the coast" was a principle which "makes it possible to fix certain criteria valid for any delimitation of the territorial sea": I.C.J. Repts. (1951), p. 129. See also: ibid., pp. 133, 193 (Opinion of Judge Read).

56. I.C.J. Repts. (1951), pp. 109, 169-170, 171 (Opinion of Judge McNair), 193 (Opinion of Judge Read). See also: Green op. cit., p.

375; G.S. Westerman The Juridical Bay, p. 185. (New York: Oxford University Press; Oxford: Clarendon Press, 1987); Verzijl op. cit., p. 261. "[T]he Court did not intend to open the door wide to extravagant claims on normal coasts. Although Norway's 1935 line may be a precedent for the method of applying the general direction of the coast rule on exceptionally broken coasts, it is not a precedent for unlimited straight base-lines all around every coast:" Waldock op. cit., p. 153.

57. O'Connell op. cit., pp. 206, 211; A.H. Dean "The Geneva Conference on the Law of the Sea: What was Accomplished?" American Journal of International Law, 52 (1958), pp. 607-628, at p. 617.

58. See for example: Bowett op. cit. pp. 24, 25; R.D. Hodgson "Islands: Normal and Special Circumstances" in J.K. Gamble, Jr. and G. Pontecorvo (Eds.) Law of the Sea: The Emerging Regime of the Oceans, pp. 139-199, at pp. 153-154. (Cambridge, Massachusetts: Ballinger Publishing Company, 1974). See also: J.R.V. Prescott "Straight and Archipelagic Baselines" in G. Blake (Ed.) Maritime Boundaries and Ocean Resources, pp. 38-51, at pp. 38-39. (London and Sydney: Croom Helm, 1987b). McDougal and Burke suggested that traditional prescriptions limiting internal waters had served the international community well and that very "weighty" new factors should be required to justify wide departures from past practice: op. cit., p. 68.

59. O'Connell op. cit., p. 211. "If coastal states had stuck to the Norwegian model, Article 7 [of the 1982 Convention] would have been comparatively unimportant on a world scale;" Bird and Prescott op. cit., p. 189. Hodgson and Smith also argue for a restrictive practice: R.D. Hodgson and R.W. Smith "The Informal Single Negotiating Text (Committee II): A Geographical Perspective" Ocean Development and International Law, 3 (1976), pp. 225-259, at p. 239.

60. P.B. Beazley "Territorial Sea Baselines" International Hydrographic Review, 48 (1971), pp. 143-154, at p. 143. See also the strong views expressed by Waldock: op. cit., pp. 169-170; Johnson op. cit., p. 162.

61. O'Connell op. cit., p. 214.

62. V. Prescott "Delimitation of Marine Boundaries by Baselines" Marine Policy Reports, 8 (1986), pp. 1-5, at p. 2.

63. Prescott op. cit. (1978), pp. 143, 148-149; Prescott op. cit. (1986), p. 1; Prescott op. cit. (1987b), p. 39; O'Connell op. cit., p. 218.

64. Hodgson op. cit., p. 175. See also: L.M. Alexander "Baseline Delimitations and Maritime Boundaries" Virginia Journal of International Law, 23 (1983), pp. 503-536, at p. 515; Beazley op. cit., p. 143.

65. Hodgson and Alexander note that if the basic motivation was to extend the territorial sea (perhaps for security purposes), this would be better accomplished by increasing its breadth rather than by drawing

straight baselines: op. cit., p. 2. This is particularly the case now that the territorial sea limit is frozen at 12 miles, as straight baselines are, in effect, a quasi-legal means of extending that limit. See also: Prescott op. cit. (1978), p. 148.

66. Hodgson and Smith op. cit., pp. 240-241.

67. Bowett op. cit., p. 89. See also: A. De Guttry "The delimitation of territorial waters in the Mediterranean Sea" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 377-415, at p. 387.

68. O'Connell op. cit., p. 218.

69. J.R.V. Prescott The Political Geography of the Oceans, pp. 82-83. (New York: John Wiley and Sons; Newton Abbot, London and Vancouver: David and Charles, 1975); Prescott op. cit. (1986), p. 2.

70. "Straight Baselines - United Arab Republic" Limits in the Seas No. 22, p. 2. (Office of the Geographer, Bureau of Intelligence and Functional Research, United States Department of State) (hereafter Limits in the Seas No. 22); Revue Egyptienne de droit international, (1950), p. 175; Leanza et al op. cit., p. 239.

71. J.R.V. Prescott "The maritime claims of African coastal states" South African Geographer, 5 (1977), pp. 453-464, at p. 454; G. Francalanci and T. Scovazzi "The Old and New Egyptian Legislation on Straight Baselines," pp. 4-5. Paper presented at the Second International Boundaries Research Unit Conference "International Boundaries: Fresh Perspectives" held at Collingwood College, University of Durham 18-21 July, 1991.

72. "The preamble of the 1990 decree states that it was promulgated after having considered the 1951 decree. The new legislation may thus have the merit of giving a more precise (though rather belated) implementation of some elastic provisions embodied in the old one:" Francalanci and Scovazzi op. cit., p. 6.

73. Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 16 (December 1990), pp. 3-8; Francalanci and Scovazzi op. cit., p. 7 and Annex pp. 1-5. The total length of these baselines is 527.1 miles: ibid., p. 7.

74. Limits in the Seas No. 22, p. 3; Francalanci and Scovazzi op. cit., p. 7.

75. The longest baseline is 30.1 miles, the shortest 0.9 miles: ibid., Annex pp. 1, 2.

76. Prescott op. cit. (1977), p. 454; Prescott op. cit. (1986) p. 4. Prescott and Bird op. cit., p. 288; Hodgson and Smith op. cit., p. 238.

77. Baselines: An Examination, pp. 21, 23; Prescott and Bird op. cit., pp. 288-291. See also pp. 295-298.

78. "In a sense this is legal fiction, permitting the coastal State to maintain a line overtaken by geography, while, at the same time, maintaining the principle of the low-water mark as the norm:" I. Aurrocoechea and J.S. Pethick "The Coastline its Physical and Legal Definition" International Journal of Estuarine and Coastal Law, 1 (1986), pp. 29-42, at p. 32.

79. Baselines: An Examination, p. 23.

80. W.S. Scholz "Oceanic research: International law and national legislation" Marine Policy, 4 (1980), pp. 91-127, at pp. 97-98.

81. "Straight Baselines - Albania" Limits in the Seas No. 7 (16 February 1970), p. 1. (Office of Strategic and Functional Research, Bureau of Intelligence and Research, U.S. Department of State). (hereafter Limits in the Seas No. 7)

82. ibid.. See also: N. Ronzitti "New criticism on the Gulf of Taranto closing line: a restatement of a different view" Syracuse Journal of International Law and Commerce, 12 (1985), pp. 465-472, at p. 468.

83. Prescott op. cit. (1975), pp. 80, 81 (Table 4). See also: ibid., pp. 90, 92; Prescott op. cit. (1986), p. 2. Most of the indentations are not even juridical bays: J.R.V. Prescott The Maritime Political Boundaries of the World, p. 296. (London: Methuen, 1985)

84. De Guttry op. cit., p. 392; V. Ibler "The Changing Law of the Sea as Affecting the Adriatic" German Yearbook of International Law, 20 (1977), pp. 174-195, at p. 178.

85. Prescott op. cit. (1987a), p. 292; Prescott op. cit. (1975), p. 41.

86. ibid., pp. 90, 92. See also: Prescott op. cit. (1978), p. 144; Prescott op. cit. (1985), p. 296.

87. P.B. Beazley Maritime Limits and Baselines: A guide to their delineation (Second Edition), p. 8. (Hydrographic Society Special Publication No. 2, 1978)

88. ibid..

89. Bernhardt et al op. cit., pp. 5-15. See also pp. 16-17, 36-37.

90. For a discussion of "locality," see: ibid. pp. 11-13.

91. Beazley op. cit., p. 8. See also: T. Scovazzi "Le Linee di Base Rette" in T. Scovazzi (Ed.) La Linee di Base Del Mare Territoriale (1986), p. 106 cited in: Bernhardt et al op. cit., p. 7.

92. Hodgson and Alexander op. cit., pp. 29, 36, 41.

93. Bernhardt et al op. cit., p. 9; Hodgson and Alexander op. cit., pp. 24, 27.

94. Limits in the Seas No. 7, p. 2; Prescott op. cit. (1975), p. 92.
95. See Article 5(2) of the Territorial Sea Convention, Article 8(2) of the 1982 Convention.
96. Limits in the Seas No. 7, p. 1.
97. Prescott op. cit. (1985), p. 296.
98. See: Prescott op. cit. (1975), p. 87; Prescott op. cit. (1987a), p. 298; Prescott op. cit. (1985), p. 296; Prescott op. cit. (1986), p. 2; O'Connell op. cit., p. 212; Klot op. cit., p. 213; Westerman op. cit., p. 186 n. 17; Bird and Prescott op. cit., p. 185.
99. "Straight Baselines - Yugoslavia" Limits in the Seas No. 6 (6 February 1970), p. 1. (Office of Strategic and Functional Research, Bureau of Intelligence and Research, U.S. Department of State) (hereafter Limits in the Seas No. 6)
100. Bowett op. cit., p. 87.
101. Limits in the Seas No. 6, p. 3.
102. I.C.J. Repts. (1951), pp. 141-142.
103. O'Connell op. cit., p. 205. In his third report to the I.L.C., Francois advocated use of the "largest-scale chart available" for delimiting straight baselines: Kobayashi op. cit., p. 50.
104. I.C.J. Repts. (1951), pp. 141, 142; Hodgson and Alexander op. cit., p. 37. Bernhardt et al concur: "Use of this scale should moderate the apparent directional changes caused by the occasional presence of small curvatures on an otherwise smooth coast:" op. cit., p. 32. According to Shalowitz it is also to the advantage of the coastal State: op. cit., p. 74. Beazley suggests 45 miles, equivalent to the longest baseline used in the Fisheries Case, "could be used as a scale by which to judge the extent of coastline to be considered when assessing the general direction of the coast:" op. cit. (1978), p. 9.
105. Hodgson op. cit., p. 175.
106. This departed from the general direction by 45°, but examination by a large-scale chart showed that Norway had little choice but to draw the line in the way in which it did: Hodgson and Alexander op. cit., p. 37.
107. I.C.J. Repts. (1951), pp. 154-155. See: Fitzmaurice op. cit. (1954), pp. 405, 406; O'Connell op. cit., p. 205.
108. ibid., p. 215. Brierley held that general direction was "essentially subjective ... an invitation to states to put forward extravagant claims to appropriate areas of the open sea:" quoted in Kobayashi op. cit., p. 27. Similarly, Waldock describes the validity of many claims as "a matter of guesswork:" op. cit., pp. 149, 150 at p.

149. Using the language of the I.C.J., Fitzmaurice suggests that a departure from the general direction might be "appreciable" without being a "distortion" of the general direction, or constituting a "manifest abuse": op. cit. (1954), pp. 404, 405, at p. 405. For the problems of defining general direction, see also p. 389.

109. Bernhardt et al do not define a "locality" with respect to island-fringed coasts, although it must be presumed that the definition of contiguity as practised by the coastal State is still operative.

110. O'Connell op. cit., p. 215. See also: Shalowitz op. cit., p. 74.

111. Prescott op. cit. (1987a), p. 307. Waldock, for example, felt that the 1935 line was a precedent for the application of the "general direction of the coast" rule in other cases where the coast is of comparable complexity: op. cit., p. 150.

112. Hodgson and Alexander op. cit., pp. 23-24, 37. Prescott argues for a deviation of not more than 10° from the general direction of the coast: op. cit. (1987a), pp. 294-295.

113. Bernhardt et al op. cit., p. 17-21.

114. In full, Bernhardt et al require that any line used for the purposes of determining the general direction of the coast should:

(i) approximately parallel the direction of the relevant *mainland* coastline;

(ii) not exceed 60 miles in length, unless it does not deviate anywhere less than 20° from the direction of the relevant coastline; and

(iii) have each endpoint on the coastal mainland: ibid., pp. 30-32.

115. ibid., pp. 17-21.

116. Limits in the Seas No. 6, p. 3.

117. ibid., p. 5.

118. ibid., pp. 4-5.

119. Hodgson and Alexander op. cit., p. 39; Hodgson op. cit., p. 155. See also: Prescott op. cit. (1975), p. 81. Alexander suggested that:

"A straight baseline is justified provided that the water area lying between the baseline and the outer territorial limits measured from the low-water mark along any twenty-four miles of baseline is equal to or less than the area contained in a semicircle, twenty-four miles in diameter, measured from the straight baseline:"

quoted in: Shalowitz op. cit., p. 216.

120. Hodgson and Alexander op. cit., p. 154.

121. Prescott op. cit. (1987a), p. 307. See also: Prescott op. cit. (1987b), p. 40. Hodgson and Alexander were aware of these problems, which are obviated by Bernhardt et al: Hodgson and Alexander op. cit., p. 39; Bernhardt et al op. cit., p. 17-21.

122. Prescott op. cit. (1987a), p. 307. See also: Prescott op. cit. (1975), p. 81.

123. Bernhardt et al have developed criteria to examine the screening effect of islands, which are discussed below: op. cit., pp. 25-30.

124. Evensen op. cit., p. 630. This is also the view of Hodgson and Alexander: op. cit., p. 42.

125. Vukas has suggested that the Yugoslavian straight baselines are too *restrictively* defined: he believes they could be extended to the islands of Lastovo (point Kopiste), Susac, Bisevo and Mula, without contravening Article 7 of the 1982 Convention: B. Vukas "The Law of the Coastal Sea and the Continental Shelf of the S.F.R. of Yugoslavia" Yugoslavia Review of International Law, 34 (1987), p. 201 cited in: M. Skrk "The 1987 Law of Yugoslavia on the Coastal Sea and the Continental Shelf" Ocean Development and International Law, 20 (1989), pp. 501-514, at p. 505.

126. For a concurring view, see: Fitzmaurice op. cit. (1954), p. 399.

127. "Straight Baselines - Turkey" Limits in the Seas No. 32 (25 March 1971), p. 1. (Office of the Geographer, Directorate for Functional Research, U.S. Department of State) (hereafter Limits in the Seas No. 32)

128. ibid.

129. ibid., p. 2.

130. Prescott op. cit. (1985), p. 296.

131. See: Limits in the Seas No. 32, p. 2. See also: Prescott op. cit. (1975), p. 84; Prescott op. cit. (1987a), p. 293.

132. cf. Prescott who disagrees: op. cit. (1985), p. 296.

133. Hodgson op. cit., p. 154.

134. This is also the view of Prescott: op. cit. (1987a), p. 294.

135. McDougal and Burke believe that there should be a very considerable number of islands in close proximity to a coastline. However, they admit Article 4 does not explicitly state that straight baselines cannot be used when only a few islands are found: op. cit., p. 40. See also: Hodgson and Alexander op. cit., p. 30.

136. Bernhardt et al op. cit., p. 25. In this case, the Turkish islands only have 6 mile territorial seas, although it is to be assumed

that the 24 mile rule is still to apply, given that this is the permissible territorial sea breadth.

137. Beazley op. cit. (1978), p. 8; Bernhardt et al op. cit., p. 25.

138. In the Fisheries Case, approximately 60 per cent of the coastline was obscured by islands, but Bernhardt et al believe 60 per cent to be too harsh a criterion: op. cit., p. 28.

139. ibid., pp. 25-30. For a discussion of the determination of general direction, see pp. 30-32.

140. Helpful though this criterion is, and allowing for the additional requirements that the general direction lines must parallel the coast, not exceed 60 miles, and have their endpoints located on the mainland, there is still subjectivity in their construction which may permit some States to justify fringing islands on this basis alone. It is, therefore, perhaps with this in mind that Bernhardt et al require this to be but one of several criteria to be satisfied for straight baselines to be drawn along island fringed coasts: op. cit., pp. 17-32.

141. Quoted in: De Guttry op. cit., p. 395.

142. Quoted in: ibid., p. 396.

143. "Straight Baselines - France" Limits in the Seas No. 37 (29 February 1972), p. 4. (Office of Strategic and Functional Research, Bureau of Intelligence and Research, U.S. Department of State) (hereafter Limits in the Seas No. 37). Westerman suggests that France's straight baseline system has been asserted in order to enclose some coastal indentations which could not be enclosed under Article 7 of the Territorial Sea Convention: op. cit. (1987), p. 186 n. 17. See also: De Guttry op. cit., p. 402.

144. Prescott does not regard the illegal enclosure of this bay as significant: op. cit. (1985), p. 297.

145. Limits in the Seas No. 37, p. 6. See also: De Guttry op. cit., p. 402.

146. Prescott op. cit. (1985), pp. 296-297.

147. Bernhardt et al op. cit., p. 5-17.

148. Limits in the Seas No. 37, p. 6.

149. ibid..

150. Prescott op. cit. (1987a), p. 298. However, in another article, Prescott cites France as having employed baselines along a coast where the islands are too few in number or too distant from the coast to constitute a fringe in its immediate vicinity: op. cit. (1987b), p. 43.

151. O'Connell op. cit., pp. 215, 216.

152. supra. note 145.
153. Limits in the Seas No. 37, p. 7.
154. "Straight Baselines - Syria" Limits in the Seas No. 53 (10 October 1973), p. 4. (Office of Strategic and Functional Research, Bureau of Intelligence and Research, U.S. Department of State) (hereafter Limits in the Seas No. 53)
155. See: ibid., p. 8 and attached chart.
156. ibid., p. 8.
157. Prescott op. cit. (1987a), p. 299. See also: Baselines: An Examination, p. 23.
158. Prescott op. cit. (1986), p. 4.
159. Limits in the Seas No. 53, pp. 8-9.
160. De Guttry op. cit., p. 394.
161. F. Durante and W. Rodinó Western Europe and the Development of the Law of the Sea Vol. 4, p. 53. (Dobbs Ferry, New York: Oceana Publications Inc., 1979). This was confirmed by the General Customs Revenue Ordinances of 1950, as amended by Decree No. 3281/68 of 26 December 1968: ibid., p. 59.
162. ibid., pp. 175-179.
163. ibid., pp. 37-39.
164. Prescott op. cit. (1987a), pp. 314, 315. Beazley concurs: op. cit. (1978), p. 8. See also: Prescott op. cit. (1978), p. 147.
165. De Guttry op. cit., p. 392.
166. Prescott op. cit. (1985), p. 297.
167. De Guttry op. cit., p. 393.
168. Official Records, 2 (1974), p. 271 cited in: C.R. Symmons The Maritime Zones of Islands in International Law, (1979), p. 6. (The Hague: Martinus Nijhoff Publishers, 1979)
169. Official Records, 2 (1974), pp. 270, 289 (Spain), 263 (France) cited in: Symmons op. cit., p. 6.
170. Prescott op. cit. (1987a), p. 315. This is also the view of Beazley: op. cit. (1978), p. 8. See also: Prescott op. cit. (1986), pp. 3-4; Prescott op. cit. (1987b), p. 45.
171. Using the criteria developed by Bernhardt et al: op. cit., p. 5-17.

172. Durante and Rodinò op. cit. Vol. 4 , p. 27.
173. ibid., pp. 47-48.
174. Prescott op. cit. (1985), p. 297 (italics added). A sub-national motivation for the Spanish straight baselines is the fact that the provinces have the exclusive right to the inshore fisheries within the internal waters off their coasts.
175. See: International Court of Justice Continental Shelf (Libyan Arab Jamahiriya/Malta) - Memorial submitted by the Libyan Arab Jamahiriya, (26 April 1983), pp. 56-57 (para. 4.31); Annex 38, Map 8. (hereafter Libyan Memorial)
176. Durante and Rodinò op. cit. Vol. 3, p. 13 (L.7.12.1971).
177. Libyan Memorial, p. 47 (para. 4.08, note 2).
178. ibid., p. 57 (para. 4.32).
179. International Court of Justice "Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985" Reports of Judgements, Advisory Opinions and Orders, p. 38 (para. 64). (The Hague, 1985)
180. Prescott op. cit. (1987b), p. 38. But *not* because it is a rock, but because it is not a fringe of islands.
181. supra. note 179.
182. Prescott op. cit. (1987b), p. 47.
183. Prescott disagrees: ibid., p. 43; op. cit. (1986), p. 3.
184. Prescott op. cit. (1985), pp. 297-298, cf. Prescott op. cit. (1986), p. 2. See also: Prescott op. cit. (1987b), pp. 41, 43; F. Francioni "The Gulf of Sirte incident (United States v Libya) and international law" Italian Yearbook of International Law, 5 (1980/81), pp. 85-109, at p. 96..
185. N. Ronzitti "Is the Gulf of Taranto an historic bay?" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 275-296, at pp. 291-292; R. Adam "Un nuovo provvedimento in materia di linee di base del mare territoriale italiano" Rivista di Diritto Internazionale, 61 (1978), pp. 469-495, at p. 474.
186. G.S. Westerman "The juridical status of the Gulf of Taranto: a brief reply" Syracuse Journal of International Law and Commerce, 1: (1984), pp. 297-309, at p. 305.
187. Ronzitti op. cit., pp. 467-468; O'Connell op. cit., p. 214.
188. Ronzitti op. cit., p. 468.

189. This lies 13 miles offshore: Prescott op. cit. (1985), pp. 297-298.
190. See: Prescott op. cit. (1987a), pp. 294-295; Prescott op. cit. (1987b), p. 41; Hodgson and Alexander op. cit., p. 42; Scovazzi op. cit. (1986), pp. 116-117; Alexander op. cit. (1983), p. 517; Bernhardt et al op. cit., pp. 18-19.
191. ibid., pp. 17-21.
192. Prescott op. cit. (1985), p. 298.
193. Adam op. cit., p. 486; M.S. Fusillo "Base lines for determining the territorial sea" Italian Yearbook of International Law, 3 (1977), pp. 570-575, at p. 572.
194. De Guttry op. cit., pp. 397-398.
195. For a discussion of this point, see: Beazley op. cit. (1978), p. 9.
196. I.C.J. Repts. (1951), pp. 128-129.
197. Shalowitz op. cit., p. 214; Fitzmaurice op. cit. (1959), p. 78; Prescott op. cit. (1987a), p. 295.
198. McDougal and Burke op. cit., pp. 409, 410; Fitzmaurice op. cit. (1959), p. 78.
199. ibid., pp. 374, 375, 387.
200. Shalowitz disagrees. He believes the reference to "fringe of islands along the coast" shows an intention to limit the use of straight baselines to coasts resembling that of Norway: op. cit., p. 214.
201. Bernhardt et al op. cit., pp. 25-32.
202. ibid., pp. 17-25.
203. N. Kliot "Maritime Boundaries in the Mediterranean: Aspects of Cooperation and Control" in Blake op. cit., pp. 208-226, at p. 218.
204. Hodgson and Alexander op. cit., p. 39. See also: L.M. Alexander "Baseline Delimitations and Maritime Boundaries" Virginia Journal of International Law, 23 (1983), pp. 503-526; Beazley op. cit. (1978), p. 8.
205. Bernhardt et al op. cit., pp. 21-25, at p. 22.
206. ibid., p. 25.
207. Prescott op. cit. (1987a), p. 299. See also: Bernhardt et al op. cit., p. 25. For a contrary view, see: Beazley op. cit. (1978), p. 9.

208. ibid., p. 8. See also: Prescott op. cit. (1987a), p. 295.
209. Bernhardt et al op. cit., p. 25.
210. Prescott op. cit. (1987a), p. 308.
211. A. Fontana "Le linee di base del mare territoriale italiano" Revista marittima, 111 (1978), pp. 76-79, at pp. 77, 79 (translation).
212. Fusillo op. cit., p. 574.
213. Prescott op. cit. (1986), p. 3.
214. Fontana op. cit., p. 79 (translation).
215. ibid..
216. Larson op. cit., p. 135. Under the Seabed Arms Control Treaty, the coastal State has the right to deploy any weapons it wishes within 12 miles of its coast, so long as it does not significantly affect the rights of innocent passage: ibid., pp. 141-142.
217. Fontana op. cit., p. 77.
218. See Chapter 5.
219. Quoted in: G. Francalanci and T. Scovazzi "A Partial *de facto* Delimitation of the Continental Shelf between Italy and Malta?" in C. Grundy-Warr op. cit., pp. 181-193, at p. 191.
220. Prescott op. cit. (1985), p. 298.
221. A. Gioia "Tunisia's claims over adjacent seas and the doctrine of 'historic rights'" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 327-376, at p. 350.
222. Prescott: op. cit. (1985), p. 297.
223. They were also protested by Malta: Gioia op. cit., p. 349.
224. International Court of Justice Continental Shelf (Tunisia/Libyan Arab Jamahiriya) - Memorial submitted by Libyan Arab Jamahiriya, p. 503 quoted in: Gioia op. cit., p. 350. (hereafter Libyan Memorial)
225. International Court of Justice Continental Shelf (Tunisia/Libyan Arab Jamahiriya) - Memorial submitted by Tunisia, paras. 3.18-3.20 cited in: International Court of Justice "Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February, 1982" Reports of Judgements, Advisory Opinions and Orders, p. 300 (Dissenting Opinion of Judge Evensen para. 18). (The Hague, 1982) (hereafter I.C.J. Repts. (1982))
226. Gioia op. cit., p. 350.

227. De Guttry op. cit., p. 397.
228. International Court of Justice Continental Shelf (Tunisia/Libyan Arab Jamahiriya) - Counter-Memorial submitted by Tunisia, pp. 17-18 cited in: Gioia op. cit., p. 352.
229. I.C.J. Repts. (1951), p. 140.
230. I.L.C. Yearbook, 2 (1956), pp. 268-269 quoted in: Bowett op. cit., p. 22.
231. For criticism of this provision, see: McDougal and Burke op. cit., p. 393. See also: infra notes 234, 235.
232. I.L.C. Yearbook, 2 (1956), p. 270 quoted in: Bowett op. cit., p. 3.
233. ibid., p. 6. See also p. 10.
234. For the negotiating history of this provision, see: G. Marston "Low-Tide Elevations and Straight Baselines" British Yearbook of International Law, 46 (1972-3), pp. 405-423, at pp. 410-418.
235. See, for example: ibid., pp. 411, 412. Notwithstanding the fact that there were precedents for such differential treatment, this distinction, has been described by Bowett as "a compromise defying logic:" op. cit., p. 10. Symmons states that: "Low-tide elevations do not truly generate maritime zones in their own right, but only by 'parasitic' attachment to their neighbouring landmass (if at all):" op. cit., pp. xi-xii.
236. See e.g. the comments of Sandström: I.L.C. Yearbook, 1 (1954), p. 95 cited in: Marston op. cit., p. 412. See also: McDougal and Burke op. cit., p. 395. Fitzmaurice states that because the matter was of relatively little importance, this was a concession made to States such as Norway which made extensive use of baselines : op. cit. (1959), p. 84.
237. I.L.C. Yearbook, 2 (1956), pp. 270-271 quoted in: Bowett op. cit., p. 13. Fitzmaurice agreed that there was no contradiction: op. cit. (1959), p. 87.
238. See: Gihl op. cit., pp. 133, 134, 174.
239. See: Bowett op. cit. p. 23. Bowett states that Article 4 of the Territorial Sea Convention "being largely declaratory of the Court's judgment, may be said to embody custom and bind non-parties:" ibid., p. 89. See also: Marston op. cit., p. 419.
240. Limits in the Seas No. 53, p. 8.
241. Although, as Marston points out, it was never the U.K.'s intention that the I.C.J. should sanction the use of low-tide elevations as basepoints: op. cit., pp. 406-410. See also: Hodgson and Smith op.

cit., p. 239. The omission from Article 4 of this rider led Norway to refuse to ratify the Territorial Sea Convention.

242. Prescott op. cit. (1987a), p. 309.

243. Malta's attempt to intervene in the Tunisia-Libya Continental Shelf Case was prompted partly by the fear that the Tunisian straight baselines could adversely affect the drawing of median lines delimited between itself and the other States, and also impinge on questions of proportionality: G.P. McGinley "Intervention in the International Court: The *Libya/Malta Continental Shelf Case*" International and Comparative Law Quarterly, 34 (1985), pp. 671-694 at pp. 652, 680-681.

244. Marston op. cit., p. 422.

245. Prescott op. cit. (1987a), p. 309. Moussa justifies the Tunisian baselines on the basis of Article 4(3): F. Moussa La Tunisie et le Droit de la Mer, p. 42. (Faculte de Droit et des Sciences Politiques et Economiques de Tunis, Centre d'Etudes de Recherches et de Publication Imprimerie Officielle de la Republique Tunisienne, 1981)

246. Libyan Memorial pp. 503-504 quoted in: Gioia op. cit., p. 353.

247. I.C.J. Repts. (1982), pp. 138-139 (Separate Opinion of Judge De Aréchaga para. 120).

248. ibid., p. 315 (Dissenting Opinion of Judge Evensen para. 24).

249. ibid., p. 316 (Dissenting Opinion of Judge Evensen para. 24).

250. Gihl is critical of the inclusion of this provision in Article 4: op. cit., p. 170.

251. I.C.J. Repts. (1982), p. 316 (Dissenting Opinion of Judge Evensen para. 24). See also: Moussa op. cit., pp. 44-45.

252. I.C.J. Repts. (1982), p. 300 (Dissenting Opinion of Judge Evensen para. 18).

253. ibid. Moussa claims that the banks are exploitable up to 10-12 miles off the coast: op. cit., pp. 44-45.

254. McDougal and Burke op. cit., pp. 388, 389. They did not believe that even low-tide elevations with lighthouses on should be used as basepoints: ibid., pp. 389-390.

255. Gioia op. cit., p. 354.

256. ibid., pp. 354-355. See: Moussa op. cit., p. 27.

257. Gioia op. cit., p. 355.

258. See those cited in: ibid., pp. 327, 354.

259. Moussa believes that they do constitute such a "fringe," because they lie within 12 miles of the coast: op. cit., p. 44. See also: D.C. Hodgson "The Tuniso-Libyan Continental Shelf Case" Case Western Reserve Journal of International Law, 16 (1984), pp. 1-37, at p. 30.

260. Quoted in: Prescott op. cit. (1987a), p. 310. According to Kobayashi this was a significant departure from the Court's Judgement: op. cit., pp. 51, 53.

261. Shalowitz op. cit., pp. 213-214; Fitzmaurice op. cit. (1954), pp. 400, 401; Fitzmaurice op. cit. (1959), p. 77; Prescott op. cit. (1987a), p. 310; Beazley op. cit. (1978), p. 9.

262. Gioia op. cit., p. 352.

263. Office for Ocean Affairs and the Law of the Sea The Law of the Sea - Baselines: National Legislation With Illustrative Maps, pp. 224-229. (New York: United Nations, 1989)

264. Morocco alleges the Chafarinas Islands lie within its internal waters and, indeed, belong to it. It refuses to acknowledge that they may generate any offshore zones for Spain: Symmons op. cit., p. 90. See also: G.H. Blake "Mediterranean Micro-Territorial Disputes and Maritime Boundary Delimitation" in Leanza op. cit., pp. 111-117.

265. I.L.C. Yearbook, 2 (1956), pp. 267-268 cited in: Bowett op. cit., pp. 22, 27.

266. Official Records, 1 (1974), p. 178 cited in: Symmons op. cit., p. 57.

267. S.R. Langford "Internal Waters as Extensions of State Sovereignty in the Mediterranean Sea: The Claims of North African States to Straight Baselines and Historic Bays" in G.H. Blake and R.N. Schofield (Eds.) Boundaries and State Territory in the Middle East and North Africa, pp. 135-146, at p. 138. (London: Menas Press, 1987) No part of the coast meets the criteria for straight baselines along deeply indented coasts laid down by Bernhardt et al, and Scovazzi notes that there is only one juridical bay along the entire coast: op. cit., p. 404.

268. No part of the coast meets the criteria for straight baselines along deeply indented coasts laid down by Bernhardt et al, and Scovazzi suggests only one of Algeria's so-called "bays" complies with the semi-circle test: ibid., p. 405.

269. Langford op. cit., pp. 138-139.

270. Bowett op. cit., pp. 89, 256; Hodgson op. cit., p. 15.

271. Quoted in: Bowett op. cit., p. 260.

272. U. Leanza, L. Sico and M. Ciciriello Mediterranean Continental Shelf Delimitations and Regimes: International and National Legal

Sources, Vol. 2 (Book III), p. 1352. (Dobbs Ferry, New York: Oceana Publications, 1988)

273. De Guttry op. cit., p. 387.

274. Interview between Dr. G.H. Blake, Department of Geography, University of Durham and Mr. Theophilus V. Theophilou, Counsellor, Ministry of Foreign Affairs, in Nicosia, Cyprus on 10 March 1987.

275. Westerman op. cit., p. vii.

276. O'Connell op. cit., p. 416.

277. Quoted in: N. Ronzitti "Is the Gulf of Taranto an historic bay?" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 275-296, at p. 291.

278. I.C.J. Repts (1982), p. 316 (Dissenting Opinion of Judge Evensen para. 24).

279. Ronzitti op. cit., p. 295 (italics added).

280. ibid., p. 275.

281. ibid., pp. 292-293, relying on the views of Johnson op. cit., p. 168.

282. Ronzitti op. cit., pp. 293, 294.

283. ibid., pp. 294-296.

284. G. Westerman "The juridical status of the Gulf of Taranto: a brief reply" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 297-309, at p. 305.

285. Gioia op. cit., pp. 337, 338.

286. ibid., p. 337 (italics added).

287. ibid., pp. 337-340.

288. ibid., p. 345.

289. Libyan Memorial, p. 503 quoted in: Gioia op. cit., p. 350.

290. ibid. p. 350.

291. I.C.J. Repts (1982), pp. 316, 317 (Dissenting Opinion of Judge Evensen para. 24)

292. Gioia op. cit., p. 351.

293. ibid., pp. 343, 344.

294. Libyan Memorial pp. 484, 504; International Court of Justice Continental Shelf (Tunisia/Libyan Arab Jamahiriya) - Counter-Memorial submitted by Libyan Arab Jamahiriya, pp. 36-39 cited in: Gioia op. cit., p. 344. During the dispute with Libya, Tunisia appeared to suggest that the Gulf was even wider and that Ras Kaboudia should be used as its northernmost entrance point: Tunisian Memorial pp. 62, 77; International Court of Justice Continental Shelf (Tunisia/Libyan Arab Jamahiriya) - Reply submitted by Tunisia, pp. 21-22 cited in: Gioia op. cit., p. 344.
295. ibid., p. 350.
296. Westerman op. cit. (1984), p. 308.
297. Fitzmaurice op. cit. (1959), p. 80.
298. I.L.C. Yearbook, 2 (1956), pp. 253. 269 quoted in: Westerman op. cit. (1984), p. 308.
299. ibid., p. 309.
300. Fitzmaurice op. cit. (1959), p. 80; N. Ronzitti "New criticism on the Gulf of Taranto closing line: a restatement of a different view" Syracuse Journal of International Law and Commerce, 12 (1985), pp. 465-472, at pp. 470-471.
301. Fitzmaurice op. cit. (1959), pp. 80-81.
302. Ronzitti op. cit. (1985), p. 470.
303. ibid., p. 471.
304. Fitzmaurice op. cit. (1954), p. 420.
305. ibid., p. 421.
306. See generally: Ronzitti op. cit. (1985), pp. 467, 468.
307. See, for example: O'Connell op. cit., p. 214.
308. Prescott and Bird op. cit., p. 295.
309. Fitzmaurice op. cit. (1954), p. 423.
310. For the effects of this in the Fisheries Case, see: Fitzmaurice op. cit. (1953), pp. 8, 9, 11, 12.
311. Hodgson op. cit., p. 154. "This lacuna opens the door to much abuse:" Degan op. cit., p. 41. See also: Beazley op. cit. (1971), p. 149.
312. Hodgson and Alexander op. cit., p. 42. See also: Alexander op. cit. (1983), p. 518.

313. Bernhardt et al op. cit., especially pp. 14, 15, 17.
314. ibid., p. 15.
315. Beazley op. cit. (1971), p. 144.
316. In a later paper Beazley suggested - based on the Fisheries Case - 45 miles as a maximum limit: op. cit. (1978), p. 9.
317. Beazley op. cit. (1971), p. 146.
318. "Compared with certain other regions, baseline claims in the Mediterranean do not appear unreasonable:" G.H. Blake "Offshore jurisdiction in the Mediterranean" Ekistics, 48 (1981), pp. 339-344, at p. 340.
319. McDougal and Burke op. cit., p. 401.
320. ibid., pp. 402-404, 411. See also: Bernhardt et op. cit., p. 15; Scovazzi op. cit. (1986), pp. 128-136.
321. Hodgson and Alexander op. cit., p. 39.

PART III -

THE DELIMITATION OF MARITIME BOUNDARIES BETWEEN STATES

CHAPTER 5 TERRITORIAL SEA AND CONTIGUOUS ZONE BOUNDARIES IN THE
MEDITERRANEAN SEA

5.1 The Legislation of Mediterranean States with Respect to the
Territorial Sea

Under Article 3 of the 1982 Convention, every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, thereby confirming the majority State practice of the last two decades, and effectively ending the twentieth century's long debate as to the legally permissible extent of the territorial sea.

After the establishment of the concept in the sixteenth century, territorial sea width in the Mediterranean was characteristically defined by the range of a cannon,¹ which came to be regarded as 3 nautical miles. However, there were exceptions, and both Spain and Italy opposed the general 3 mile rule. Spain wanted a wider territorial sea in order to retain exclusive rights to the fisheries off its shores, and from 1760 claimed a 6 nautical mile territorial sea, a claim to which both Britain and the United States issued protest.

During the 1970s, several Mediterranean States joined the worldwide movement in favour of the 12 mile territorial sea, and in so doing brought about a degree of regional uniformity, conspicuous by its absence in the preceding decades.² Thirteen of the Mediterranean's

coastal States now claim a 12 mile territorial sea, as does Turkey for the Mediterranean outside of the Aegean (Table 11).

In 1958, Egypt became the first Mediterranean State to extend its territorial sea to 12 miles, in so doing doubling its 1951 claim. Although this new claim applied to the Mediterranean, Dean suggests that taken with Saudi Arabia's contemporaneous extension, Egypt's revised limit was part of an assertion of Arab claims to the Gulf of Aqaba.⁴ Certainly, Arab States were vocal in support of a 12 mile territorial sea limit at both the 1958 and 1960 Geneva Conferences on the Law of the Sea (UNCLOS I and II), but at the latter, Egypt emphatically denied Dean's assertion that its position was strongly affected by the issue of the passage of Israeli vessels through the Gulf of Aqaba and the Straits of Tiran. Rather, Egypt noted that Arab States were amongst those small, less developed States which favoured a 12 mile limit to secure broader exclusive fishing zones and to ensure that foreign warships and military aircraft were unable to pass through or over areas near to their coasts.⁵ Furthermore, at UNCLOS III, Egypt indicated that whilst it claimed a 12 mile territorial sea, it would accept whatever limit the Conference determined upon,⁶ as subsequently confirmed by its declaration upon ratifying the 1982 Convention.⁷

However, the issue of passage clearly affects Israel's position as to the width of its territorial sea. In 1956, Israel had extended its territorial sea from 3 to 6 miles, in apparent reluctant conformity with the regional norm of the time in both the Mediterranean and Red

Table 11 - Mediterranean States' Territorial Sea Claims

	<u>Date</u>	<u>Claim (n. m.)</u>
Albania	4/9/52	10
	15/4/70	12
	23/2/76	15
	9/3/90	12
Algeria	12/10/63	12
Cyprus	6/8/64	12
Egypt	15/1/51	6
	17/2/58	12
France	1/3/1888	3
	24/12/71	12
Greece	17/9/36	6
Israel	23/10/56	6
	5/2/90	12
Italy	1/1/09	10 km
	30/3/42	6
	14/8/74	12
Lebanon	16/9/83	12
Libya	18/2/59	12
Malta	10/12/71	6
	18/7/78	12
Monaco	20/4/67	3
	14/2/73	12
Morocco	2/3/73	12
Spain	4/1/77	12
Syria	28/12/63	12
	16/8/81	35
Tunisia	26/7/51	3
	30/12/63	6
	2/8/73	12
Turkey	15/5/64	6
	20/5/82	12
		(excluding Aegean - 6)
United Kingdom (Gibraltar, Sovereign Bases - Akrotiri, Dhekelia)	1878	3
Yugoslavia	8/12/48	6
	24/4/65	10
	7/4/79	12

Bold type indicates present claim.

Source: Author's research.

Seas,¹³ only to be frustrated by Egypt and Saudi Arabia's mutual extension to 12 miles in 1958, to which it issued vigorous protests at UNCLOS I.

Although, the 1982 Convention subsequently validated these claims, until recently, Israel steadfastly maintained a 6 mile limit, leading Ayubi to suggest that:

"Israel's close proximity in the northern Red Sea not only to Egypt but also to Jordan and Saudi Arabia may ... explain quite a few of Israel's sea policies, and may well be behind both its questioning of many of the normative provisions of the Law of the Sea during UNCLOS III,"

and its eventual rejection of the 1982 Convention.¹⁴

Certainly, this was one possible explanation of Israel's disinterest in a 12 mile territorial sea; however, during its occupation of Sinai, Israel inherited Egypt's 12 mile claim. Israel made it clear that such inheritance did not necessarily indicate its recognition of the claim, but its fishermen nevertheless quickly took advantage of the 12 mile limit to harvest the rich fishing grounds off the Bardawil Lagoon and off El Arish, where a significant shrimp fishery was developed.¹⁵

At UNCLOS III, the Israeli position regarding the breadth of the territorial sea was contradictory. On the one hand it stated that:

"It was obvious that, from the standpoint of territorial security, a zone of control subject to the exclusive sovereignty of the coastal State, was a necessity, but a territorial sea of six nautical miles was sufficient for that purpose;"

whilst on the other, it indicated it would support the general trend in favour of a 12 mile limit "only if it was definitively and generally accepted."'' On 5 February 1990, Israel's proclamation of a 12 mile territorial sea appeared to acknowledge that the 12 mile limit had received general acceptance.¹²

This course of action seems logical, particularly if Israel's Mediterranean fishery - which grew rapidly in the early 1970s - is to develop further. Moreover, it will also enable Israel to deal better with those Arab ships en route between Cyprus, Lebanon and Egypt, which frequently strayed into Israeli waters under the previous 6 mile limit.¹³ It remains to be seen, however, whether the enforcement of a 12 mile territorial sea will disturb Israel's already fragile relations with its eastern Mediterranean neighbours.

It is also to be noted that Israel appears to administer a territorial sea of two different widths along its Mediterranean coast. The Gaza Strip, occupied in succession by Egypt and Israel since 1948, but annexed by neither, is still juridically part of the Palestine Mandate. Consequently, it would seem that its territorial sea remains at the 3 nautical miles prescribed by the Government of Palestine's 1937 Fisheries Ordinance.¹⁴ However, other commentators disagree

including that, under international law, Israel has sovereignty over the Gaza Strip and, therefore, that the territorial sea off its coast extends to the limit claimed by Israel.¹⁵

Both of Israel's immediate neighbours claim 12 mile territorial seas, although the Lebanese claim is the most recent in the Mediterranean, having been made as late as 1983. Previously, the only Lebanese territorial sea legislation had been that under French Mandate, the Order of 14 November 1929 having set the limit at 6 miles for fishery purposes.

By the same Order, an identical limit was imposed on the coastal zone of Syria under French Mandate. This legislation was revoked in December 1963, when Syria proclaimed a 12 mile territorial sea, only for the limit to be further extended to 35 miles in 1981.¹⁶ This makes the Syrian territorial sea by far the widest claimed in the Mediterranean, and establishes a unique breadth in the world's oceans. It clearly contravenes the 1982 Convention, prompting protests from both New Zealand¹⁷ and Israel. The latter, for example, in its Note to the U.N. Secretary-General of 12 March 1982, stated that:

"...there is no foundation in existing international law for Syria's claims to extend the territorial sea to a breadth of thirty five miles ... and accordingly, it does not recognize the said Syrian measure, and reserves its rights and the rights of its nationals in respect to it."¹⁸

The 35 mile limit may also lead to a dispute with Turkey, and is likely to antagonise Cyprus. However, it is the Cypriot view that the 35 mile claim will lapse once Syria accedes to the 1982 Convention, which Cyprus believes Syria intends to do in due course. As a result, Cyprus has not formally objected to the Syrian claim, in the belief that signature of the 1982 Convention registers both Cypriot acceptance of the 12 mile territorial sea limit and its disapproval of the Syrian claim.¹⁹ However, Syria felt able to vote for the Convention, despite the fact that it claimed a 35 mile territorial sea. Syria remains a non-signatory, but it is probable that it will continue to claim 35 miles even if it accedes to the 1982 Convention, or after the Convention enters into force.²⁰

Until recently, Albania also claimed a territorial sea breadth in excess of the legally permitted 12 miles. Albania twice extended its territorial sea from its original 10 mile claim of 4 September 1952: on 15 April 1970, the limit of Albania's territorial waters was revised to 12 miles, to be followed by an extension to 15 miles on 23 February 1976. This made Albania the only State in the world to claim this breadth of territorial sea, and several States objected to it.²¹ The claim also created problems for Albania's neighbours, in the main, over fishing rights: for example, in 1984, Albania detained Greek fishermen who strayed into its waters, and a year later arrested three French fishermen found in its territorial sea.²²

As to the reasons for Albania's 15 mile claim: a shooting incident involving Yugoslav fishermen occurred in 1976, the year of the most

recent extension,¹³ and thus protection of Albanian fishing interests may well have been a motivation. However, territorial security appears to have been the main reason behind Albania's unilateral claim for, at UNCLOS III in 1974, it stated that:

"Since the two Super Powers were traversing the Mediterranean and the Adriatic like sea monsters, Albania was going to reconsider the breadth of its territorial waters beyond the 12-mile limit."¹⁴

It added further that:

"... it supported the right of every sovereign country to determine the extent of its territorial waters in a reasonable way, without prejudice to the interests of neighbouring countries or international navigation, in accordance with specific geographical, biological and oceanographical conditions, taking into consideration first of all the requirements of national security."¹⁵

It is, therefore, somewhat surprising that on 9 March 1990, Albania issued Decree No. 3766 *reducing* its territorial sea breadth to 12 miles.¹⁶

Albania's northern Adriatic neighbour, Yugoslavia, has claimed a 12 mile territorial sea since April 1979. Its original 1948 claim was for a 6 mile territorial sea, but on 24 April 1965 this was increased to 10 miles. Thus between April 1965 and April 1970, the claims of

both Albania and Yugoslavia were the same, a fact which is unlikely to be coincidental.

Italy, the other Mediterranean State with an Adriatic coast, has also twice revised its territorial sea limit. By Royal Decree of 1 January 1909, Italian territorial waters extended 10 kilometres from the coast. On 30 March 1942, this was revised to 6 miles, a limit which prevailed thereafter until Article 2 of the Navigation Code was amended, by Act No. 359 of 14 August 1974, to extend the Italian territorial sea to 12 miles. This extension is probably best understood as part of the worldwide movement towards a 12 mile zone. It probably also explains why the French territorial sea was extended to 12 miles in December 1971, France having claimed a 3 mile limit for fishing purposes from as far back as 1 March 1888.

The extension of the French territorial sea had the additional effect of completely engulfing the exclusive fishing zone proclaimed by the Decree of 7 June 1967.²⁷ For this reason, Article 4 of the 1971 Law stated that its provisions did not affect the exercise of fishing rights granted to some foreign vessels according to international agreements and French municipal law.²⁸

The French move also undoubtedly influenced Monaco, which had declared a 3 mile territorial sea in 1967: Monaco extended its territorial sea to 12 miles in February 1973. Prescott suggested that there would be no advantage, only added responsibility, if Monaco increased its territorial waters beyond 3 miles,²⁹ but in view of its

geographical situation, it is clearly sensible for Monaco to have identical offshore limits to France.

Spain's territorial sea legislation of 4 January 1977 represents the first precise definition of what constitutes the Spanish territorial sea. The preamble to Act No. 10/1977 noted that for the purposes of both fishing (Act No. 20/1967 of 8 April 1967) and taxation (Decree No. 3281/1968 of 26 December 1968), 12 miles had already been established as the limit for the exercise of Spanish jurisdiction. Therefore, by Article 3, a 12 mile territorial sea limit was claimed in accordance with majority State practice and prevailing international law, (notably the Territorial Sea Convention to which Spain had acceded on 25 February 1971). However, by Article 5, the fishing rights recognised or established for foreign vessels under international agreements, (e.g. the European Fisheries Convention of 9 March 1964), are respected.³⁰

This 12 mile limit does not, however, apply to all Spanish Mediterranean territory. Spain has five "plazas de soberania" on or near the coast of Morocco: these consist of two coastal enclaves - Ceuta and Melilla - and three sets of islands, each of which are also claimed by Morocco. Spain applies its territorial sea legislation to its islands, but *not* to Ceuta and Melilla, for which it claims no territorial sea.³¹ The enclaves' special territorial status is cited as the reason why no territorial sea attaches to them: in other words, were they independent States, they would be entitled to a territorial sea. However, this is an unsatisfactory explanation since there are

many examples of territories lacking full independent status having a territorial sea: for example, by Article 5 of the 1971 Law by which France delimited its territorial sea, the French 12 mile limit was applied to all its overseas departments and dependencies.

Taking this further, Article 3 of the 1982 Convention *permits* but does not *require* a State to establish the breadth of its territorial sea up to 12 miles. This suggests a State may claim any width it wishes between 0 and 12 miles, but there is legal opinion which holds that territorial waters are "non-refusable." For example, in the Fisheries Case (1951), Judge McNair held:

"The possession of this territory is not optional, not dependent upon the will of the State, but compulsory."³²

Similarly, O'Connell states that:

"... the idea that a State does not have a territorial sea unless it proclaims it, is difficult to reconcile with the doctrine of the inherency of the continental shelf."³³

However, Spain's disinclination to claim a territorial sea zone for either Ceuta or Mellila is explained by its position *vis-à-vis* Gibraltar. If Spain was to claim a territorial sea for its coastal enclaves it might be viewed as a precedent strengthening the U.K.'s claim to a 3 mile territorial sea for the Crown Dominion, which Spain objects to based on its interpretation of Article X of the Treaty of

Utrecht (1713), by which Gibraltar was ceded to Great Britain. Indeed, upon its accession to the Territorial Sea Convention on 25 February 1971, Spain stressed that this was "not to be interpreted as recognition of any rights or situations in connection with the waters of Gibraltar other than those referred to in article 10 of the Treaty of Utrecht ...;"³⁴ a view repeated when it published its Territorial Sea Act in 1977.³⁵

As to the remaining Mediterranean States, Malta, Morocco and Tunisia each made territorial sea claims of 12 miles during the 1970s.

Malta first claimed a 6 mile territorial sea in December 1971. On 18 July 1978, it extended this claim to 12 miles, once it became evident that UNCLOS III would agree upon this limit in its final convention.

Morocco and Tunisia made clear their position on territorial sea breadth somewhat earlier by issuing 12 mile claims not long before UNCLOS III began in December 1973. The relevant Moroccan legislation was enacted in March of that year, whilst Tunisia revised its territorial sea limit for the second time in August 1973. Previously, a Beylical Decree of 26 July 1951 had set the limit of Tunisia's territorial waters at 3 miles. In December 1963 this was increased to 6 miles, notwithstanding the fact that in March 1959 the Council of the League of Arab States had recommended that all Arab States should adopt a 12 mile limit.³⁶ Algeria paid heed to this recommendation by claiming a 12 mile territorial sea in October 1963.

Libya extended its territorial waters from 6 to 12 miles on 18 February 1959.³⁷ It thus became the second Mediterranean State to claim a 12 mile limit, apparently in order to protect its fish and sponges from alleged wrongful exploitation by foreign fishermen.³⁸

In the Eastern Mediterranean, Cyprus has claimed a 12 mile territorial sea since the enactment of its Territorial Sea Law No. 45 of 6 August 1964, having two years earlier confirmed its inheritance of the 3 mile limit applied to the island prior to its independence. The reasons for this extension are explained in a Note Verbale from the Cypriot Ministry of Foreign Affairs, dated 4 April 1967:

"(a) In determining the extent of its territorial sea, the Republic of Cyprus has followed the practice already adopted by almost all Mediterranean countries in extending their territorial waters beyond the three-mile limit, provided by the old rule - the 'canon [sic] shot' rule;

(b) Internationally, it is no longer recognized that there is any rule of customary or positive international law preventing the extension of the limit of the territorial sea of a State up to a distance of twelve miles;

(c) On the contrary, the practice followed by the majority of States is to extend their territorial sea beyond the three-mile limit, a limit which has nowadays proved obsolete and inappropriate;

(d) The geographical position of the Republic of Cyprus and reasons relating to the protection, security and well-being of its

people, made such extension imperative;

(e) The above law of the Republic of Cyprus is not at variance with the principle of the 'freedom of the high seas', which, according to international law, commences beyond the twelve-mile limit."³⁹

There are, however, one, possibly two, exceptions to the application of the 12 mile limit to the entire coast of Cyprus. Firstly, upon Cypriot independence in 1960, the British Sovereign Bases of Dhekelia and Akrotiri were permanently ceded to the United Kingdom; their territorial sea limits were set at 3 nautical miles, as for other United Kingdom territory. Secondly, since the Turkish invasion of Cyprus in 1974, the island has suffered a *de facto* partition. Turkey occupies the northern part of the island, and in 1975, proclaimed its independence as the Turkish Republic of Northern Cyprus. Whether Turkey has inherited the Cypriot 12 mile territorial sea claim, or applied its own 12 mile claim to the Turkish territory, is not known, although as the Turkish Republic has only been recognised by Turkey, any offshore claims would not be regarded as internationally valid.⁴⁰

As to Turkey itself, a 6 mile territorial sea was claimed by the Territorial Sea Act of 15 May 1964, this breadth corresponding with the 1936 claim of Greece, and therefore, avoiding conflict between the States in the Aegean Sea. However, under Article 2 of this Act, Turkey reserved the right to determine its territorial sea breadth in accordance with the principle of reciprocity in relation to States whose territorial sea was of greater breadth.⁴¹ Subsequently, on this

basis it claimed a 12 mile territorial sea in the Black Sea, as referred to in the territorial sea boundary protocol between Turkey and the U.S.S.R. of 11 September 1980.⁴²

Law No. 2674 (approved on 20 May 1982) apparently confirmed Turkey's 12 mile claim for the Black Sea, and also increased the Turkish territorial sea to 12 miles in the Mediterranean, *excluding the Aegean*, Article 1 reading thus:

"Turkish territorial waters are a part of Turkey. The width of Turkish territorial waters is six nautical miles.

In consideration of all special characteristics and conditions of designated seas, and observing the principle of equity, the Council of Ministers is authorised to extend the width of territorial waters beyond six nautical miles."⁴³

Consequently, in compliance with this Law, the Turkish Council of Ministers adopted Decree No. 8/4742 of 29 May 1982, which states that:

"Under the authority granted by Law No. 2674, dated 20 May 1982 ... it is the 29 May 1982 decision of the Council of Ministers that, after the aforementioned law goes into effect, and by consideration of the specific features of the seas surrounding Turkey, and under the principle of equity, the current condition regarding the extent of the territorial waters in the Black Sea and the Mediterranean will be continued."⁴⁴

This would seem to suggest that Turkey still claims a 6 mile territorial sea in the Mediterranean,⁴⁵ but most commentators have interpreted the legislation to mean that Turkey has extended the territorial sea off her southern coast to 12 miles, whilst retaining a 6 mile limit in the Aegean.⁴⁶ The U.S. Department of State is of the opinion that if the territorial sea limits in the Black and Mediterranean Seas were 6 miles, there would have been no need for the second paragraph of Article 1 of Law No. 2674 (quoted above), nor would the decision of the Council of Ministers have been necessary;⁴⁷ and the Turkish Foreign Ministry has confirmed that this is the case. However, this means that Turkey must have claimed a territorial sea of 12 miles for the Mediterranean before 1982 if, as it stated, the current condition was to be continued, although there appears to be no published Turkish source that explicitly gives the 12 mile claim for the Mediterranean. What is not disputed, however, is that Turkey claims 6 miles in the Aegean.

Turkey's 6 mile limit in the Aegean finds its origin in the 1923 Treaty of Lausanne, which left Greece in possession of over 3 000 Aegean islands and islets, and Turkey, just the two strategic islands of Imroz Gökçeada and Tenedos (Bozca Ada), which guard the approaches to the Dardanelles. On 17 September 1936, Greece claimed a territorial sea of 6 miles.⁴⁸ This encompasses about 35 per cent of the Aegean's waters, whereas Turkish territorial waters cover a mere 9 per cent and, in many places, extend for less than 6 miles due to the proximity of Greek islands.

Greece has reserved the right to extend its territorial sea to 12 miles, but Turkey has declared that it would regard such an extension as *casus belli* for the following reasons.⁴⁹

(i) a mutual extension of territorial seas to 12 miles would be of no benefit to Turkey as its share of the Aegean's waters would increase by a mere one per cent, whereas Greece's share would almost double to 64 per cent,

ii) an extension of territorial seas to 12 miles would substantially reduce the area of Aegean continental shelf from 56 to 26 per cent, and would preempt the question of sovereignty over some parts of the continental shelf lying 6-12 miles from land,

iii) except for short sections between Limnos and Lesbos, and between Chios and Ikaria, Turkish vessels would almost inevitably have to pass through Greek territorial waters in order to reach the high seas, unless they hugged the Turkish coast until they were east of Rhodes. Whilst Greece argues that Turkish shipping would be fully protected by the right of innocent passage, Turkey is not altogether reassured by this right, which can be suspended by the coastal State, and which does not apply to aircraft.⁵⁰

Greece has shown no indications that it intends to exercise its right to extend its territorial sea limit to 12 miles in the foreseeable future,⁵¹ and given the highly unstable situation in the Aegean, to do so might well provoke the conflict promised by Turkey. Nevertheless, there seems no reason why Greece should not claim 12 mile territorial waters off its non-Aegean coasts, although it seems unlikely to do so.

5.2 The Delimitation of Territorial Sea Boundaries

Before examining the practice of Mediterranean States with respect to territorial sea boundary delimitation, it is appropriate first to trace the development of the criteria governing such delimitation practice.

(a) Pre-World War II

Until 1945, and the Truman Proclamation on the Continental Shelf, maritime boundary delimitation between States was relatively rare and confined, with the exception of the 1942 seabed boundary delimitation in the Gulf of Paria, to the separation of neighbouring States' territorial sea jurisdictions. However, as Rhee has shown, the delimitation of sea areas between States had been envisaged from the earliest origins of the law of the sea. Both Grotius and Pufendorf expressed views on maritime boundary delimitation in the seventeenth century, although it was not until the nineteenth century that it became necessary to delimit territorial sea boundaries between States.⁵²

The majority of maritime boundaries concluded between States in the early part of the nineteenth century involved opposite State situations;⁵³ the establishment of boundaries between adjacent States was virtually ignored until after 1850.⁵⁴ This can be explained by the fact that although the distinction between opposite and adjacent State situations cannot be absolute, maritime boundary problems between

opposite States have generally been regarded as less difficult to solve for, as Grotius tentatively suggested, it was possible to imagine that the sovereignty of each State would meet in the middle of the body of water.⁵⁵ Hence the reason the median line has come to be regarded as the general rule governing the delimitation of territorial sea boundaries between opposite States.

(i) Delimitation between Opposite States

O'Connell identifies three solutions proposed or utilised for delimiting territorial sea boundaries between opposite States:

- (i) the median line;
- (ii) the thalweg;
- (iii) a common median zone.⁵⁶

The origins of the median line principle have been traced by O'Connell to Pufendorf,⁵⁷ who proposed, in 1672, that maritime areas be delimited equally according to an early form of proportionality:

"... the sovereignty of each [State] shall extend into the middle in proportion to the breadth of its land."⁵⁸

However, before Pufendorf, Grotius had indicated that a sea area might be divided by analogy with the principle governing the delimitation of international rivers; namely, that "in doubtful cases ... sovereignty extends to the middle of the river," although Grotius was not sure whether the "middle" should refer to the sea surface or the channel.⁵⁹

The principle of the thalweg first emerged in the early nineteenth century and was often upheld in place of the median line in agreements concerning navigable waters, although the two concepts were often confused or substituted for each other.⁶⁰ The principle was derived from the analogy between straits and rivers, and took account of the fact that an areal delimitation alone might deprive one State of a necessary shipping channel. Thus, where the primary delimitation issue was equal access to, and the sharing of, navigable waters, the thalweg was the preferred means of delimitation.

The third principle adopted, although cases were rare, was the condominium arrangement first proposed by Bluntschi in 1868, whereby instead of drawing a boundary line the States concerned established a common zone.⁶¹ This arrangement had the effect of preserving equal rights of navigational access where territorial seas overlapped, and was used, for example, in the agreement between France and Spain of 30 March 1879, by which a common zone was established in the Bay of Figuiet.⁶²

However, in the early delimitations between States, really only two principles or methods predominated: the centre, middle or "median" line, or the line of the deepest water channel, the "thalweg." Consequently, in recognition of the fact that these were the dominant principles of delimitation, attempts were made to combine the two methods. In 1861, Twiss proposed that the median line be accepted as the general rule, and the "central deep-water line" as a supplementary rule, whilst at the same time stressing that "the right of *innocent use*

of the entire bay or strait for the purposes of navigation or passage may be common to both Nations."⁶³ Similarly, in 1872, Field envisaged a median line delimitation unless there was a navigable channel, whereupon the boundary should follow "the middle channel; or if there be several channels, to the middle of the principal one."⁶⁴

Thus it was that the median line came to be accepted first by scholars, and then by scholarly bodies, as the general rule for the delimitation of territorial sea boundaries in narrow straits. For example, in 1894, the Institute of International Law recommended the median line principle for delimitation between opposite States, a proposal which was accepted by the International Law Association the following year.⁶⁵ By comparison, few authors or scholarly bodies upheld the thalweg as the general rule as it was considered applicable only to those straits and channels where one could be easily identified, and where the preservation of equal rights of access and navigation was of paramount importance.⁶⁶ Therefore, unlike the median line, the thalweg lacked universal applicability.

(ii) Delimitation between Adjacent States

Insofar as the delimitation of territorial sea boundaries between adjacent States is concerned, several different methods of delimitation have been suggested or employed, although many early territorial sea boundary agreements between adjacent States were vague as to the methods of delimitation used,⁶⁷ and the subject was long neglected by jurists.

Meridians were used in two early delimitations between France and Spain in the Bay of Figuer in 1879, and between Portugal and Spain for the Rio Guadiana estuary in 1885, but this method is only appropriate where the coast runs straight along a line of latitude or longitude. Indeed, where such a coastal configuration is present, a line perpendicular to the coast is also appropriate, and was used in a draft convention of 1892 between France and Italy for the delimitation of the waters of the Bay of Mantone for fishing purposes.⁶⁸

One of the first views expressed on the subject is that of La Pradelle, who identified two methods of adjacent State delimitation in 1928. His first method was to project the land boundary seawards along a great circle; the second was to draw a perpendicular to the general direction of the coast.⁶⁹ Both were criticised by Boggs, the first because:

- (i) the land boundary is usually accidental in direction and unrelated to the nature or purpose of delimiting a maritime boundary;
- (ii) a State whose land boundary constituted an arc would have its maritime boundaries projected into the sea as a continuation of this arc to infinity, so that the amount of territorial sea appurtenant to that State would be disproportionate to the length of its coast.

The second method is problematic, because the determination of the general direction of the coast requires the subjective selection of the lengths of coastline to be used in the determination.⁷⁰ Nevertheless, in the Grisbadarna Case, heard by the Permanent Court of Arbitration in 1909, the Court fixed the boundary as a line perpendicular to the general direction of the coast.

However, both Boggs and Gidel upheld the equidistance line solution; and this has evolved as the general rule, although as O'Connell states "it has little peremptory character" in the adjacent States' situation,⁷¹ even if, as in several early delimitations, it is flexibly rather than strictly applied.⁷² The result is the characteristic modified equidistance line boundaries agreed by States during the present century. Gidel favoured the equidistance principle because it allocated neighbouring States equal shares of the adjacent waters. He felt the prolongation of the land boundary led to an inequitable result unless the final segment of the land boundary corresponded to its general direction, and both he and Münch felt a perpendicular to the general direction of the coast was only a special form of equidistance line.⁷³

Finally, where the waters on either side of an equidistance line are not equally navigable, it might be thought equitable that the thalweg should be employed as the boundary. However, the thalweg is of limited utility in adjacent State delimitation because of the difficulty in its identification, and because it gradually disappears within a short distance of the coast. Moreover, if the terminus of the land boundary does not coincide with the location of the thalweg it is difficult to use the thalweg as a valid boundary.⁷⁴ Consequently, in recognition of this problem, the I.L.C.'s draft articles on territorial sea boundary delimitation specifically mentioned the presence of navigable channels as a "special circumstance" requiring departure from an equidistance line delimitation.

(b) The Work of the International Law Commission 1951-1956

The Hague Codification Conference of 1930 did not consider the question of the delimitation of territorial sea boundaries between States with opposite or adjacent coasts,⁷⁵ although the median line solution was embodied "in principle" in Basis of Discussion No. 16.⁷⁶ Consequently, it was not until the I.L.C.'s deliberations in the early 1950s that any attempt was made to codify an article dealing with this issue.

In 1952, Special Rapporteur Francois drafted an article on the delimitation of the territorial sea between two adjacent States, which would generally apply the median line. This was included in his first report on the régime of the territorial sea, and retained in his second report after States had been consulted about their practice and clarification had been sought from experts on some of the technical aspects of the issue.⁷⁷

The issue of territorial sea boundary delimitation between opposite and adjacent States, was next referred to a Committee of Experts, which met in The Hague in April 1953. In the case of opposite State delimitation, the Experts recommended that, as a general rule, the boundary should be the median line, "every point of which is equidistant from the baselines of the States concerned." However, the Committee recognised that there might be "special reasons, such as navigation and fishing rights, which may divert the boundary from the median line."⁷⁸

Insofar as adjacent State delimitation was concerned, the Committee considered four methods of lateral boundary delimitation:

- (i) a continuation of the land frontier;
- ii) a perpendicular on the coast at the intersection of the land frontier and the coastline;
- (iii) a line drawn vertically on the general direction of the coastline;
- iv) an equidistance line.

After thorough consideration, it decided that unless already fixed therwise, the territorial sea boundary between adjacent States "should be drawn according to the principle of equidistance from the respective coastlines." However, as a rider it added that:

"In a number of cases this may not lead to an equitable solution, which should then be arrived at by negotiation."⁷⁹

Subsequently, in 1954, the I.L.C. adopted two articles on territorial sea boundary delimitation,⁸⁰ which were modelled on those set down for the continental shelf. The two geographical situations were dealt with separately, but nevertheless each article provided, in the absence of agreement, for the median line or equidistance principle, unless another boundary line was justified by special circumstances.

The same format persisted in the I.L.C.'s final report of 1956: Articles 12(1) (opposite States) and 14(1) (adjacent States) provided that in the absence of agreement, and unless another boundary line was

justified by special circumstances, the boundary line should be the median line in the case of delimitation between opposite States or in straits, or drawn according to the principle of equidistance in the case of adjacent States.⁸¹ However, in its commentary to Article 12, the I.L.C. recognised that special circumstances would probably necessitate frequent departures from the mathematical median line, but that nevertheless, "it thought it advisable to adopt, as a general rule, the system of the median line as the basis for delimitation."⁸² With reference to Article 14, the I.L.C. noted that there were other possible lines of delimitation, but agreed with the Committee of Experts in disapproving of them, and upheld the equidistance line, whilst indicating that it felt that "this rule should be very flexibly applied."⁸³

(c) The Geneva Convention on the Territorial Sea and the Contiguous Zone and the 1982 Law of the Sea Convention

The First United Nations Conference on the Law of the Sea (UNCLOS I), held in Geneva in 1958, accepted the I.L.C.'s draft articles on delimitation with only small changes. A single article for territorial sea boundary delimitation replaced the two in the I.L.C. draft, and was worded in such a way as to make the median line a residual rule. In addition, Article 12 provided for "historic title" as well as special circumstances to allow for departure from the median line delimitation.⁸⁴ Thus Article 12(1) of the Geneva Convention on the Territorial Sea and Contiguous Zone reads:

"1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision."

Subsequent to this Convention, there was such a general acceptance and application of Article 12 in State practice, that it ensured that there would be no difficulty in repeating its provisions in the 1982 Convention. Thus, at UNCLOS III, there was none of the controversy which attended the negotiations concerning the criteria for the delimitation of continental shelf and E.E.Z. boundaries. Instead, Article 15 of the 1982 Convention reproduces the exact sense and almost the exact wording of Article 12(1), in providing that:

"Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason

of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

Only a few States objected to the provisions of Article 15. The Venezuelan objection was predictable given its reservations to Articles 12 and 24 (contiguous zone) of the Territorial Sea Convention and Article 6 of the Continental Shelf Convention, all of which proposed delimitation by equidistance. However, Venezuela also joined with Bangladesh in wishing there to be uniformity in the principles governing delimitation, rather than the rule for territorial sea boundary delimitation upholding different principles to those governing delimitation of the continental shelf and E.E.Z.⁸⁵

As for Turkey, its representative stated, with clear reference to Turkey's Aegean Sea boundary problems with Greece, that "the drafting of article 15 did not take into account situations that a country might face in semi-enclosed seas."⁸⁶

(d) Interpretation of Article 12(1) (Territorial Sea Convention) and Article 15 (1982 Convention)

In reading both Article 12(1) of the Territorial Sea Convention and Article 15 of the 1982 Convention, one may conclude that in the absence of agreement, an equidistance or median line boundary should be established between the respective territorial seas of neighbouring States, unless special circumstances or reason of historic title

require otherwise. However, neither article gives any guidance as to what "special circumstances" would justify such a departure, and thus State practice can be the only guide.

O'Connell has noted that if the clause "special circumstances" is to be regarded as having the same expansive meaning the concept has acquired through its use in continental shelf delimitation cases, it must be assumed that there is considerable scope for States to claim that special circumstances exist, requiring a delimitation other than the median/equidistance line.⁸⁷ On the other hand, some commentators, such as Jacovides, argue that because no two geographical boundary situations can be identical, the term "special circumstances" was intended to be the exception to a rule of equidistance, and should therefore be interpreted restrictively, with the onus being on the party claiming special circumstances to prove their existence.⁸⁸

Insofar as State practice is concerned, this would appear to affirm that, with respect to the territorial sea at least, equidistance is the general rule, as there are apparently few examples where special circumstances have been invoked causing the agreed boundary line to depart from application of this method of delimitation.

Finally, it should be noted that both Articles 12(1) and 15 resolve by one formula the two questions of the delimitation of the territorial seas between opposite *and* adjacent States, despite the fact that the legal factors may differ in the two geographical situations. O'Connell suggests that the joint treatment of the two geographical

situations was less an intended result than the accident of a consolidation of previous codification attempts, which had concentrated on opposite State situations,⁸⁹ but this appears to have posed States few problems.

5.3 Territorial Sea Boundary Delimitation in the Mediterranean Sea

Despite the fact that each of the Mediterranean's coastal States claim a territorial sea, very few territorial sea boundaries have been agreed between them and many more await delimitation. Table 12 identifies those situations where territorial sea boundaries have, or are potentially to be, delimited. It will be noted that in some cases, geographical circumstances dictate that more than one boundary is required to separate the territorial jurisdiction of two States.

(a) Territorial Sea Boundary Agreements in the Mediterranean Sea

Only four territorial sea boundary agreements have thus far been negotiated in the Mediterranean. As described below, these are between:

- (i) the Republic of Cyprus and U.K. (for its Sovereign Base Areas of Dhekelia and Akrotiri);
- (ii) Italy and Yugoslavia;
- (iii) France and Monaco;
- (iv) France and Italy.

Table 12 - Existing and Potential Territorial Sea Boundaries in the
Mediterranean Sea

Opposite State Boundaries

Spain-Morocco^d
France-Italy^a

Adjacent State Boundaries

Spain-United Kingdom (Gibraltar)^b
Spain-France
France-Monaco^c
France-Italy
Italy-Yugoslavia
Albania-Yugoslavia
Greece-Albania
Greece-Turkey
Turkey-Syria
Syria-Lebanon
Lebanon-Israel
Israel-Egypt
Egypt-Libya
Libya-Tunisia
Tunisia-Algeria
Algeria-Morocco
Morocco-Spain (Ceuta and Melilla)^d
Cyprus-United Kingdom (Sovereign Base Areas)^e
Cyprus-Turkish Republic of Northern Cyprus^b

Possible Mixed Boundary Situations

France-Italy
Greece-Turkey

^a- One of the two opposite State boundaries necessary has already been delimited, the other awaits agreement.

^b- Agreement will require the delimitation of two territorial sea boundaries.

^c- Agreement has required the delimitation of two territorial sea boundaries.

^d- Agreement will require the delimitation of four territorial sea boundaries.

^e- Agreement has required the delimitation of four territorial sea boundaries.

Source: Author's research.

(1) Cyprus-United Kingdom

The territorial sea boundary agreement between Cyprus and the United Kingdom formed part of the Treaty Concerning Establishment of the Republic of Cyprus of 16 August 1960. Under this Treaty, the boundaries separating the territorial waters of Cyprus and the Sovereign Base Areas are fixed by a series of lines defined by bearings from true north (Figure 22).⁹⁰ In 1975, Prescott wrote that these represented "generalised lines of equidistance,"⁹¹ but later accepted the view of the Geographer that they were not.⁹²

Proceeding seawards, the boundaries appear in their initial stages to have been drawn perpendicular to the coast, or as the Geographer puts it, "as simplified normals to generalized coastal baselines."⁹³ Thereafter, each boundary separating the territorial waters of Cyprus and Akrotiri changes direction at a specified point offshore, whilst those boundaries between Cyprus and Dhekelia change their bearing twice. The Geographer suggests the reason for these changes in direction is because a greater length of coast is considered in determining the coast's general direction:

"As the limit extends seaward, the coastal area involved in the normalization increases and the line vector must change."⁹⁴

Also of interest is the fact that these directional changes occur at distances greater than 3 miles offshore - the limit of the

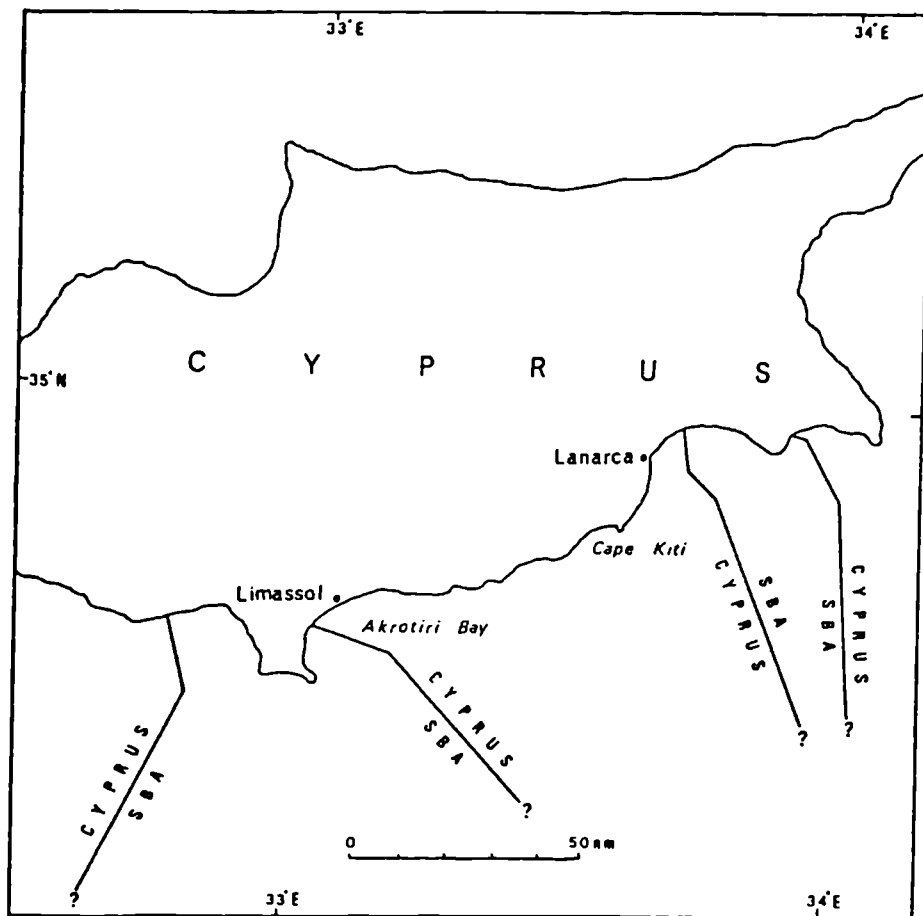


Figure 22 - The territorial sea boundaries between Cyprus and the U.K.'s Sovereign Base Areas.

Source: J.R.V. Prescott The Political Geography of the Oceans, p. 102. (Newton Abbot, London and Vancouver: David and Charles, 1975)

U.K.'s territorial waters claim - although the azimuths do not change beyond Cyprus's 12 mile territorial sea limit.

The four boundaries have no termini. This is curious since, as the Geographer points out, the 12 mile limit from the baseline could have been determined precisely, and would appear to indicate that their non-termination was deliberate. Two possible reasons are suggested:

- (i) to avoid either government increasing its territorial sea so as to envelope or enclose that of the other; or
- (ii) to allow for their extension as continental shelf (and now, presumably E.E.Z.) boundaries.⁹⁵

It is clearly unusual for a territorial sea boundary to separate zones of jurisdiction of different widths,⁹⁶ although as Prescott points out, the lack of termini means that the boundaries "can accommodate the British claim of 3 nautical miles and the Cypriot claim of 12 miles, as well as any extension of either claim."⁹⁷ Nevertheless, it would seem something of a misnomer to suggest that a territorial sea boundary separates what in effect are two different juridical zones, for the waters lying beyond the 3 mile British territorial sea, *but within 12 miles of the Cypriot coast*, are clearly "high seas", despite the fact that they are abutted by Cypriot territorial waters. However, this arrangement, curious though it is, appears to present no problems.

Of additional interest is the *divergence* of the two boundaries separating the territorial waters of Cyprus and Akrotiri, and the

convergence of those between Cyprus and Dhekelia. Given that in each case no termini have been specified, this presumably means that the divergent boundaries may be prolonged indefinitely, whilst the converging boundaries may be extended until they meet.⁹⁸ If so, the extension of these boundaries in this way will have implications for the potential delimitation of maritime boundaries between Cyprus and the Sovereign Base Areas for continental shelf or E.E.Z. purposes.

(ii) Italy-Yugoslavia

Italy and Yugoslavia agreed upon a territorial sea boundary in the Gulf of Trieste as part of a Treaty of Economic Cooperation, signed in Osimo on 10 November 1975, and ratified on 3 April 1977. This Treaty was mainly concerned with delimiting the *land* boundary separating Trieste and Istria, which had been the subject of border disputes since the Second World War, but it also established the territorial sea boundary between the two States in the Gulf of Trieste.⁹⁹

In the Exchange of Notes reproduced in Annex IV, it is stated that in delimiting this boundary both parties relied on the principles found in the Territorial Sea Convention.¹⁰⁰ The boundary continues the direction of the final segment of the agreed land boundary towards the centre of the Gulf, before turning west and then southwest until it reaches the outer limit of the two States's respective 12 mile territorial seas to the west of Piran (Yugoslavia). It is delimited in such a way as to include deep water navigation channels for large vessels using the Italian port of Trieste.¹⁰¹

Hopefully, this agreement should strike a note of optimism for the delimitation of other Mediterranean boundaries between politically discordant States, given that the agreement was concluded despite the longstanding political difficulties between Italy and Yugoslavia. Indeed, rather than political considerations providing obstacles to delimitation, Florio describes how boundary delimitation was governed *more* by political than legal considerations.¹⁰²

(iii) France-Monaco

Territorial sea boundaries between France and Monaco were established by a Maritime Delimitation Agreement of 16 February 1984.¹⁰³ On 20 April 1967, a Franco-Monegasque Declaration had established Monaco's territorial waters at 3 miles, but these were extended to 12 miles in February 1973, thereby mirroring the French extension from 3 to 12 miles of December 1971. As the preamble to the 1984 Agreement states, these extensions made it necessary to re-delimit Monaco's territorial waters.

Under Article 1, the two territorial sea boundaries between France and Monaco are delimited by loxodromic curves joining specified coordinates which, by Article 3, are computed in accordance with the compensated European geodesic system (Europe 50). The established fishing practices of the two States' professional fishermen are protected by Article 4, by which the Parties agree "by way of neighbourly arrangement, to allow French and Monegasque coastal fishing vessels to continue their activities in the traditional fishing

areas located within Monegasque territorial waters and the neighbouring French territorial waters." However, the same Article states that these provisions shall not "constitute an obstacle to the establishment by each of the Parties, in its territorial waters, of one or more reserved or protected zones for marine flora and fauna." Within such zones, each States' nationals are to enjoy the same rights and be subject to the same obligations.

(iv) France-Italy

On 18 January 1908, a Convention was signed between France and Italy delimiting the exclusive fishing zones of the two States between Corsica and Sardinia in the Strait of Bonifacio. The boundary line comprised two segments, one drawn between Guardia del Turco and Isola Budelli, the other between Control do li Scala and Punta Marmorata.¹⁰⁴ However, this line will be abrogated once the Maritime Boundaries Agreement of 28 November 1986 comes into force.

By this Agreement, France and Italy established a five segment boundary delimiting their respective territorial waters in the Strait of Bonifacio. However, in order to ensure that the new boundary did not interfere with the established fishing practices of the two States' fishermen, it was agreed to allow French and Italian vessels to continue to fish in those traditional fishing areas lying within a rectangular area defined by parallels of latitude and meridians of longitude.¹⁰⁵

(b) Undelimited Boundaries

Table 13 is an attempt to identify problems and issues which attend Mediterranean territorial sea boundaries which still require delimitation. On the basis of these, it is suggested that the prospects for delimitation are in many cases poor, and in some cases remote, although should delimitation occur, equidistance is the likely method in a number of situations. The following sections examine these difficulties in greater detail.

(i) Political Difficulties

The political difficulties inherent in Mediterranean maritime boundary delimitation have already been discussed in Chapter 1, and therefore, do not require to be repeated here. However, from Table 13 it can be seen that virtually all the outstanding territorial sea delimitations have to occur in the face of potential political difficulties, and thus the importance of the factor cannot be dismissed lightly. Indeed, in no situation where there is a potential political difficulty can the prospects for delimitation be better than poor.

Possibly the best examples of these political difficulties are found in the western Mediterranean, and concern Spain. As already noted, Spain refuses to recognise the entitlement of Gibraltar to a territorial sea, its objections resting upon an interpretation of Article 10 of the Treaty of Utrecht of 13 July 1713, under which the King Philip of Spain yielded:

Table 13 - Potential Territorial Sea Boundaries in the Mediterranean:
Problems and Issues

<u>Boundary</u>	<u>Potential difficulties</u>					<u>Likely delimitation method</u>	<u>Prospects for agreement</u>
	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>	<u>E</u>		
Spain-Morocco	✓		✓		✓	Q	S
Morocco-Spain							
(Ceuta and Melilla)	✓			✓		Q	S
Spain-U. K.							
(Gibraltar)	✓			✓		Q	S
Spain (Ceuta)-U. K.							
(Gibraltar)	✓			✓		Q	S
Spain-France					✓	Q	F
France-Italy						Q	G
Albania-Yugoslavia	✓		✓	✓	✓	U	P
Greece-Albania	✓		✓	✓		U	P
Greece-Turkey	✓	✓				U	P
Turkey-Syria		✓	✓	✓		U	P
Cyprus-Turkish							
Republic of							
Northern Cyprus	✓					U	S
Syria-Lebanon	✓			✓		Q	S
Lebanon-Israel	✓			✓		Q	S
Israel-Egypt	✓			✓		Q	P
Egypt-Libya	✓					Q	P
Libya-Tunisia	✓	✓	✓			U	P
Tunisia-Algeria					✓	Q	F
Algeria-Morocco					✓	U	F

Key:

Potential difficulties

- A - Political
- B - Legal
- C - Geographical
- D - Different territorial sea breadths
- E - Straight baselines

Likely delimitation method

- Q - Equidistance
- U - Unclear

Prospects for agreement

- G - Good
- F - Fair
- P - Poor
- S - Slim

Source: Author's research.

"... to the Crown of Great Britain the *full and intire Propriety* of the town and castle of Gibraltar, together with the port, fortifications, and forts thereto belonging ... *without any territorial jurisdiction*, and without any open communication with the country round about."¹⁰⁶

Clearly, Article 10 makes no mention of the limits of British jurisdiction over Gibraltar's adjacent waters, and it is doubtful whether its draftsmen even envisaged such jurisdiction. However, the matter became an issue during the early part of the nineteenth century, when Spanish coastguard ships attempting to control the movement of smuggled goods from Gibraltar clashed in Algeçiras Bay with Royal Navy ships protecting British merchant vessels whose home port was Gibraltar. Spain protested the presence of the Navy ships in Algeçiras Bay and other Spanish waters, arguing that the Treaty of Utrecht had ceded to Britain the port of Gibraltar but no jurisdiction over its adjacent waters. However, Britain responded by claiming that, to the contrary, the rule of cannon-shot applied, and that as much of Algeçiras Bay was within range of Gibraltar's guns, Spain's coastguard activities were violations of its territorial jurisdiction.¹⁰⁷

Spain continued to protest, but in November 1826, the British Foreign Secretary, Canning, in a Note to the Spanish Minister in London, devised a meaning for "port of Gibraltar" in Article 10,¹⁰⁸ which was to become the basis of the United Kingdom's 3 mile territorial sea claim in 1851. Spain responded in a Note of 9 June 1851, in which it rejected the U.K.'s claim, proposing instead that a

joint commission be established to define Gibraltar's land and sea boundaries, and to declare the disputed waters within Algeçiras Bay "common waters." In turn, Britain turned down this proposal, and claimed that Canning's definition had acquired "prescriptive validity" due to the absence of Spanish protest, a claim which Spain vehemently denied.¹⁰⁹ A process of protest and counter-protest has continued unabated ever since.

On 10 March 1865, Britain and Spain agreed to abolish the requirement for merchant ships to fly their flags when navigating the Strait of Gibraltar within range of their respective fortresses, an act which was regarded by Gibraltarians as tacit Spanish recognition of British jurisdiction over Gibraltar's adjacent waters, although Spain persisted with its view that no such jurisdiction was prescribed by the Treaty of Utrecht.¹¹⁰ Then in 1874, the Spanish revenue authorities at Algeçiras, in an attempt to stop smuggling from Gibraltar to Spain, unilaterally claimed the right to intercept and board all merchant ships passing within a fixed zone of 7.5 miles from the Spanish coast. Britain immediately protested, "and forgetting its own 'Hovering Acts,' argued that the law of nations did not permit a right of search over foreign ships on the high seas 'beyond the well-defined limit of three miles'."¹¹¹

However, significantly, in the same year, Spain resurrected its proposal for a mixed commission to be appointed to delimit maritime boundaries, but in respect of a working arrangement for Algeçiras Bay. This indicated that Spain was now willing to accept some form of

British jurisdiction over Gibraltar's adjacent waters, and was an attempt to avoid incidents such as the mistaken arrest of the *Trueno* in 1875, which was held to be "hovering" in British waters. Negotiations between 1878 and 1883 produced nothing, however, because Britain attempted to change Spain's proposal and actions into a recognition of Gibraltar's 3 mile territorial sea.¹¹² For example, in September 1876, Spain instructed its coastguard vessels not to pursue smugglers within an area of 3 miles to the south and east of Gibraltar, and within Algeçiras Bay, not beyond a straight line running north-south from Punta Mala and passing 2 miles west of Europa Point on Gibraltar. Spain's intention was to avoid clashes with the Royal Navy, but Gibraltarians interpreted the Royal Order as a *de facto* recognition of Gibraltar's territorial sea.

Again, during the 1950s and 1960s, smuggling from Gibraltar into Spain flourished, and Spanish coastguard vessels increasingly clashed with Royal Navy ships defending suspected smugglers from arrest within Gibraltar's territorial sea,¹¹³ causing the Gibraltar Government to state, in May 1962, that "the British would defend themselves by every means in their power" should the Spanish coastguards operate within Gibraltar's territorial waters.¹¹⁴

Nevertheless, throughout the 1960s, Spain unsuccessfully pressed for the return of Gibraltar to Spain; and as part of its measures designed to force Britain to give up its sovereignty to the Rock, declared an exclusion zone for foreign aircraft in Algeçiras Bay. This severely restricted military and civilian use of Gibraltar's airfield,

and also had the effect of prohibiting aircraft from overflying the Bay's waters, thereby denying the right of overflight over Gibraltar's territorial sea.¹¹⁵

However, in the 1980s, relations improved between the U.K. and Spain on the question of Gibraltar's sovereignty, although periodic tension along the nominal median line in Algeçiras Bay persists, e.g. in early 1986, British protested a violation of Gibraltar's territorial sea by a Spanish warship.¹¹⁶ Consequently, the delimitation of territorial sea boundaries between Gibraltar and Spain appear highly unlikely, and are dependent upon prior formal Spanish recognition of Gibraltar's territorial sea claim. That no such delimitation is likely can perhaps be inferred from the fact that although both States refer to the median line in their territorial sea legislation,¹¹⁷ neither State appears to anticipate an adjacent State delimitation.

Spain also has potentially as many as four opposite State territorial sea boundaries to delimit with Morocco. One of these will separate the States' territorial waters in the Strait of Gibraltar. Theoretically this will be a median line, given that both States' national legislation refers to such a boundary, although the delimitation is complicated by the presence of Gibraltar and Ceuta at the eastern end of the boundary area, and also by both States' straight baselines.

Spain has repeatedly given notice of its non-recognition of the U.K.'s territorial sea claim for Gibraltar, its most recent declaration occurring on the occasion of its signature of the 1982 Convention:

"The Spanish Government, upon signing this Convention, declares that this act cannot be interpreted as recognition of any rights or situations relating to the the maritime spaces of Gibraltar which are not included in article 10 of the Treaty of Utrecht of 13 July 1713 ..."

Given this position, it seems unlikely that any boundary between Spain and Morocco can impinge upon the area lying off Algeçiras Bay, until the Gibraltar question is finally resolved. To delimit a boundary which ignores the claims of the U.K. would be to bring to a head the whole question of Gibraltar's sovereignty, a course of action which seems inopportune given the present state of negotiations between Spain and the U.K. Indeed, in this context, it is worthy of note that Spain has refrained from drawing a straight baseline across Algeçiras Bay, thereby leaving a break in its continuous straight baseline system along both its Atlantic and Mediterranean coasts.

As to Ceuta: should Gibraltar come under its sovereignty it seems probable that Spain would press maritime claims on its behalf, as this would enable Spain to control all the maritime territory between its European coast and the coast of North Africa, at the same time obviating any need for a delimitation between Morocco and Spain in this area. However, at present, Spain makes no maritime claims on behalf of

Ceuta, whilst Morocco disputes its right to be sovereign over the enclave. Therefore, only if Spain regains control of Gibraltar and cedes control over Ceuta can a maritime boundary between Spain and Morocco be drawn in this region.

The other three potential boundaries between the States concern the Spanish islands which lie off the Moroccan coast, the delimitation of which appears highly unlikely. At present, Spain claims no territorial sea or other maritime zones for these islands, although were Spain to make claims to a continental shelf or an E.E.Z. it could deprive Morocco of significant areas of sea and seabed in the Alboran Sea. For its part, Morocco disputes the islands' Spanish sovereignty and refuses to recognise their entitlement to offshore jurisdiction, a position affirmed by its action in placing the three sets of islands either behind or within its straight baseline system. Whatever the politics of the situation, however, territorial sea boundaries would seem to be of little value given the islands close proximity to the North African coast.

It must also be clear from the preceding discussion that politics militate against the theoretical territorial sea boundary between Ceuta and Gibraltar ever being delimited. Similarly, the delimitation of territorial sea boundaries between Morocco and Ceuta, and between Morocco and Melilla, seem highly unlikely given the sovereignty question concerning the enclaves and the disruption to Moroccan marine space which would result from Moroccan recognition of any offshore claims on behalf of the enclaves.

Difficult political problems also exist in the eastern Mediterranean. For example, although the island of Cyprus is split between the self-proclaimed Turkish Republic of Northern Cyprus and the legitimate government of the south, the likelihood of any territorial sea boundaries being delimited between the two is non-existent. However, although no *de facto* maritime boundaries exist, (because Cypriot recognition of such would be tantamount to acceptance of Turkish sovereignty), Cypriot fishermen are nevertheless careful not to cross imaginary lines separating the waters under Turkish and Cypriot control; and where they have done so, there have been incidents with Turkish patrol boats.¹¹⁹

The Syrian occupation of northern Lebanon, allied with the unstable political situation existing at present in Lebanon, also makes unlikely the delimitation of a territorial sea boundary between these two States; whilst Glassner and Unger have pointed out that:

"Israel is in a truly unique situation of being unable to negotiate with any of her [Arab] neighbours on maritime or other matters,"¹²⁰

the only possible exception being Egypt. It is, therefore, interesting to note that in the absence of formal boundary agreements, Israel delimits its maritime boundaries by means of a perpendicular to the coast, originating at the land boundary terminus,¹²¹ given that it is a party to the Territorial Sea Convention which prescribes delimitation by equidistance.

(ii) Legal Difficulties

The legal difficulties referred to in Table 13 concern those situations where States have differing views as to the appropriate methods or principles governing territorial sea boundary delimitation. This, however, is not easy to discern, because many Mediterranean States - Albania, Algeria, Cyprus, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Tunisia and Yugoslavia - make no specific provisions for the delimitation of territorial sea boundaries in their domestic legislation. Insofar as Monaco and Malta are concerned, the absence of such provisions is not significant: Monaco has already fixed its territorial sea boundaries with France, whilst under a 12 mile territorial sea limit, Malta's territorial sea cannot overlap with that of any of its neighbours. However, with respect to the other aforementioned States, an attempt must be made to deduce their likely position on delimitation from their attitude towards the relevant provisions of conventional international law.

Israel, Italy and Yugoslavia, have each ratified the Territorial Sea Convention and, therefore, there is some certainty that they will hold that, in the absence of agreement, their territorial sea boundaries should be delimited by means of an equidistance line, unless there is reason by means of historic title or other special circumstances to delimit the boundary in another manner. Indeed, insofar as Yugoslavia is concerned, its signature and subsequent ratification of the 1982 Convention would appear to confirm its position, given that Article 15(1) reproduces the exact sense and

almost the exact wording of Article 12(1) of the Territorial Sea Convention.

The signature of the 1982 Convention by Algeria, Greece, Lebanon, and Libya, and its ratification by Cyprus and Tunisia, would also appear to indicate that these States support territorial sea boundary delimitation on the basis of equidistance, although some doubt must exist as far as Algeria and Libya are concerned, given that at UNCLOS III they co-sponsored draft articles calling for delimitation according to equitable principles. However, the opposition to equidistance expressed by the group of States which favoured delimitation on the basis of equitable principles was, in the main, concerned with the application of a rule of equidistance to the delimitation of continental shelf and E.E.Z. boundaries. Only in a few cases did the opposition to equidistance also extend to territorial sea boundary delimitation, and there would appear to be no reason why the equidistance rule should be opposable to Algeria or Libya in the delimitation of their territorial sea boundaries. Indeed, Morocco saw no incompatibility between its co-sponsorship of the aforementioned draft articles and its territorial sea legislation, which prescribes the use of equidistance in the absence of agreement.¹²²

Of those Mediterranean States whose legislation expressly provides for territorial sea boundary delimitation, only Turkey's refers to delimitation by means other than equidistance. Turkish Law No. 2674 of 20 May 1982 declares that:

"Turkish territorial waters with States which share adjacent or opposite shores will be delineated by agreement. This agreement will be made by taking into account relevant characteristics of the region and circumstances and according to the principle of equity."¹²³

However, previous to 1982, Turkey had held that its territorial sea boundaries should be delimited by means of a median line; Article 3 of Turkey's Territorial Waters Law No. 476 of 15 May 1964 read:

"In the case of a State adjoining the territory of Turkey, and whose distance from the Turkish coast is less than the sum of the widths of their respective territorial waters, the median line does constitute the outer boundary, unless otherwise agreed upon;"¹²⁴

and it was with such a median line that Turkey established its territorial sea boundary with the U.S.S.R. on 17 April 1973.

The legislation of all remaining Mediterranean states refers either directly or indirectly to equidistance. France and Spain each state that failing agreement they shall not extend their territorial waters beyond a median line,¹²⁵ whilst both Egypt and Syria declare in general terms that if their territorial seas are overlapped by those of other States, the boundaries of their territorial waters shall be determined in accordance with the principles of international law, unless otherwise stated in a particular convention.¹²⁶ This would seem

to suggest compliance with the rule of equidistance found in the Territorial Sea and 1982 Conventions, the latter of which Egypt has ratified. However, insofar as Syria is concerned, the position is less clear, given its non-accession to either Convention. Nevertheless, its positive vote for the 1982 Convention may be taken as indicative of its attitude towards territorial sea boundary delimitation, although its unlawful 35 mile territorial sea claim must always be borne in mind in any such assertion.

However, applying the above analysis to specific boundary situations, it can be seen that leaving aside for the moment the undelimited boundary between Libya and Tunisia, only those boundaries which involve Turkey appear to present legal difficulties. For example, although complicated by Syria's 35 mile territorial sea claim, the delimitation of a territorial sea boundary between Turkey and Syria is most obviously hampered by the possibility of disagreement as to the applicable delimitation principles.

The situation in the Aegean colours all of Turkey's marine policy with respect to delimitation, and although the primary rule of delimitation - agreement - allows individual States to delimit their maritime boundaries by different methods in different geographical circumstances, Turkey might be thought loathe to approve the use of equidistance in any boundary situation because of its effects when applied to the delimitation of its maritime boundaries with Greece in the Aegean. Furthermore, the application of equidistance to the delimitation between Turkey and Syria would appear to result in the

northwest deflection of the boundary to the advantage of Syria, on account of the coastal geography in the boundary region, making it even more certain that the delimitation should be carried out according to equitable principles.

Insofar as the boundary between Libya and Tunisia is concerned, the legal difficulties are not so much to do with conflicting views as to the applicable law, as with the legacy of the I.C.J.'s adjudication of the States' continental shelf boundary dispute. Although, the I.C.J.'s Judgement did not impinge upon the areas of the two States' territorial seas, it nevertheless indicated that the continental shelf boundary should begin at:

"... the point where the outer limit of the territorial sea of the Parties is intersected by a straight line drawn from the land frontier point of Ras Ajdir through the point 33° 55' N, 12° E, which line runs at a bearing approximately 26° east of north ..."

Clearly, this reference to a straight line from the land frontier point was *not* intended to define the two States' territorial sea boundary, (the delimitation of which lay beyond the jurisdiction of the Court); and therefore, irrespective of the continuing continental shelf boundary problem, Tunisia and Libya must agree upon a boundary separating their respective territorial waters. Nevertheless, the delimitation of the continental shelf boundary, and the proceedings of the I.C.J., are obviously relevant its delimitation.

*

If the States agree to adopt the continental shelf boundary suggested by the Court - and one must note Tunisia's opposition to such a delimitation - the territorial sea boundary must be drawn in such a way as to join up with the States' continental shelf boundary. However, this would seem to give little room for manoeuvre, as the landward terminus of the boundary chosen by the I.C.J. will be the controlling element in the delimitation. In choosing this line, the I.C.J. had regard to what it considered to be a *de facto* maritime boundary separating the two States' petroleum concessions, but in its Application for revision and interpretation of the Court's Judgement, Tunisia disputed both that the line should follow the bearing indicated and that it should pass through the point defined. Rather, Tunisia argued that it was for the experts of the Parties to define the precise bearing of the line, whilst the coordinates of the point through which such a line should pass should be 33° 50' 17" N, 11° 59' 33" E, not 33° 55' N, 12° E. The Court, however, subsequently rejected all of Tunisia's legal arguments in this respect, thereby leaving its decision intact.

What, therefore, of the territorial sea boundary? Clearly, Tunisia's unhappiness with the Court's Judgements makes it unlikely that the I.C.J.'s continental shelf boundary will become the subject of an agreement between Libya and Tunisia. On the other hand, Libya is unlikely to be willing to negotiate a boundary which cedes Tunisia more continental shelf than the I.C.J. Consequently, without a continental shelf boundary agreement, the negotiation of a territorial sea boundary is improbable, given that its landward terminus would define the point

of origin of the seabed boundary. Therefore, because the delimitation of the territorial sea boundary is dependent on prior agreement of the continental shelf boundary it will remain undelimited until this point is defined, thereby highlighting the problem of trying first to delimit an offshore zone unconnected to the international land boundary and divorced from its immediate coastal geography, rather than working from the delimitation of the territorial sea seawards.

(iii) Geographical Difficulties

The geographical difficulties referred to in Table 13 concern either the presence of islands in the boundary region or particular coastal configurations, each of which favour one State at the expense of another based on the assumption that equidistance will form the basis of any delimitation agreement.

For example, in respect of Albania and Greece, a problem exists in relation to the Greek islands of Kerkira (Corfu), Erikousa, and Orthonoi, which lie off the terminus of their international land boundary. The presence of these islands has the effect of forcing a median line separating 12 mile territorial seas to follow a northerly course for a total boundary length of 43 miles,¹²⁸ thereby restricting Albania's offshore claims. Prescott suggests Albania "is likely to seek relief from the constricting effect of the Greek islands,"¹²⁹ but what form this will take is unclear.

Neither State makes specific provisions for territorial sea delimitation in its legislation, nor is either State a party to the Territorial Sea Convention, under which the islands might be considered "special circumstances" requiring deviation from the median line. Greece has, however, signed the 1982 Convention, thereby indicating approval of a virtually identical provision in Article 15. Moreover, it would be difficult for Greece not to accept that the islands constituted special circumstances, given its prominent support of equidistance at UNCLOS III.

Nevertheless, it would appear much more likely that this problem will be dealt with as part of the States' continental shelf boundary negotiations, given that the Continental Shelf Convention is in force between them. Both States are, therefore, bound by Article 6(1), which allows for special circumstances to warrant deviations from a strict median line delimitation. Even so, the question remains as to what effect the islands will be allowed in the delimitation, for at the outset Albania is likely to claim that they should be given minimal weight, whereas Greece, ever mindful of its problems with Turkey, will be keen not to concede the entitlement of its islands to both a territorial sea and a continental shelf of their own.

Albania also has geographical difficulties in respect of any delimitation with Yugoslavia, aside from the States' uneasy political relationship. Both States are silent with respect to the delimitation of territorial sea boundaries, although Yugoslavia is a party to the Territorial Sea Convention and has ratified the 1982 Convention, which

suggests support for the equidistance-special circumstances rule. If such a rule was applied to its boundary with Albania, coastal geography would appear to dictate that an equidistance line extend across the Albanian coast. However, possibly to combat this eventuality, Albania has drawn a straight baseline linking Cape Rodoni to the international land boundary. If used as a baseline for delimitation purposes, this will have the effect of deflecting the territorial sea boundary westwards into the Adriatic Sea and away from the Albanian coast. Consequently, Yugoslavia is likely to oppose an equidistance line delimitation using the offending baseline, whereas Albania will be unlikely to agree to any delimitation which does not take account of it.

(iv) The Problem of Different Territorial Sea Breadths

The problem of different territorial sea breadths has already been touched upon in discussing the boundaries separating the territorial waters of Cyprus and the U.K.'s Sovereign Base Areas. It may also be a significant problem in future territorial sea delimitations involving Syria, in view of its 35 mile territorial sea claim.

It is, therefore, interesting to note that at UNCLOS I, Turkey held that:

"... the rules concerning the delimitation of the territorial sea of two neighbouring Countries could not be applied if the two countries concerned claimed different breadths."¹³⁰

There is no conventional law provision in this respect, but whilst there remains a discrepancy between the States' territorial water claims it seems unlikely that any maritime boundary, whether territorial sea, continental shelf or E.E.Z., can be delimited. Using the example of Syria and Lebanon, the alternatives would be for Syria to be persuaded to reduce its territorial sea claim to the legal limit of 12 miles - for which there are precedents³¹ - or for the two States to agree to a delimitation only as far as 12 miles from their respective shores, neither of which seems practical.

(v) The Problem of Straight Baselines

The problem of straight baselines in Mediterranean territorial sea boundary delimitation has already been mentioned, for example, in relation to the boundary through the Strait of Gibraltar. Neither the Spanish nor Moroccan straight baselines appear legitimate under international law and, therefore, it would appear inappropriate for either State to protest the other's use of such baselines. This leaves the States with two options in determining their boundary (probably a median line):

- (i) to ignore all the straight baselines and use the low-water line along the relevant coasts;
- (ii) to use each State's straight baselines as the starting point for the delimitation.

The second option seems the most likely to be employed, given that each State's national legislation refers to the nearest points on the baselines of the respective coasts, but Spain adds the important rider

that such baselines shall be drawn in accordance with international law, which is doubtful, although not by Spain in respect of its own baselines!

It is possible, however, that no boundary will be delimited through the Strait of Gibraltar, as neither State stands to gain from the exercise. As the Strait is used for international navigation, passage through it, and hence through the territorial waters of Spain and Morocco, is governed by the régime of transit passage as defined in Articles 37-44 of the 1982 Convention. Although this régime does not affect the legal status of the waters as Spanish and Moroccan territorial sea (Article 34), it does mean that every State enjoys the freedoms of navigation and overflight while transiting the Strait. Therefore, the main question between the bordering States is not the delimitation of territorial sea rights, but the rules and regulations which they may adopt for the Strait under Articles 34-45 of the 1982 Convention.

Straight baselines may, however, be of more significance in other Mediterranean boundary situations. For example, it seems likely that the territorial sea boundary off the Mediterranean mainland coasts of Spain and France is likely to be based on equidistance, given their respective legislative provisions and the fact that they have already delimited such a boundary in the Bay of Biscay,¹³² (although not every point is equidistant from the respective baselines used at the time).¹³³ However, the Mediterranean delimitation is complicated by the Spanish straight baseline drawn between Cabo de Creus and the

international land boundary. This baseline would appear to have the effect of deflecting an equidistance line northeastwards to the advantage of Spain. French protests may, as a consequence, lead to this baseline being ignored for the purposes of delimitation.

A similar situation pertains to the potential delimitation between Tunisia and Algeria. Tunisia may contest the Algerian straight baselines in the border region, because although they do not significantly depart from the general direction of the coast, their use could deflect an equidistance boundary to the advantage of Algeria. As there are doubts concerning their legal validity, it is possible that an equidistance boundary may be drawn ignoring the offending baselines, although the Decree by which they were established explicitly states that the territorial sea shall be measured from straight baselines and the closing lines of bays.

There is also a problem with straight baselines in the delimitation of a territorial sea boundary between Algeria and Morocco, except that in this case both States have straight baselines in the boundary region. The relevant baselines depart significantly from the coast, and would affect the delimitation of an equidistance line should this be used as the delimitation method.¹³⁴ However, as neither State's baselines appear legitimate, it would be difficult for either State to contest the use of the other's baselines in an equidistance line delimitation, although Algeria would appear to gain most from their use. Alternatively, the States may agree to disregard the baselines for the purposes of delimitation, but this seems unlikely as

both States explicitly refer to straight baselines and bay closing lines as the basis for their domestic jurisdiction with respect to the territorial sea.

5.4 Mediterranean Legislation with Respect to the Contiguous Zone

Not all Mediterranean States have found it necessary to claim a contiguous zone, and of those that do, the references to "security" in the Egyptian and Syrian claims are inconsistent with both Article 24 of the Territorial Sea Convention and Article 33 of the 1982 Convention, neither of which mentions security. The reason for the absence of such a provision is found in the I.L.C.'s commentary to the draft articles that formed the basis of the Geneva Conventions, wherein it was stated that the I.L.C. did not recognise special security rights in the contiguous zone because:

"It considered that the extreme vagueness of the term 'security' would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State." ¹³⁵

Nevertheless, by Presidential Decree of 17 February 1958, Egypt claimed a contiguous zone of 6 miles from the outer limit of its 12 mile territorial sea for "the purposes of enforcing security, navigation and other financial and health laws and regulations."¹³⁶ This 18 mile claim was illegal under Article 24 of the Territorial Sea

Convention, which permitted only a 12 mile claim,¹³⁷ although with its signature and ratification of the 1982 Convention on 26 August 1983, Egypt increased its contiguous zone to that Convention's permitted breadth of 24 miles by means of a declaration.¹³⁸

In similar fashion, Syria claimed a "supervision" zone of 6 miles measured from the outer limit of its 12 mile territorial sea on 28 December 1963, which also referred to security as well as navigation, fiscal and sanitary matters.¹³⁹ As with Egypt, this 18 mile claim was illegal under the Territorial Sea Convention. It is not clear whether this contiguous zone still exists now that Syria claims a 35 mile territorial sea. If it does, measuring the contiguous zone at 6 miles from the outer limit of the territorial sea gives Syria a contiguous zone of 41 miles instead of the permitted 24.¹⁴⁰ This, however, seems unlikely.

A number of Mediterranean States have established a contiguous zone for customs purposes. For example, Italy established a 12 mile customs zone on 25 September 1940,¹⁴¹ whilst Libyan jurisdiction was set at 10 miles in November 1955.¹⁴² A customs zone of 20 kilometres was also established for the French Mandate of Lebanon by the Customs Code of 15 June 1935, as was a 20 kilometres zone for the purpose of applying the Lebanese Penal Law on 1 March 1943.¹⁴³ It is doubtful, however, whether any of this legislation remains in force, as in each case the breadth of the contiguous zone is defined as 12 miles or less, with the result that the contiguous zone is incorporated completely within each State's 12 mile territorial sea.¹⁴⁴

On the other hand, both Malta and Morocco have existing contiguous zone claims of 24 miles. Malta first claimed a contiguous zone of 12 miles on 10 December 1971, in order to prevent contravention of its laws "relating to customs, fiscal matters, immigration and sanitation, including pollution." On 25 October 1975, this was extended to 20 miles, only to be further extended to its present limit on 21 July 1978. The Moroccan contiguous zone of 24 miles has been in force since 8 April 1981. Its purpose is to prevent infringement of customs, fiscal, sanitary or immigration laws within the Moroccan territory or territorial sea.

Finally, France established a 20 kilometre zone for customs purposes in 1948, a limit which it revised to 12 miles by the Maritime Customs Code of 1968.¹⁴⁵ On 31 December 1987, this was further extended to 24 miles under an Act forming part of its campaign against drug trafficking.¹⁴⁶

5.5 Contiguous Zone Boundary Delimitation under International Law

The I.L.C. made no draft provisions concerning the delimitation of contiguous zone boundaries. However, an article dealing with this question was inserted into the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Article 24(3) provides that:

"Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond

the median line every point of which is equidistant from the nearest points on the baselines from which the territorial seas of the two states is measured."

There is no comparable provision in the 1982 Convention,¹⁴⁷ and as far as can be ascertained only one contiguous zone boundary agreement has ever been concluded, namely that between France and Spain in the Bay of Biscay, which formed part of their territorial sea and continental shelf boundary agreement of 1974.¹⁴⁸

5.6 Contiguous Zone Boundary Delimitation in the Mediterranean Sea

Despite the above, some States' legislation continues to provide for contiguous zone boundary delimitation. For example, upon its ratification of the 1982 Convention on 20 June 1986, Yugoslavia made the following declaration with respect to contiguous zone delimitation:

"Due to the fact that the provisions of the Convention relating to the contiguous zone (article 33) do not provide rules on the delimitation of the contiguous zone between States with opposite or adjacent coasts, the Government of the Socialist Federal Republic of Yugoslavia considers that the principles of the customary international law, codified in article 24, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone, ..., will apply to the delimitation of the contiguous zone between the parties to the United Nations Convention on the Law of the Sea."¹⁴⁹

Yugoslavia remains the only Mediterranean State to express an opinion on contiguous zone boundary delimitation, although the recent legislation extending the French contiguous zone to 24 miles contemplates delimitation agreements with neighbouring States.¹⁵⁰ Nevertheless, it would seem unlikely given the non-existence of State practice, that any contiguous zone boundaries will be established between Mediterranean States. Indeed, despite Yugoslavia's views on the subject, it has yet to make a contiguous zone claim!

5.7 Conclusions and Additional Territorial Sea Problems

The above discussion has demonstrated how few territorial sea boundaries have been delimited in the Mediterranean and the reasons why, whilst making clear that contiguous zone boundary delimitation can almost be discounted.

Insofar as the territorial sea is concerned, it can be seen that boundary delimitation is hindered by a number of different factors, some of which combine in particular geographical situations. The best example of this is probably that relating to Greece and Turkey in the Aegean.

It is difficult to establish the number of separate boundaries necessary to delimit their respective territorial waters. Theoretically there are places where boundaries should be drawn to separate overlapping 6 mile claims, whilst a further boundary is necessary where the States are adjacent to each other at the terminus

of the international land boundary. However, given that the present controversy between the States concerns the delimitation of their continental shelf boundary, (admittedly compounded by further problems between the States relating to the breadth of their respective territorial waters and to control of the Aegean airspace), none of these boundaries is ever likely to be delimited.

Nevertheless, it is possible that at least one territorial sea boundary exists between Greece and Turkey. On 4 January 1932, Turkey and *Italy* signed a convention delimiting, by means of a median line, the territorial waters between the coast of Anatolia and the island of Castellorizzo and the nearby islands. However, under the Treaty of Peace with Italy, signed in Paris on 10 February 1947, Italy ceded full sovereignty over Castellorizzo and its adjacent islands to Greece. Therefore, as a matter of law, it is questionable whether the boundary agreement between Italy and Turkey is applicable as between Greece and Turkey, now that Greece has succeeded Italy as the sovereign over Castellorizzo. De Guttry believes that the agreement is applicable, basing her opinion on Article 11 of the 1978 Vienna Convention on the Succession of States in Respect of Treaties, and on the view of Brownlie, who holds that no precise rule of general international law governs this question.¹⁵¹ Greece also appears to accept that the agreement is in force as between itself and Turkey,¹⁵² but it seems highly unlikely that Turkey is of the same opinion, in particular, because of its opposition to the equidistance method of delimitation.

However, leaving aside this controversy, the geographical circumstances pertaining in the Aegean make it much more sense to delimit a single boundary to define the limits of Greek and Turkish maritime jurisdiction, (preferably an E.E.Z. boundary, but failing that a continental shelf boundary), rather than a series of territorial sea boundaries.

A similar, if less complicated situation exists with respect to France and Italy. Theoretically, part of a maritime boundary between France and Italy could be an opposite States territorial sea boundary, i.e. between Corsica (France) and the Archipelago of Tuscany (Italy). In practice, it is more likely that a continental shelf or E.E.Z. boundary delimitation between the two States will traverse this area, and this perhaps is a conclusion which can be applied to many of the potential boundaries examined above.

Although it should be remembered that France and Italy have signed an agreement establishing a territorial waters boundary through the Strait of Bonifacio separating Corsica and Sardinia, and that Libya and Tunisia did not ask the I.C.J. to rule on their territorial sea boundary, current State practice appears to favour establishing a single line of delimitation encompassing all zones of offshore jurisdiction. For the present, in the Mediterranean, this is likely to stop short of delimiting E.E.Z. boundaries, but it is not difficult to foresee many territorial sea boundary delimitations forming part of wider continental shelf boundary delimitations, as many of the problems

identified are common to the delimitation of both territorial sea and continental shelf boundaries.

Perhaps, therefore, in considering the territorial sea, more attention should be focussed on the issue of freedom of navigation within such waters, rather than upon the delimitation of boundaries, as the impotence of this freedom has been identified as a major issue in the application of the law of the sea to the Mediterranean, and creates probably the greater concern. At UNCLOS III, many Mediterranean States - notably Italy - feared that the acceptance of the E.E.Z. concept would have deleterious effects on the vitally important free passage of vessels within the confines of this semi-enclosed sea.¹⁵³ Although these fears should have been allayed by the E.E.Z. régime adopted as part of the 1982 Convention, freedom of navigation nevertheless remains a live issue, as already illustrated with respect to the claims of Mediterranean States to straight baselines and historic bays. Of particular concern are those coastal State claims in excess of 12 miles, and the restrictions placed by some States upon the innocent passage of certain vessels within the territorial sea, although the two problems cannot be divorced from each other.

In the past, the movement towards extended territorial sea jurisdiction was, in many cases, prompted by a desire to protect coastal fisheries from the attention of foreign fishing fleets operating on the high seas outside territorial waters. The conservation of resources depended upon the exercise of sovereignty and, therefore, the territorial sea was the key to the satisfaction of

a coastal State's economic interests in its adjacent waters. However, with the establishment of the 200 mile E.E.Z./E.F.Z., O'Connell argues that the need to claim a territorial sea beyond 12 miles has rescinded, which leads him to postulate that:

"Broader claims, even if expressed to be tantamount to territorial sea claims, are likely to degenerate in practice into nothing more than economic zones, leaving the sea outside the 12 mile limit equivalent to, if not actually characterized as, high seas."¹⁵⁴

This may indeed happen for those 200 mile territorial seas claimed by Latin American States in the 1960s, but it does not describe the position with respect to more recent extensive territorial sea claims such as those of Syria and Albania, which interfere with the legitimate freedom of navigation beyond the prescribed 12 mile limit in order to safeguard State security.

Clearly, the previous Albanian claim and the current Syrian claim are "a violation of the existing law of the sea,"¹⁵⁵ for beyond the territorial sea navigation is one of the recognised high seas' freedoms. However, within the territorial sea this freedom is circumscribed under the régime of innocent passage. Thus, by applying the régime of innocent passage beyond the conventional territorial sea limit of 12 miles, Syria (and previously Albania) is unduly restricting the freedom of navigation upon the Mediterranean's high seas. Moreover, this action is compounded by the fact that the territorial sea legislation of Syria (and Albania) includes provisions which go

beyond those recognised under customary or conventional international law as appropriate to the régime of innocent passage.

Under Decree No. 5384 of 23 February 1976, Albania stipulates that foreign warships may only enter the Albanian territorial sea and airspace with special authorisation.¹⁵⁶ Similarly, since its Legislative Decree No. 304 of 28 December 1963, Syria has required that foreign warships obtain permission prior to transiting its territorial sea; Article 12 of that Decree reads:

"The passage of military ships in the territorial waters is subject to a previous permission and the authorities of the Syrian Arab Republic have the right to adopt all the necessary measures against contravening ships. It is not allowed for submarines to pass submerged in the territorial sea."¹⁵⁷

However, Albania and Syria are not alone amongst Mediterranean States in specifying conditions upon which they will admit foreign warships into their territorial waters, although because of the extent of its territorial sea claim the Syrian regulations have more serious consequences for the freedom of navigation. A French Decree of 1929, applied to Lebanon whilst under French Mandate, limited foreign warships in Lebanese waters up to 6 miles offshore,¹⁵⁸ whilst more recently, Algeria, Yugoslavia, Egypt, and Turkey, have sought to restrict the movement of foreign warships within their territorial seas.¹⁵⁹

Algeria was the first Mediterranean State to impose such restrictions: by Decree No. 63-403 of 12 October 1963, it stipulated that foreign warships must obtain prior permission prior to entering the Algerian territorial sea. On 18 October 1972, a further decree extended this requirement to apply to military-related vessels, which are required to request authorisation 15 days prior to their entering Algerian territorial waters.¹⁶⁰

Yugoslavia has also revised its position on the passage of warships. By its 1965 Law on the Coastal Sea, the Outer Sea Belt, and the Epicontinental Belt, Yugoslavia allowed no more than three warships of the same flag to transit at the same time. When this Law was amended by Decree No. 765 of 7 April 1979, Yugoslavia further provided for legislative regulations concerning the passage through its territorial sea of foreign warships and other public vessels, yachts, nuclear-powered vessels, ships carrying radioactive materials, and fishing boats.¹⁶¹ On its ratification of the 1982 Convention in June 1986, Yugoslavia made it clear that these measures were not, in its view, incompatible with the Convention's rules concerning innocent passage, rather:

"... Yugoslavia considers that a coastal State may, by its laws and regulations, subject the passage of foreign warships to the requirement of previous notification to the respective coastal state and limit the number of ships simultaneously passing, on the basis of the international customary law and in compliance with

the right of innocent passage (articles 17-32 of the Convention)."¹⁶²

This declaration was based on Article 310 of the 1982 Convention, which states that upon signing, ratifying, or acceding to the 1982 Convention, States may make declarations "with a view, *inter alia*, to the harmonization of its laws with the provisions of this Convention." However, Article 310 adds that such declarations are only permissible so long as they:

"... do not purport to exclude or modify the legal effect of the provisions of this Convention in their application to that State."

Consequently, as Yugoslavia goes beyond simply restricting the innocent passage of warships, it would appear to be modifying the Convention's provisions with respect to innocent passage in respect of its own national legislation.¹⁶³

Egypt does likewise. Amongst the several declarations made by Egypt upon its ratification of the 1982 Convention on 26 August 1983, two deal with passage through the Egyptian territorial sea. With reference to the passage of warships, Egypt declared that:

"Warships shall be ensured innocent passage through the territorial sea of Egypt, subject to prior notification."¹⁶⁴

Such provisions have already been discussed, but Egypt also made a declaration concerning the passage through its territorial waters of foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous and noxious substances. Recognising that such ships pose a number of hazards, Egypt stated that:

"Whereas article 23 of the [1982] Convention stipulates that the ships in question shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements,

The Government of the Arab Republic of Egypt declares that it will require the aforementioned ships to obtain authorization before entering the territorial sea of Egypt, until such international agreements are concluded and Egypt becomes a party to them."¹⁶⁵

The 1982 Convention does not settle the controversy as to whether the innocent passage of warships of one State within the territorial sea of another State requires the permission of the coastal State concerned and, therefore, it cannot be said with any certainty that such provisions are contrary to international law. However, the absence of such a provision in either the Territorial Sea Convention or the 1982 Convention would appear to suggest that warships enjoy the same rights of innocent passage as other vessels, and that requests for permission to traverse the territorial sea go against the spirit, if not the law of innocent passage. On the other hand, regulations applying to the innocent passage of other vessels, in particular Egypt

and Yugoslavia's restrictions on the movement of nuclear vessels, can be clearly said to go beyond conventional norms.

Libya's restricted navigation areas present the same problem under a different guise. Under shipping regulations effective from 1 June 1985, innocent passage of commercial vessels in four specified areas of Libya's *claimed* territorial sea or internal waters requires prior notification, and is restricted to daylight hours.¹⁵⁶ Three of the restricted areas (A, B and D) lie off the coast of Tripoli within Libya's territorial sea. Zones A and B were first publicised in 1973, and are reportedly mined. Zone C comprises 4 350 square kilometres and is situate in the eastern part of the Gulf of Sirte, claimed by Libya as an historic bay. If this historic bay claim is disregarded, then a large part of Zone C lies outside Libya's 12 mile territorial sea and in the high seas, where it illegally restricts the freedom of navigation.

Clearly, the Libyan regulations, unique in their kind, represent a violation of international law whose application to other parts of the world would have far reaching consequences. Neither customary nor conventional international law requires prior notification for innocent passage; indeed, Article 24(1) of the 1982 Convention states that:

"1. The coastal State shall not hamper the innocent pasage of foreign ships through the territorial sea except in accordance with this Convention. In particular, ... , the coastal State shall not:

(a) impose any requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage."

Instead, under Article 25(3) of the 1982 Convention, the coastal State may only temporarily suspend the innocent passage of foreign ships in specified areas of its territorial waters *if such suspension is essential for the protection of its security, including weapons exercises.*

Finally, there is the Aegean airspace problem, which will be mentioned only briefly.

Since 1931, Greece has claimed a 10 mile territorial sea for the purpose of exercising complete and absolute sovereignty over its airspace. Turkey (and the United States) recognise only six miles, coincident with Greek sovereignty over its territorial waters;¹⁵⁷ and this position is consistent with the 1944 Chicago Convention on Civil Aviation, which recognises the complete and exclusive sovereignty over the airspace above a State's territorial waters.¹⁵⁸

In 1974, Turkey chose to challenge the long-established Greek control of Aegean airspace, with one of its complaints being directed at the Greek claim to a 10 mile territorial sea for airspace purposes. As a result, since that time, the right to control Aegean airspace has provided one element in the ongoing dispute between Greece and Turkey over the Aegean's marine space, in which context it is properly viewed.

Notes:

1. J.R.V. Prescott The Political Geography of the Oceans, p. 37. (New York: John Wiley and Sons; Newton Abbot, London and Vancouver: David and Charles, 1975)
2. T.W. Fulton The Sovereignty of the Sea, p. 569. (Edinburgh and London: William Blackwood and Sons, 1911. Reprinted Millwood, New York: Kraus Reprint Co., 1976)
3. Several commentators have suggested that 6 miles was a regional norm for the Mediterranean, but the evidence is not convincing.
4. Cited in: A.A. El-Hakim The Middle Eastern States and the Law of the Sea, p. 5. (Syracuse University Press; Manchester University Press, 1979)
5. A.H. Dean "The Geneva Conference on the Law of the Sea: What was Accomplished" American Journal of International Law, 52 (1958), pp. 607-628, at pp. 608-609; Official Records, (1960), p. 102.
6. Official Records, 1 (1974), p. 75 cited in: El-Hakim op. cit., p. 44.
7. When it affirmed its 12 mile limit: Office of the Special Representative of the Secretary-General for the Law of the Sea Law of the Sea Bulletin, No. 3 (March 1984), p. 13.
8. Prescott op. cit., p. 69 citing Official Records, 3 (1958), p. 35. "It is not entirely clear why 6 miles was chosen as the territorial sea breadth. ... It appears Israel wanted to select a breadth which would be adequate for her domestic needs and at the same time contribute to the consolidation of a tacitly agreed regional standard derived from Ottoman policy:" M.I. Glassner and M. Unger "Israel's Maritime Boundaries" Ocean Development and International Law, 1 (1974), pp. 303-313, at p. 305.
9. N.N.M. Ayubi "The Arab States and Major Sea Issues" in G. Luciani (Ed.) The Mediterranean Region: Economic Interdependence and the Future of Society [sic.], pp. 126-148, at pp. 134-135. (London: Croom Helm, 1984)
10. Glassner and Unger op. cit., p. 312.
11. Official Records, 1 (1975), p. 151 quoted in: A. De Guttry "The delimitation of territorial waters in the Mediterranean Sea" Syracuse Journal of International Law and Commerce, 11 (1984), pp. 377-415, at p. 383.
12. Territorial Waters (Amendment) Law, 5750-1990: Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 16 (December 1990), p. 17.
13. Glassner and Unger op. cit., p. 310.

14. ibid., p. 305.
15. See, for example: De Guttry op. cit., p. 383.
16. Office of the Special Representative of the Secretary-General for the Law of the Sea Law of the Sea Bulletin, No. 1 (September 1983), p. 61.
17. Note of 3 June 1982: ibid., p. 63.
18. ibid., p. 62.
19. Interview between Dr. G.H. Blake, Department of Geography, University of Durham and Mr. Theophilus V. Theophilou, Counsellor, Ministry of Foreign Affairs, in Nicosia, Cyprus on 10 March 1987.
20. The Convention will enter into force upon the receipt of the sixtieth instrument of ratification. As of 31 October 1991, 51 ratifications had been deposited with the United Nations: Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 19 (October 1991), pp. 7-8.
21. J.R.V. Prescott The Maritime Political Boundaries of the World, p. 299. (London and New York: Methuen, 1985); M. Skrk "The 1987 Law of Yugoslavia on the Coastal Sea and the Continental Shelf" Ocean Development and International Law, 20 (1989), pp. 501-514, at p. 505.
22. N. Kliot "Maritime boundaries in the Mediterranean: aspects of cooperation and dispute" in G. Blake (Ed.) Maritime Boundaries and Ocean Resources pp. 208-226, at pp. 210, 222. (London and Sydney: Croom Helm, 1987); Keessing's Contemporary Archives, 30 (May 1985), pp. 33556-33557.
23. G.H. Blake "Mediterranean Non-Energy Resources: Scope for Cooperation and Dangers of Conflict" in Luciani op. cit., pp. 41-74, at p. 53.
24. Official Records, 1 (1975), p. 100 quoted in: U. Leanza, L. Sico and M.C. Ciciriello Mediterranean Continental Shelf: Delimitations and Regimes: International and National Legal Sources, Vol. 2 (Book III), p. 1385. (Dobbs Ferry, New York: Oceana Publications, 1988)
25. ibid.
26. Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 16 (December 1990), p. 2.
27. F. Durante and W. Rodinò Western Europe and the Development of the Law of the Sea, Vol. 1, p. 5 (France). (Dobbs Ferry, New York: Oceana Publications Inc., 1979)
28. ibid., p. 91 (France).
29. Prescott op. cit. (1975), p. 69.

30. Durante and Rodinò op. cit., Vol. 4, pp. 27-28 (Spain).
31. Article 3 of the 1982 Convention is permissive as to the breadth of territorial sea a State may claim and, therefore, a claim to no territorial sea, although unusual, is not illegal. However, see: infra. notes 32, 33.
32. International Court of Justice "Fisheries Case (United Kingdom v Norway), Judgment of December 18th, 1951" Reports of Judgements, Advisory Opinions and Orders, p. 160 (Opinion of Judge McNair). (Leyden, 1951). See also: Sir G. Fitzmaurice "The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law - I" British Yearbook of International Law, 31 (1954), pp. 371-429, at p. 372. For a discussion of the two opposing viewpoints, see: D.P. O'Connell The International Law of the Sea Vol. 1 (Ed. I.A. Shearer), pp. 49-52. (Oxford: Clarendon Press, 1982)
33. ibid., p. 52.
34. United Nations National Legislation and Treaties Relating to the Law of the Sea, United Nations Legislative Series ST./LEG./SER. B/16, p. 128. (New York, 1974); S.C. Truver The Strait of Gibraltar and the Mediterranean, p. 175. (Alphen aan Rijn; Germantown, Maryland: Sijthoff and Noordhoff, 1980)
35. Office of the Special Representative of the Secretary-General for the Law of the Sea Law of the Sea Bulletin, No. 2 (March 1985), p. 77.
36. El-Hakim op. cit., p. 6.
37. This provoked an oral protest from the U.K.'s Ambassador on 11 March 1959: E. Lauterpacht "The contemporary practice of the United Kingdom" International and Comparative Law Quarterly, 9 (1960), p. 278 cited in: El-Hakim op. cit., p. 6.
38. Official Records, 3 (1958), p. 13 cited in: El-Hakim op. cit., p. 6. The Libyan claims were regarded with scepticism by McDougal and Burke: M.S. McDougal and W.T. Burke The Public Order of the Oceans: A Contemporary International Law of the Sea, pp. 550-552. (New Haven and London: Yale University Press, 1962). Interestingly, Libya used the same arguments in support of the E.E.Z. concept at UNCLOS III: El-Hakim op. cit., p. 6.
39. Durante and Rodinò op. cit., Vol. 1, pp. 5-6 (Cyprus).
40. G.H. Blake "Mediterranean Micro-Territorial Disputes and Mediterranean Maritime Boundary Delimitation" in U. Leanza (Ed.) The International Legal Regime of the Mediterranean Sea, pp. 111-117, at p. 113. (Milan; Giuffrè, 1987)
41. Office of the Special Representative of the Secretary-General for the Law of the Sea Law of the Sea Bulletin, No. 2 (March 1985), p. 84.

42. Letter from D.J. Dzurek, Chief Spatial, Environmental and Boundary Analysis Division, Office of the Geographer, U.S. Department of State to Dr. G.H. Blake, Department of Geography, University of Durham dated 11 September 1987; "Territorial Sea Boundary: Soviet Union-Turkey" Limits in the Seas, No. 59 (9 October 1974). (Office of the Geographer, Bureau of Intelligence and Research, U.S. Department of State); "Continental Shelf Boundary: Turkey-U.S.S.R. and Straight Baselines: U.S.S.R. (Black Sea)" Limits in the Seas, No. 109 (29 September 1988), pp. 10-16 (Appendix 1). (Office of the Geographer, Bureau of Oceans and International and Scientific Affairs, U.S. Department of State)

43. Translation provided by the U.S. Department of State in a letter from D.J. Dzurek, Chief Spatial, Environmental and Boundary Analysis Division, Office of the Geographer, U.S. Department of State to Dr. G.H. Blake, Department of Geography, University of Durham dated 11 September 1987. De Guttry's translation is somewhat fuller:

"The Council of Ministers is empowered to determine the territorial waters at an extent greater than six miles for certain seas in accordance with the relevant peculiarities and circumstances of those seas as well as with the principle of equity:" op. cit., p. 384 n. 40.

44. Translation provided by the U.S. Department of State in a letter from D.J. Dzurek, Chief Spatial, Environmental and Boundary Analysis Division, Office of the Geographer, U.S. Department of State to Dr. G.H. Blake, Department of Geography, University of Durham dated 11 September 1987. De Guttry's translation is somewhat fuller:

"Regarding the extent of territorial waters in the Black Sea and Mediterranean Sea, the Council of Ministers ... taking into account the peculiar characteristics of the seas which surround Turkey and of the principle of equity has decided that the situation which obtained before promulgation of this law will be continued:" op. cit., p. 384 n. 40.

45. ibid.

46. See, for example: P.G. Charitos "The Legal Regime of the Greek-Turkish Maritime and Air Frontiers in the Aegean Sea, according to the Conventions of Chicago and Montego Bay and to the General Principles of International Law" in: Leanza op. cit., pp. 67-72, at p. 69.

47. Letter from D.J. Dzurek, Chief Spatial, Environmental and Boundary Analysis Division, Office of the Geographer, U.S. Department of State to Dr. G.H. Blake, Department of Geography, University of Durham dated 11 September 1987.

48. At UNCLOS I, Greece said it would favour a 3 mile limit notwithstanding its domestic legislation: Leanza et al op. cit., Vol. 2 (Book III), p. 1283.

49. Prescott op. cit. (1985), p. 309. Blake calculates the respective percentages to be 44 and 7.5: G. Blake "Marine Policy Issues for Turkey" Marine Policy Reports, 7 (February 1985), pp. 1-5, at p. 3.

50. Prescott op. cit. (1985), p. 308. Blake calculates that a mutual extension of territorial waters to 12 miles would reduce the area of continental shelf from 49 to 21 per cent, with Greece having control over 71 per cent of the Aegean's seabed: op. cit. (1985), p. 3. See generally: A. Wilson The Aegean Dispute, pp. 5, 23. Adelphi Papers No. 155. (London: International Institute for Strategic Studies, 1979)

51. At UNCLOS III, Greece was in favour of a 12 mile territorial sea limit: Official Records, 3 (1974), p. 200 cited in: O'Connell op. cit., p. 164.

52. S-M. Rhee "Sea-Boundary Delimitation between States before World War II" American Journal of International Law, 76 (1982), pp. 555-588, at pp. 555-556.

53. ibid., pp. 559-564.

54. ibid., p. 564.

55. Cited in: ibid., pp. 555-556.

56. D.P. O'Connell The International Law of the Sea Vol. 2 (Ed. I.A. Shearer), pp. 658-659. (Oxford: Clarendon Press, 1984)

57. ibid., pp. 659.

58. Translation from the Latin in: Rhee op. cit., pp. 555-556.

59. Quoted in: ibid., pp. 555-556. A number of early treaties employed the median line. See: O'Connell op. cit. (1984), p. 667.

60. Rhee op. cit., pp. 560-561.

61. ibid., p. 560.

62. ibid., p. 562; O'Connell op. cit. (1984), p. 667. Most of these condominium arrangements were terminated after serving certain purposes: Rhee op. cit., p. 563.

63. Quoted in: ibid., p. 560.

64. Quoted in: ibid.

65. Annuaire de l'Institut de Droit International, 13 (1894), p. 330; International Law Association Report of the 17th Conference Held at Brussels in 1895, (1896), p. 105, both cited in: Rhee op. cit., p. 563.

66. ibid., p. 564.

67. See the examples given by Rhee: op. cit., pp. 564-565.

68. ibid., p. 565. For the draft convention between France and Italy, see: U.N. Doc. A/CN.4/71/Add.2 (1953).
69. O'Connell op. cit. (1984), p. 661.
70. ibid., p. 661; S.W. Boggs International Boundaries - A Study of Boundary Functions and Problems, p. 189. (Morningside Heights, New York: Columbia University Press, 1940)
71. O'Connell op. cit., p. 660.
72. See the examples given in: Rhee op. cit., pp. 561-562.
73. Cited in: O'Connell op. cit., p. 662; G.C. Gidel Le Droit international public de la mer, Vol. 3, p. 710. (Châteauroux, 1934)
74. Rhee op. cit., p. 563.
75. S.P. Jagota Maritime Boundary, pp. 12, 49. (Dordrecht: Martinus Nijhoff, 1985)
76. O'Connell op. cit., p. 675.
77. U.N. Doc. A/CN.4/53; Yearbook of International Law Commission, 2 (1952), pp. 38, 68 (hereafter I.L.C. Yearbook) cited in: Jagota op. cit., pp. 50-51.
78. Annex to U.N. Doc. A/CN.4/61/Add.1 (18 May 1953); I.L.C. Yearbook, 1 (1953), p. 19 cited in: Jagota op. cit., p. 51.
79. Annex to U.N. Doc. A/CN.4/61/Add.1 (18 May 1953); I.L.C. Yearbook, 1 (1953), p. 19 cited in: Jagota op. cit., pp. 51-52.
80. Articles 15 and 16: I.L.C. Yearbook, 2 (1954), pp. 157-158 quoted in: Jagota op. cit., pp. 52-53.
81. I.L.C. Yearbook, 2 (1956), p. 257 quoted in: Jagota op. cit., pp. 53-54.
82. I.L.C. Yearbook, 2 (1956), p. 271 quoted in: Jagota op. cit., p. 54.
83. I.L.C. Yearbook, 2 (1956), p. 272 quoted in: Jagota op. cit., p. 54.
84. As proposed by Norway: O'Connell op. cit. (1984), p. 667.
85. U.N. Doc. A/CONF.62/SR.158, pp. 4-7 (Venezuela); U.N. Doc. A/CONF.62/SR.162, pp. 3-4 (Bangladesh); U.N. Doc. A/CONF.62/SR.160, p. 5 (Turkey) cited in: Jagota op. cit., pp. 251-253.
86. U.N. Doc. A/CONF.62/SR.160, p. 5 (Turkey) quoted in: Jagota op. cit., p. 253.

87. O'Connell op. cit., pp. 677-678.

88. A.J. Jacovides "Three Aspects of the Law of the Sea: Islands, delimitation and dispute settlement" Marine Policy, 3 (1979), pp. 278-288, at p. 284. For a different view, see E.D. Brown "Rockall and the Limits of National Jurisdiction of the U.K. - Part 2" Marine Policy, 2 (1978), pp. 181-211, at p. 199.

89. O'Connell op. cit. (1984), p. 674.

90. It appears they were delimited on the basis of customary international law, as only the United Kingdom was a party to the Territorial Sea Convention.

91. Prescott op. cit. (1975), p. 101.

92. Prescott op. cit. (1985), pp. 299-300. "Although a precise determination of the principles used by the negotiators seems to be impossible, it can be stated that the boundaries were *not* based on the equidistance principle:" De Guttry op. cit., p. 407.

93. "Territorial Sea Boundary Cyprus-Sovereign Base Areas (U.K.)" Limits in the Seas, No. 49 (10 November 1972), p. 2. (Office of the Geographer, Bureau of Intelligence and Research, U.S. Department of State). (hereafter Limits in the Seas, No. 49)

94. H adds:

"The result is a simplified but effective method of maritime boundary delimitation. The principal difficulty, if indeed nominalization was the basis, would involve the determination of the 'general direction' and sector of the coastline to be used for the particular perpendicularity:" ibid.

95. ibid. See also: Prescott op. cit. (1975), p. 101.

96. However, see the territorial sea boundary agreement between Norway and the U.S.S.R.: ibid.; O'Connell op. cit. (1984), p. 681.

97. Prescott op. cit. (1985), p. 300.

98. The boundaries between Cyprus and Dhekelia meet approximately 33 miles offshore. The eastern boundary between Cyprus and Akrotiri will not, if prolonged, connect with the western boundary between Cyprus and Dhekelia: Limits in the Seas, No. 49, p. 2.

99. See Annexes III and IV of the Treaty.

100. Cited in: De Guttry op. cit., pp. 407-408.

101. Prescott op. cit. (1985), p. 304.

102. Cited in: De Guttry op. cit., p. 408.

103. Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 9 (April 1987), pp. 58-61; Revue Générale de Droit International Public, 90 (1986), pp. 308-311. The 1984 Maritime Delimitation Agreement between France and Monaco was rendered enforceable in Monaco by Sovereign Order No. 8.403 of 30 September 1985.

104. De Guttry op. cit., p. 408.

105. Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 10 (November 1987), pp. 95-96.

106. Quoted in: Truver op. cit., p. 164.

107. ibid., p. 165. In 1723, the British Minister in Madrid, William Stanhope argued, based on a variation of the "cannon-shot rule" for delimiting territorial waters, that:

"Although it is stipulated in Article X of the Treaty of Utrecht that the English shall not have any jurisdiction attached to the Town of Gibraltar, yet this must be understood to mean jurisdiction beyond the range of its fortifications' guns, for it is unquestionable when a Town is yielded, there is tacitly yielded at the same time, all the ground commanded by its artillery, since otherwise the cession would be of no use."

Quoted in: ibid.

108. ibid.

109. ibid., p. 167. Spain often protested incursions of British vessels into Spanish territorial waters, and between 1826 and 1851 arrested 235 ships engaged in smuggling within its territorial waters: ibid.

110. ibid., p. 170.

111. Quoted in: ibid., p. 171. This caused Spain to state instead that it would merely exercise the "necessary vigilance" within its 6 mile territorial sea, quoted in: ibid.

112. ibid., pp. 172-173. Britain was also opposed to Spain's 6 mile territorial sea claim: ibid., p. 172.

113. ibid., p. 167.

114. Quoted in: ibid., p. 174.

115. ibid., p. 173.

116. The Times, 3 April 1986; The Guardian, 3 April 1986.

117. Although the U.K. legislation is inapplicable to Gibraltar. See: Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 10 (November 1987), pp. 11-20

118. Office of the Special Representative of the Secretary-General for the Law of the Sea Law of the Sea Bulletin, No. 4 (February 1985), p. 14; No. 5 (July 1985), p. 21.

119. supra., note 19.

120. Glasner and Unger op. cit., p. 312.

121. ibid., p. 306.

122. Article 2 of the Moroccan Act No. 1.73.211 of 2 March 1973 states that:

"In the absence of a specific agreement on the subject, the breadth of the territorial waters shall not extend beyond a median line every point of which is equidistant from the nearest points on the baselines of the Moroccan or adjacent coasts:"

Office of the Special Representative of the Secretary-General for the Law of the Sea Law of the Sea Bulletin, No. 2 (March 1985), p. 60.

This was further clarified by Decree No. 2-75-311 of 21 July 1975, which states that:

"The outer limit of Morocco's territorial waters is the median line between the coasts of Morocco and the coasts of opposite foreign states measured from the low-water-lines and the straight baselines and the closing lines of bays ... :"

Leanza et al op. cit., Vol. 1 (Book II), p. 650.

123. Quoted in: De Guttry op. cit., p. 409.

124. "Straight baselines: Turkey" Limits in the Seas, No. 32 (25 March 1971), p. 1. (Office of the Geographer, Bureau of Intelligence and Research, U.S. Department of State).

125. Article 2 of France's territorial sea legislation of December 1971 reads:

"Unless provided in some particular convention, the breadth of the territorial waters does not extend beyond a median line every point of which is equidistant from the nearest point on the baselines of the French coasts and the baselines of the foreign coasts opposite or adjacent to the French coasts:"

Durante and Rodinò op. cit. Vol. 1, p. 91 (France).

This provision is mirrored by Article 4 of Act No. 10/1977 concerning the Spanish territorial sea, which reads:

"Failing agreement to the contrary, the territorial sea shall not, in relation to neighbouring countries and countries whose coasts are opposite to those of Spain, extend beyond the median line every point of which is equidistant from the nearest points on the baselines from which the territorial seas of each of the countries is measured, such baselines being drawn in accordance with international law:"

ibid. Vol. 4, pp. 27-28 (Spain).

126. Article 8 of Egypt's Royal Decree of 15 January 1951; Article 7 of Syria's Legislative Decree No. 304 of 28 December 1963: De Guttry op. cit., p. 409.

127. International Court of Justice "Case Concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriya): Judgment of 24 February, 1982" Reports of Judgements, Orders and Advisory Opinions, p. 93 (para. 133 (C)(2)). (The Hague, 1982)

128. Prescott op. cit. (1985), p. 83.

129. ibid., p. 307.

130. Leanza et al op. cit., Vol. 2 (Book III), p. 1308.

131. For example, Guinea's 200 mile territorial sea claim of 24 March 1980 was reduced to 12 miles on 30 July 1980. Likewise, Guinea-Bissau's 150 mile claim of 31 December 1974 was reduced to 12 miles on 19 March 1978: R.W. Smith (Ed.) "National Claims to Maritime Jurisdiction" Limits in the Seas, No. 36 (5th Revision) (6 March 1985), pp. 79, 81. (Office of Ocean Law and Policy, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State).

132. A boundary separating France's 12 mile territorial sea and Spain's 6 mile territorial sea and 12 mile contiguous zone was established by a Convention of 29 January 1974, which entered into force on 5 April 1975. Under the terms of this Convention, this boundary now forms the territorial sea limit of the two States, given Spain's extension of its territorial sea limit to 12 miles in 1978: "Territorial Sea and Continental Shelf Boundaries: France-Spain (Bay of Biscay)" Limits in the Seas, No. 83 (12 February 1979). (Office of the Geographer, Bureau of Intelligence and Research, U.S. Department of State).

133. ibid., p. 11. It should be noted, however, that this agreement has no precedential value, every boundary situation being unique.

134. Interestingly, Morocco's 1975 Decree does not contemplate an adjacent States' delimitation.

135. I.L.C. Yearbook, 2 (1956), p. 295 quoted in: El-Hakim op. cit., p. 21.

136. Office of the Special Representative of the Secretary-General for the Law of the Sea Law of the Sea Bulletin, No. 2 (March 1985), p. 26.

137. In 1972, the Legal Advisor to the Israeli Navy stated that Israel could not inherit Egypt's contiguous zone during its occupation of Sinai for this very reason: Glassner and Unger op. cit., pp. 305, 306. Israel does not claim a contiguous zone.

138. Office of the Special Representative of the Secretary-General for the Law of the Sea Law of the Sea Bulletin, No. 3 (March 1984), p. 13.

139. El-Hakim op. cit., p. 21. A 20 kilometre customs zone was established for Syria on 15 June 1935, whilst under French Mandate: ibid., p. 7.

140. This is the view of Kliot op. cit., p. 221 (Table 13.3).

141. Durante and Rodinò op. cit. Vol. 1, p. 23.

142. United Nations Laws and Regulations on the Regime of the Territorial Sea, United Nations Legislative Series ST./LEG./SER. B/6, p. 32. (New York, 1957)

143. United Nations Laws and Regulations on the Regime of the High Seas, United Nations Legislative Series ST./LEG./SER. B/1, pp. 307, 83. (New York, 1951)

144. At UNCLOS I, Lebanon was one of those States which argued that the institution of a 12 mile territorial sea and 200 mile E.E.Z. made the contiguous zone superfluous. Algeria and Egypt were amongst those States taking a contrary view: J. Symonides "Origins and Legal Essence of the Contiguous Zone" Ocean Development and International Law, 20 (1989), pp. 203-211, at pp. 206-207.

145. Smith op. cit., p. 64.

146. Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 12 (December 1988), pp. 13-14.

147. The Main Trends document produced at Caracas in 1974 included a provision for the delimitation of the contiguous zone, but the Informal Single Negotiating Text (ISNT) subsequently made no reference to it, presumably because of the advent of the E.E.Z. concept: Jagota op. cit., pp. 225, 227.

148. supra. note 125.

149. Office of the Special Representative of the Secretary-General for the Law of the Sea Law of the Sea Bulletin, No. 8 (November 1986), p. 9. This statement is interesting because Yugoslavia has never proclaimed a contiguous zone. Indeed, in its 1987 Law on the Coastal Sea and Continental Shelf, a notable omission was any reference to the contiguous zone: Skrk op. cit., p. 503.

150. Act of 31 December 1987 concerning the campaign against drug trafficking and amending certain provisions of the Penal Code: Office for Ocean Affairs and the Law of the Sea Law of the Sea Bulletin, No. 12 (December 1988), p. 13.
151. De Guttry op. cit., p. 408.
152. ibid.
153. Italy remains opposed to the E.E.Z. concept on this basis, although it is difficult to see why.
154. O'Connell op. cit. (1982), p. 169.
155. V. Ibler "The Changing Law of the Sea as Affecting the Adriatic" German Yearbook of International Law, 20 (1977), pp. 174-195, at p. 178.
156. Smith op. cit., p. 12.
157. "Straight Baselines - Syria" Limits in the Seas, No. 53 (10 October 1973), p. 6. (Office of the Geographer, Bureau of Intelligence and Research, U.S. Department of State).
158. Smith op. cit., p. 107.
159. For example, Turkey's Decree 7/17114 of 20 February 1979, stipulates that foreign warships must provide notice prior to transiting the territorial sea: ibid., p. 173. At UNCLOS III, Malta supported prior authorisation for warships in the territorial sea, but it has made no legislative provisions in this regard: Leanza et al op. cit., Vol. 2 (Book III), pp. 1466, 1468.
160. Smith op. cit., p. 13.
161. ibid., p. 190. Similar provisions are found in the Law on the Coastal Sea and Continental Shelf of 23 July 1987: Skrk op. cit., pp. 505, 506.
162. Office of the Special Representative of the Secretary-General for the Law of the Sea Law of the Sea Bulletin, No. 8 (November 1986), p. 8.
163. On the other hand, Skrk argues that the system of prior notification does not impair the right of a ship to innocent passage, but simply protects Yugoslav security within the limits of State sovereignty: op. cit., p. 506.
164. Office of the Special Representative of the Secretary-General for the Law of the Sea Law of the Sea Bulletin, No. 3 (March 1984), p. 13.
165. ibid.; R.W. Smith Exclusive Economic Zone Claims: An Analysis and Primary Documents, p. 123. (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1986)

166. The Geographer Geographic Notes, Issue 1 (30 September 1985), p. 12.
167. Blake op. cit. (1985), p. 3.
168. Charitos op. cit., p. 68.