THE STATUS OF THE GULF OF SIRTE IN INTERNATIONAL LAW

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I. INTRODUCTION

Among the many sources of strain and conflict that have arisen between states throughout the development of the law of the sea, coastal states' claims of jurisdiction over adjacent seas and sea-bed areas are perhaps the single most important category. Fisheries disputes and problems related to the delimitation of the continental shelf account for by far the largest number of incidents. One need only check the record starting with the early precedent of the *Fisheries Case*[1] of 1951 and ending with the most recent judgment in the *Gulf of Maine*[2] case in 1984.

An equally serious source of tension between maritime powers and coastal states, however, is connected to the parallel phenomenon of the increasingly liberal use of straight baselines and the widespread resort to the theory of historic titles to justify the closing of large bodies of adjacent waters and bays. To date, reactions to this phenomenon, and particularly to the latter practice, have been limited to protests or other diplomatic steps intended to prevent acquiescence. By contrast, with respect to the Gulf of Sirte, the United States deemed it necessary—or advisable—to accompany the act of protest with a show of force which took the form of military maneuvers in the proximity of the contested area. As is known, this attempt caused open armed conflict resulting in the downing of two Libyan planes by jet fighters of the United States Sixth Fleet in the Mediterranean.[3]

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1. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Judgment of Dec. 18).

2. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.) 1984 I.C.J. 1 (unofficial) (Judgment of Oct. 12).

3. This article will not examine the legal issues connected to the use of force for the purpose of enforcing navigational rights or coastal states' claims over sea areas. For an analysis of these issues see Francioni, *The Gulf of Sirte Incident and International Law*, 5 ITALIAN Y.B. INT'L L. 85 (1980-81); Adam, *L'incidente del Golfo della Sirte*, 64 RIVISTA DI DIRITTO INTERNAZIONALE [RIV. DIR. INT.] 1025 (1981); Spinnato, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 OCEAN DEV. & INT. L.J. 65 (1983).

In view of the dangerous potential for military escalation that such precedent suggests, it seems important to analyze the legal status of the Gulf of Sirte. At this juncture indeed several countries, foremost among them the United States, maintain an attitude of non-recognition of the Libyan claim.

The legal issues to be addressed in this paper are the following: 1) Is the closing of the Gulf of Sirte justifiable under the Geneva Convention of 1958,[4] the Montego Bay Convention of 1982,[5] as well as customary international law? 2) To what extent is the straight baseline method recognized in the 1951 Anglo-Norwegian *Fisheries Case*,[6] as well as in the 1958 and 1982 Conventions,[7] applicable to the entirety of the Gulf of Sirte? 3) And, finally, is this gulf subject to a regime of appropriation by virtue of historic titles or vital interests that may be claimed by Libya? The following discussion shall also attempt to develop a criterion of transitional law intended to determine the limits of standing for coastal states' claims which are neither generally recognized nor so completely arbitrary and capricious as to constitute a prime facie violation of international law.

II. THE ORIGIN AND JUSTIFICATION OF THE LIBYAN CLAIM

The Gulf of Sirte was unilaterally proclaimed an integral part of Libyan territory by the Declaration of October 10, 1973.[8] This act purported to enclose the waters of the Gulf within a straight line of approximately 300 miles connecting the two parts of the coast at the cities of Benghazi and Misurata at a latitude of 32 degrees and 30 minutes north.[9] The United States was notified of the Declaration by a note from the Libyan Embassy in Washington to the Department of State on October 11, 1973.[10] On October 19, 1973,

4. 1958 Convention on the Territorial Sea and the Contiguous Zone, *done* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964) [hereinafter cited as 1958 Convention on the Territorial Sea].

5. Third United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1893), *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter cited as 1982 Convention].

6. Fisheries Case, *supra* note 1.

7. 1958 Convention on the Territorial Sea, *supra* note 4; 1982 Convention, *supra* note 5.

8. Declaration of Oct. 10, 1973, *reprinted in* Spinnato, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 OCEAN DEV. & INT'L L. 65, 67-68 (1983).

9. *See* Rousseau, *Chronique des faits internationaux*, 78 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R. G. DR. INT. P.] 1177 (1974).

10. Letter from Libya to the United States (October 11, 1973).

the Declaration was sent to the United Nations in a Note Verbale which justified the closing based on "security interests" as well as sovereign rights and possession exercised over the area for a long time. A regime of prior authorization was made mandatory for foreign vessels that intended to navigate in the area of the Gulf.

The United States Government did not reply immediately. However, on February 11, 1974,[11] a note of protest was addressed to Libya in which the claim over the Gulf of Sirte was declared "unacceptable and a violation of international law."[12] The following passage from the note illustrates the arguments made by the Department of State to challenge the legality of the Libyan proclamation:

> Under international law, as codified in the 1958 Convention on the Territorial Sea and Contiguous Zone, the body of waters enclosed in this line (the straight line closing the Gulf of Sirte) 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. This action is particularly unfortunate when the international community is engaged in intensive efforts to obtain broad international agreement on law of the sea issues, including the nature and extent of coastal state jurisdiction. Unilateral actions of this type can only hinder the process of achieving an accommodation of the interests of all nations at the Law of the Sea Conference.
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> 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.[13]

Regarding the entire correspondence by the U.S. Department

11. Letter from the United States to Libya (February 11, 1974).

12. *Id.*

13. A. Rovine, Digest of United States Practice in International Law 293 (1974). France and the United Kingdom protested while Italy presented "reservations" on the legality of the closing of the Gulf of Sirte in a note delivered by the Libyan *charge d'affaires* in Rome. *See* Statement of Mr. Bensi, Under-Secretary of State for Foreign Affairs, *reprinted in* 2 Italian Y.B. Int'l L. 422 (1976).

of State, the United States' claim appears to be based on the following legal points: 1) The status of a bay or gulf cannot be determined by unilateral acts of the coastal state but must conform to international norms in order to be recognized by other states; 2) The delimitation of the Gulf of Sirte was not consistent with the 1958 Geneva Convention; 3) The closing of the Gulf was not consistent with general international law.

As to the first point, the United States position is, needless to say, entirely correct. As was stated by the International Court of Justice in the *Fisheries Case*, "[t]he delimitation of the sea areas has always had an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law."[14] The Court added in this case that "[a]lthough . . . 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."[15] In light of this Libya was not free to unilaterally determine the sea boundary of the Gulf of Sirte, but was under an obligation to set the boundary in accordance with applicable rules of both conventional and customary international law.

The relevant conventional rules on the closing of bays or gulfs are contained in the Geneva Convention on the Territorial Sea and the Contiguous Zone.[16] Article 7[17] of this Convention, which deals with bays "the coast of which belong to a single State,"[18] provides a double test for the validity of the closing of the bay. First, the maximum distance between the entrance points of the bay cannot be greater than twenty-four miles;[19] second, the body of waters to be enclosed as a bay must have an area as large as, or larger than, that of the semi-circle whose diameter is represented by the line joining the entrance points of the indentation.[20]

The Gulf of Sirte does not meet either of these two technical criteria. The closing line established by the 1973 Libyan Declaration is almost 300 miles,[22] therefore far exceeding the twenty-four

14. Fisheries Case, *supra* note 1, at 116, 132.
15. *Id.* at 132.
16. 1958 Convention on the Territorial Sea, *supra* note 1.
17. *Id.* art. 7.
18. *Id.*
19. *Id.* art. 7(4).
20. *Id.* art. 7(2).
21. *Id.* art. 7(4).
22. 1973 Declaration, *supra* note 8.

mile limit laid down in Article 7(4) of the 1958 Geneva Convention.[23] Furthermore, adopting such a closing line results in the sea area claimed by Libya being considerably smaller than the area of the semi-circle having such line as its diameter, so as not to be capable of satisfying the requirement laid down in Article 7(2) either.[24]

However, while the Geneva Convention on the Territorial Sea and the Contiguous Zone[25] is applicable to the United States, which ratified it on April 12, 1961, it is not binding on Libya, who has not ratified it.[26] It is obvious, therefore, that the provisions of the 1958 Convention are not relevant in determining the legality of Libya's action, unless their normative content is proved to be declaratory of customary international law. The view advanced by the United States in its note of 1974 protesting the Libyan claim, in so far as it made reference to "international law as codified in the 1958 Convention on the Territorial Sea,"[27] seems to point in this direction. What, then, is the state of customary international law on the subject?

State practice and pronouncements by scholars with regard to the problem of delimiting bays show remarkable dynamism in the sense of reflecting a consistent evolution of powers on behalf of the coastal state. From the early doctrine of *inter fauces terrarum* formulated by Grotius,[28] the criteria adopted have included the defensibility of the opening by reference to a cannon shot,[29] the range of vision from headland to headland,[30] the six-mile and later the ten-mile rule,[31] to finally the formalization of the twenty-four

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23. 1958 Convention on the Territorial Seas, *supra* note 1, art. 7(4).

24. *Id.* art. 7(2).

25. 1958 Convention on the Territorial Seas, *supra* note 1.

26. *See* UNITED NATIONS TREATY SERIES: TREATIES AND INTERNATIONAL AGREEMENTS REGISTERED OR FILED AND RECORDED WITH THE SECRETARIAT OF THE UNITED NATIONS 565 (1980).

27. *See* A. ROVINE, *supra* note 13.

28. This doctrine states that "a bay or gulf can only be territorial if it is not so large that when compared with the land surrounding it, it cannot be considered to be a part of it." GROTIUS, II DE JURE BELLI AC PACIS (1625).

29. *See* VATTEL, LE DROIT DES GENS 129 (1754). For an early critique of this view, see FAUCHILLE, TRAITE DE DROIT INTERNATIONAL PUBLIC 372 (1925).

30. This criterion was adopted in an early American case, Commonwealth v. Peters, 12 Met. 387 (1847), in which it was held that the waters of a bay were territorial because they were "not so wide by that persons and objects on the other side can be discerned by the naked eye by persons on the opposite side." *Id.* at 392.

31. For the six and ten mile rules see the literature cited in L.J. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW 106 (1964); STROHL, THE INTERNATIONAL LAW OF BAYS 5 (1963). Some authors exclude the existence of a general rule concerning the maximum length of closing lines in bays. *See* GIULIANO, I DIRITTI E GLI OBBLIGHI DEGLI STATI 225 (1956);

mile rule of the 1958 Geneva Convention.[32]

Perhaps the most serious attempt to formulate a generally acceptable rule on the subject was the one undertaken by the special Rapporteur of the International Law Commission, François, with the help of a Committee of Experts which met at the Hague in April of 1953. The Committee was invited to clarify which technical conditions were to be satisfied for an indentation or curve in the coastline to qualify as a bay.

The Report of the Committee[33] built its definition of a juridical bay around two basic criteria. The first concerned the relationship between the width of the mouth of the bay and the area of its waters. This criterion is contained in the semi-circle test. The second criterion concerned the maximum length of the closing line which was set according to the criterion of the range of vision, that is, at ten miles. While the semi-circle rule was followed by the Commission in drafting the Article on bays and eventually became part of Article 7 of the Geneva Convention,[34] the ten-mile limit for the closing line enjoyed scarce support in the Commission. Thus the 1955 draft Article came to contain a maximum closing limit of twenty-five miles.

Many governments, however, commenting on the draft Articles considered the proposed twenty-five mile limit excessive. Among them were Brazil, Egypt and Israel,[35] with one group of states—Belgium, Great Britain and the United States[36]—expressing a clear preference for the ten-mile limit. Legal opinion on the matter, therefore, seemed to indicate that the maximum closing line of a bay should have been fixed at some intermediate point between ten and twenty-five miles. The Commission, indeed, acknowledged this by redrafting Article 7 on bays and fixing the maximum length of the closing line at fifteen miles. This was done allegedly to find

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SCHWARZENBERGER, INTERNATIONAL LAW 328 (3d ed. 1956) SUY, LES GOLFES ET LES BAIES EN DROIT INTERNATIONAL PUBLIC III (1957); QUADRI, DIRITTO INTERNAZIONALE PUBLICO 681 (5th ed. 1968). For a precedent supporting the view of these authors, see the judgment of the Permanent Court of Arbitration of 1910 in the North Atlantic Fisheries Case (U.S. v. U.K.), Hague Ct. Rep. (Scott) 141 (Perm. Ct. Arb. 1916), which found that no mandatory rule of international law existed on the matter.

32. 1958 Convention on the Territorial Sea, *supra* note 4.

33. This report is published as an annex to François, *Addendum to the Second Report on the Regime of the Territorial Sea, reprinted in* [1953] 2 Y.B. INT'L L. COMM'N 75.

34. 1958 Convention on the Territorial Sea, *supra* note 4, art. 7.

35. François, *Regime of the High Seas and the Territorial Sea*, [1956] 2 Y.B. INT'L L. COMM'N 40-41, 43, 52, 58, U.N. Doc. A/CN.4/99/Add.1.

36. *Id.* at 80, 91, 94.

a compromise between, on the one hand, the group of states which, because they supported the three-mile limit of the territorial sea had upheld the ten-mile limit in their treaty practice concerning bays, and on the other, the group of states that were pressing for an increase in the breadth of the territorial sea. The latter group was, as is now known, the winning side. And so the Article on bays prepared by the International Law Commission was finally adopted at the Geneva Convention with the amendment that increased the limit to twenty-four miles.

Even, however, if it is possible to concede that such a twenty-four mile limit presented in 1958 an act of "progressive development" rather than of pure codification, in view of the relative strength of the ten-mile supporters, subsequent practice seems to show a consolidation of the twenty-four mile closing width of bays. First of all, it must be recognized that such strenuous supporters of the lower limit as the United States and Great Britain ratified the Geneva Convention on the Territorial Sea without reservations as to the part of Article 7 concerning bays.[37]

Secondly, official policy statements made in the post-1958 period by countries previously following the ten-mile rule show a shift to the twenty-four mile rule. The Secretary of State of the United States, for instance, wrote to Attorney General R. Kennedy on January 15, 1963 that with respect to the delimitation of Bristol Bay in Alaska, the rule set in the Geneva Convention, although not yet in force, was to be "regarded in view of its adoption by a large majority of the States of the world the best evidence of international law on the subject at the present time."[38]

Further, some important judicial cases brought before municipal courts of countries that in the past had consistently relied on the ten-mile rule show adherence to the twenty-four mile limit as a general principle of international law. This happened, for instance, in some American cases involving a conflict between federal and state jurisdiction over bays.[39] In this context, the United States

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37. *See* UNITED NATIONS TREATY SERIES, *supra* note 26, at 567.

38. This letter is *reprinted in* WHITEMAN, IV DIGEST OF INTERNATIONAL LAW 230 (1965).

39. *See* particularly, United States v. Florida, 420 U.S. 531 (1975) concerning the delimitation of "Florida Bay" which, according to the Special Masters Report, could not be regarded as a juridical bay in its entirety but only with respect to its eastern portion, that is "east of a closing line running southwesterly from East Cape of Cape Sable to Knight Key in the Florida Keys, at a distance of approximately 24 geographical Miles." The Territorial Sea Limits, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 268 § 2 (1974). For other United States precedents on bays, see United States v. California, 381 U.S. 139

judicial authorities were obviously under no obligation to apply the twenty-four mile criterion *qua* conventional law. The fact that it was found decisive in the particular case is to be interpreted as the consequence of a corresponding determination that the twenty-four mile limit is a rule of customary international law.[40] Finally, the consolidation of the twenty-four mile limit into international practice is shown by the adoption of this rule as Article 10 of the 1982 Montego Bay Convention,[41] reproducing in its relevant part Article 7 of the 1958 Geneva Convention.[42]

As far as customary international law is concerned, it is impossible to recognize the Libyan claim as consistent with the general regime in force regarding the technical delimitation of bays. It is therefore necessary to turn to an examination of other possible legal grounds for the validity of the Libyan claim. These are the "straight baselines method of delimitation" and the claim to a "historic" title over the Gulf of Sirte.

III. IS THE "STRAIGHT BASELINES" METHOD APPLICABLE TO THE GULF OF SIRTE?

Although the Libyan government does not appear to have made express reference to the straight baseline method in its 1973 Declaration an examination of it is necessary in view of the unique legal basis that it provides for the enclosure of internal waters which do not technically qualify as "bays." Article 4 of the Geneva Convention[43] and the 1951 precedent of the *Fisheries Case*[44] allow the closing off of a body of adjacent waters independently of the twenty-four mile limit and the semi-circle test, provided a certain number of conditions are met by the coastal state. The first condition concerns the geographic character of the coastline which must be "deeply indented and cut into,"[45] or possess "a fringe of islands along the coast."[46] The second relates to the general direction of the coast from which the baseline must not depart to any appreciable extent.[47]

(1964), *reh'g denied*, 382 U.S. 889 (1965), *modified* 382 U.S. 448 (1966), *modified*, 432 U.S. 40 (1977); United States v. Louisiana, 394 U.S. 11, *reh'g denied*, 394 U.S. 994, *modified*, 394 U.S. 1, *modified*, 394 U.S. 836 (1969).

40. United States v. Florida, 420 U.S. at 531.
41. 1982 Convention, *supra* note 5.
42. 1958 Convention on the Territorial Sea, *supra* note 4.
43. *Id.*
44. Fisheries Case, *supra* note 1.
45. 1958 Convention on the Territorial Sea, *supra* note 4, art. 4(1).
46. *Id.*
47. *Id.* art. 4(2).

The third concerns the link between the body of waters to be enclosed and the mainland. This link must be sufficiently close as to render the waters under examination capable of being treated as internal.[48]

Finally, Article 4(4), indicates as a relevant factor the existence of economic interests "peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage."[49] These conditions have been confirmed, with some additions, in the text of Article 7 of the 1982 Montego Bay Convention on the Law of the Sea,[50] so that it is reasonable to assume that they represent generally accepted standards of international law.

Is the drawing of a straight line across the Gulf of Sirte consistent with these standards? An examination of the Libyan coastline shows that it is neither deeply indented nor cut into around the Gulf of Sirte, and that there is no fringe of islands present. Rather, the Gulf is characterized by one large recess in the coast whose opening is approximately 300 miles.

The closing line also departs from the direction of the coast. Indeed, it has the effect of macroscopically rounding off the profile of the African coast. As for the condition concerning sufficiently close links of the waters landward of the baseline with the land domain, it could perhaps at least be conceded that the deeper portion of the Gulf satisfies this condition. With respect to the economic interests relevant to the region concerned, although they may have been a factor in the decision of the Libyan government, they were not identified at the time of the 1973 Declaration, nor was any evidence of long usage given as required by Article 4(4) of the Geneva Convention[51] and Article 7(5) of the Montego Bay Convention.[52]

As can be seen, the conditions for the drawing of straight baselines are only partially met in the case of the Gulf of Sirte. Thus, there is ample reason for doubt about the admissibility of such baselines, particularly in relation to the geographic conditions of the Libyan coast. The use of the word "doubt" is particularly appropriate because of the lack of legal precision in the above-described criteria concerning admissibility of baselines. It is submitted that this lack of precision has led to a "liberal interpreta-

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48. *Id.* art. 4(4).

49. *Id.* Reference to economic interests as one of the relevant factors justifying the employment of straight baselines was first contained in the Fisheries Case, *supra* note 1, at 116, 142.

50. 1982 Convention, *supra* note 5.

51. 1958 Convention on the Territorial Sea, *supra* note 4.

52. 1982 Convention, *supra* note 5.

tion" of the same criteria with a resulting departure in state practice from those conditions which originally justified, such as in the case of the Norwegian coast, the employment and subsequent recognition of the method.[53] A recent example of state practice which reflects the adoption of "exaggerated" baselines is the Italian Decree of April 26, 1977,[54] proclaiming both the closing of all the major gulfs of the peninsula, despite the fact that the width of their entrances exceeds[55] the twenty-four mile limit, and the drawing of straight lines around the Tuscan archipelago and the perimeter of the two islands of Sicily and Sardinia.

But even if one were to overcome these doubts and concede that the system of straight baselines was admissible, this would not involve the right of the coastal state to exclude innocent passage. Article 5(2) of the Geneva 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."[56] Libya would not, therefore, have been in a position to prohibit access and transit of foreign vessels although such prohibition would, arguably, be legitimate with respect to either overflight or naval units engaged in any activity prejudicial to the peace and security of the coastal state.[57]

IV. THE CLAIM TO AN "HISTORIC" TITLE

In view of the doubts arising over the compatibility of the present regime of international law with the drawing of a 300-mile-long straight baseline across the Gulf of Sirte, it is necessary to consider the question of the "historic" character of the Gulf as a possible ground for the validity of the Libyan claim.

Article 7(6) of the Geneva Convention provides that the general criteria for the delimitation of bays "shall not apply to so-called

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53. For state practice concerning liberal interpretation of the straight baselines method, see WHITEMAN, *supra* note 38, at 137; PEARCY, *Geographical Aspects of the Law of the Sea*, in ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 1, 11 (1959).

54. Decree No. 816 of Apr. 26, 1977, 305 GAZZ. UFF. ITAL. (Nov. 9, 1977). For a critical comment, see Adam, *Un Nuovo Provvedimento in Materia di Linee di Base Nel Mare Territoriale Italiano*, 61 RIV. DIR. INT. 470 (1978).

55. The Gulfs of Venice, Manfredonia, Salerno, Squillace and Taranto.

56. 1958 Convention on the Territorial Sea, *supra* note 4, art. 5(2).

57. 1958 Convention on the Territorial Sea, *supra* note 4, art. 14(4); 1982 Convention, *supra* note 5, art. 19(2).

'historic' bays."[58] This exception is relevant to the dispute over the Gulf of Sirte because the 1973 Libyan Declaration[59] contained, among other things, a reference to centuries old "sovereign rights" having been exercised by Libya over the Gulf.

The problem with this exception, which has been confirmed in almost identical terms in Article 10(6) of the Montego Bay Convention,[60] is that no objective test is offered for determining when a bay can be qualified as "historic." Indeed, all that exists are some general international standards which have been set forth in the past for determining the validity of the historic title claimed over the bay. They are: 1) The effectiveness of the exercise of powers over the bay; 2) The continuity of such exercise of powers over a considerable period of time; and 3) The lack of objections on the part of other states.[61]

These standards are also reflected in some important municipal court decisions. Among them, the United States Supreme Court decisions in *United States v. Alaska,*[62] which declared Alaska's claim over Cook Inlet inadmissible, and *United States v. Louisiana* (1969)[63] are of particular interest. However, there is no trace of an explicit recognition of these criteria in either the Montego Bay Convention[64] nor its preparatory works. In addition, the latter show that the problem of historic bays and historic waters, in general, has been almost ignored and that a proposal advanced in 1976 by Colombia in effect adopting the above-mentioned standards was quickly discarded.[65]

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58. 1958 Convention on the Territorial Sea, *supra* note 4, art. 7(6).

59. 1973 Declaration, *supra* note 8.

60. 1982 Convention, *supra* note 5, art. 10(6).

61. *Cf.* GIDEL, III LE DROIT INTERNATIONAL PUBLIC DE LA MER 635 (1932-1934); BOURQUIN, LES BAIES HISTORIQUES 43 (1952); L.J. BOUCHEZ, *supra* note 12, at 237; F. LAURIA, IL REGIME GIURIDICO DELLE BAIE E DEI GOLFI 135 (1970).

62. United States v. Alaska, 422 U.S. 184, *rem'd*, 519 F.2d 1376 (9th Cir. 1975). In *Alaska*, the Supreme Court relied on the criteria for determining the historical character of a bay by the Office of Legal Advisor, U.S. Department of State: "1. open, notorious and effective exercise of authority over the area by the State claiming the rights; 2. continuous exercise of authority; 3. acquiescence of foreign nations in the exercise of authority." *Id.* at 189. The Court held that enforcement of fishing and wildlife regulations did not constitute sufficient display of authority under criteria one and two. The Court also held that acquiescence of foreign nations does not mean simply the absence of protest but requires evidence that foreign nations knew or reasonably should have known that the claim over the bay was being asserted. *Id.* at 202.

63. *Louisiana*, 394 U.S. at 11.

64. 1982 Convention, *supra* note 5.

65. *See* V THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 202 (1977) [hereinafter cited as V UNCLOS III OFFICIAL RECORDS (1977)].

To what extent, then, are these standards relevant for determining the status of the Gulf of Sirte? There is little doubt that a strict application of these criteria to the Gulf is quite unlikely to produce a finding of historic title. Despite the rather naive reference in the Libyan Declaration[66] to a centuries old display of sovereignty, there is really no serious evidence to confirm that such a display of sovereignty every existed, either during the Italian domination over Libya and Tripolitania or before then, during the Turkish Empire's domination over Libya. On the contrary, as far as Italy is concerned, the 1973 Declaration[67] was criticized in a manner which would have been completely out of place had Italy somehow concurred in the past with the formulation of an historic title over the Gulf of Sirte.[68]

V. THE THEORY OF "VITAL" BAYS

The problem, however, cannot be disposed of on the basis of these considerations alone. In fact, it is quite indisputable that within the mainstream of tendencies aimed at widening the limits of coastal states' jurisdiction over adjacent waters, one recent practice has emerged strongly concerning the assertion of an exceptional *jus excludendi* over large bays. That basis is one of alleged "vital" interests founded on security or economic considerations arising independently of any true historic title. This theory, better known as the theory of "vital" bays, has been justified by newly independent states in order to combat the unfavorable situation which would arise vis-à-vis long-established states due to the "incapacity" of the former to rely upon history or a long passage of time to assert claims over their adjacent waters.[69]

This justification, however, is not without flaws. First, new states can always invoke the history and practice of their predecessors to make territorial claims. Second, this theory implies that new states have the capacity to appropriate exceptional maritime areas by instantaneous decisions based on their vital interests. Such a capacity seriously prejudices

66. *See* note 8.

67. *Id.*

68. For the Italian reactions, see Statement of Mr. Bensi, *supra* note 13.

69. For a discussion of this view, see Summary Records of 318th Meeting, [1955] 1 Y.B. INT'L L. COMM'N 211, U.N. Doc. A/2693, ACN.4/90 and Add.1-5; A/CN.4/93; A/CN.4/L.54 (statement of Garcia Amador); BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 179, 241 (1965).

those states who have acquired corresponding titles at the expense of long practice and passage of time. Rather, then, than resting on strictly legal grounds, the theory of "vital" bays seems to be "politically" motivated by the widespread suspicion and even intolerance that has been shown by many newly born states toward the traditional slow process of custom formation. The result, from a general point of view, is a preference for agreements and codification. Moreover, with respect to the particular problem here discussed, there is a preference for unilateral acts soliciting the prompt recognition of other nations of the interests asserted.

In any event, it seems doubtful the doctrine of "vital" bays may be labeled as a radical and isolated Libyan doctrine. Similar claims have been pressed by, among others, the Soviet Union with respect to the Bay of Peter the Great, Argentina and Uruguay with respect to the very extensive area of Rio de la Plata estuary, Panama with respect to the Panamanian Gulf, and Australia, Gabon and Guinea with respect to practically all the bays and gulfs of their coasts.[70]

As previously mentioned, the Italian government has also asserted exceptional claims over Italy's adjacent waters by closing the Gulf of Taranto with a straight line of approximately 60 miles within which the waters are considered internal. The Presidential Decree by which this assertion of authority was effected referred to an historic title.[71] However, there is no serious evidence of historic titles over the area which conforms to the traditional standards mentioned above. On the contrary, the main factor behind the closing of this Gulf appears to be to secure the Gulf from the unwelcome visits of non-NATO naval units.

This also explains the apparent lack of protest on the part of foreign nations.[72] NATO countries have no interest in challenging the Italian action insofar as it benefits them as well. On the other hand, the Soviet Union is not in a position to raise any legal issue on this matter since

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70. For a survey of state claims, see Secretary General of the United Nations, *Juridical Regime of Historic Waters, Including Historic Bays*, [1962] 2 Y.B. INT'L L. COMM'N 1; VII & VIII NEW DIRECTIONS IN THE LAW OF THE SEA (M. Nordquist, S. Houston & K.R. Simmonds eds. 1980).

71. Presidential Decree No. 816, *supra* note 54.

72. Only the United Kingdom appears to have shown some concern about the Gulf of Taranto. In 1981 the Foreign Secretary, Lord Carrington, replied to a question raised by Lord Kenneth that the British interpretation of the Geneva Convention was not consistent with the Italian Claim. The same reply, however, specified that NATO does not take a position with respect to the territorial sea limits of its members. *See* Ronzitti, *Is the Gulf of Taranto an Historic Bay?* 11 SYR. J. INT'L L. & COMM. 275 (1984).

it was one of the forerunners in the trend toward making sweeping claims over large bays, such as the Bay of Peter the Great facing Japan.[73]

VI. TOWARD A RELATIVE APPROACH ON "HISTORIC" BAYS

If judged in this dynamic context, the Libyan claim over the Gulf of Sirte may not be qualified as a violation of international law. By the same token, the Libyan claim cannot be considered in itself as constituting an internationally valid title over the area. Rather, it is the first step in the process of asserting a special regime which may or may not be successfully established depending on a range of considerations including the acquiescence of other states, the extent of analogous claims advanced in international practice, and the persistence of the Libyan claim itself in the future.

What one cannot overlook in this context is that the evolution of the Law of the Sea in the past three decades has been marked by the repeated assertion of claims based on special interests and circumstances of a geographic, economic, or environmental nature. Moreover, while strongly contested at the beginning, these claims have actually prevailed over the competing general interest of the freedom of the seas.

Besides the most obvious example of the straight baseline method being sanctioned on the basis of special circumstances in the *Fisheries Case*,[74] one may recall the Canadian Arctic Waters Pollution Prevention Act of 1970.[75] That Act created a 100-mile exclusive zone which was at first protested by the major maritime powers but later acquiesced to and finally recognized in Section 8 of the Montego Bay Convention.[76] To this should be added that fishing zones were at first opposed, even by force, and then challenged before the International Court of Justice in the *Fisheries*

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73. This bay was claimed as national waters by a decision of the Council of Ministers of the Soviet Union of July 20, 1957. The United States protested on August 12, 1957, and again on August 20, 1958. France, Sweden, the United Kingdom, Holland, Germany and Japan also protested. *See* Rousseau, *Notes et Commentaires: Extension des Eaux Territoriales Sovieteques dans la Baie de Vladivostock*, 62 R. G. DR. INT. P. 63 (1958); BUTLER, THE SOVIET UNION AND THE LAW OF THE SEA 108 (1971). The Soviet Union replied on January 7, 1958, to the United States protest contesting the arguments and rejecting its conclusions. *See* WHITEMAN, *supra* note 38, at 255.

74. Fisheries Case, *supra* note 1.

75. CAN. REV. STAT. ch. A1 (Supp. I 1970). For comments, see PHARAND, THE LAW OF THE SEA OF THE ARCTIC WITH SPECIAL REFERENCE TO CANADA (1983).

76. *Cf.* 1982 Convention, *supra* note 25, art. 294 concerning the admissibility of a pollution prevention zone in ice-covered areas.

Jurisdiction Case,[77] but then were almost immediately followed by combined assertion in state practice and UNCLOS III with the concept of a 200-mile exclusive economic zone. The international law of bays has been similarly influenced by this general trend. The number and frequency of coastal states' claims in this regard shows that the old concept of an historic bay is currently evolving into a more flexible notion whose crucial elements are the *bona fide* assertion of state interests and the recognition of and acquiescence of third states, rather that immemorial usage and the long passage of time.

VII. THE ROLE OF RECIPROCITY

A "relative approach on historic bays" involves a certain degree of legal uncertainty in the period of time before the definitive consolidation of title or, vice versa, before the definitive failure of it by virtue of a generalized attitude of objection. This is precisely the period in which the Gulf of Sirte incident occurred, and it is precisely with respect to this period of time that it is necessary to ask what rules, if any, govern the relations between the claiming coastal state and other states. An answer to this question may be found in the principle of reciprocity. In other words, at least on an intertemporal basis, this principle would involve an obligation to respect the Libyan claim by those states whose own domestic legislation and international practice has proceeded to the assertion of similarly exceptional claims over their respective coasts. Conversely, no such obligation would exist for those states which abstain from pressing claims of a similar nature with respect to their own bays or gulfs.[78]

The application of this criterion to the Gulf of Sirte leads to the interesting result that the Libyan claim is, indeed, *indirectly* supported by the practice of other neighbouring Mediterranean countries. Tunisia, for instance, has asserted territorial powers over the Gulf of Gabès, and Italy, as mentioned above, has closed the entire Gulf of Taranto. Both countries' closings were allegedly made on the basis of an historic title. In reality, however, since such an historic title does not appear to have roots in the past, the basis

77. Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. 3 (Judgment of July 25).

78. This is a specific application of Conforti's theory of reciprocity as one of the possible forms of peaceful self-defense ("forme *non violente*, o meglio *non belliche*, di autotutela"). CONFORTI, LEZIONI DI DIRITTO INTERNAZIONALE 270 (1982).

is clearly national security considerations and interests which are similar to those invoked by Libya in her 1973 Declaration.

As far as the United States is concerned, its 1974 challenge of the Libyan claim is consistent with a very restrictive attitude regarding the limits of the admissibility of historic bays. This attitude, which has been consistently expressed in executive positions and judicial pronouncements at the highest level, renders the Libyan claim unrecognized by and unenforceable against the United States, at least at this formative stage in which the standard of reciprocity is decisive.