

TUNISIA'S CLAIMS OVER ADJACENT SEAS AND THE DOCTRINE OF "HISTORIC RIGHTS"*

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I. INTRODUCTION

The existence of "historic rights" along the Tunisian coasts has long been emphasized by legal writers¹ and has been one of the central issues in the dispute between Tunisia and Libya over the delimitation of their respective continental shelves.² The 1982 judgment of the International Court of Justice regarding the delimitation of the Tunisian and Libyan continental shelves, however, did not clarify the nature, or the extent, of Tunisia's "historic rights," because an investigation of this kind was not deemed indispensable for a decision to be reached.³ It seems, therefore, worthwhile to examine recent Tunisian practice relating to the delimitation of maritime areas in order to ascertain whether, and to what extent,

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1. See generally, G. GIDEL, 1 *LE DROIT INTERNATIONAL PUBLIC DE LA MER, LE TEMPS DE PAIX* 491-93 (1932); G. GIDEL, 3 *LE DROIT INTERNATIONAL PUBLIC DE LA MER, LE TEMPS DE PAIX* 663 (1934); François, *Deuxieme Rapport sur la Haute Mer*, [1951] 2 *Y.B. INT'L L. COMM'N* 97, U.N. Doc. A/CN.4/42/1951; M. STROHL, *THE INTERNATIONAL LAW OF BAYS* 263 (1963); L.J. BOUCHEZ, *THE REGIME OF BAYS IN INTERNATIONAL LAW* 221-22 (1964); F. LAURIA, *IL REGIME GIURIDICO DELLE BAIE E DEI GOLFI* 171 (1970); Barrie, *Historical Bays*, 6 *COMP. & INT'L L.J. S. AFRICA* 39, 53 (1973); F. MOUSSA, *LA TUNISIE ET LE DROIT DE LA MER* 25-29 (1981).

2. Memorial of Tunisia (Tunisia v. Libyan Arab Jamahiriya), 1980 I.C.J. Pleadings (I Continental Shelf) 31, 57-58, 73-111 (Memorial dated May 30, 1980) [hereinafter cited as Tunisian Memorial]; Memorial of the Libyan Arab Jamahiriya (Tunisia v. Libyan Arab Jamahiriya), 1980 I.C.J. Pleadings (I Continental Shelf) 455 (Memorial dated May 30, 1980) [hereinafter cited as Libyan Memorial]. See Counter Memorial of the Libyan Arab Jamahiriya (Tunisia v. Libyan Arab Jamahiriya), 1980 I.C.J. Pleadings (II Continental Shelf) 41-73 (Counter Memorial dated Dec. 1, 1980) [hereinafter cited as Libyan Counter Memorial]; Reply of the Libyan Arab Jamahiriya (Tunisia v. Libyan Arab Jamahiriya), 1980 I.C.J. Pleadings (IV Continental Shelf) 14-25 (Reply dated July 15, 1981) [hereinafter cited as Libyan Reply]; Reply of Tunisia (Tunisia v. Libyan Arab Jamahiriya), 1980 I.C.J. Pleadings (IV Continental Shelf) 21-29 (Reply dated July 15, 1981) [hereinafter cited as Tunisian Reply].

3. Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 18, 71-77 (Judgment of Feb. 24). See Queneduc, *Note sur L'arrêt de la Cour Internationale de Justice Relatif à la Délimitation du Plateau Continental Entre la Tunisie et la Libye*, 27 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [AN. FR. DR. INT.]* 203 (1981); Zoller, *Recherche sur les Méthodes de Délimitation du Plateau Continental: A Propos de l'Affaire Tunisie - Libye*, 86 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R.G. DR.INT.P.]* 645 (1982); Feldman, *The*

Tunisia's claims can be justified on the basis of any "historic rights" that might exist. An assessment of the actual relevance of Tunisia's "historic rights" should prove particularly interesting in light of the extensive changes undergone by the Law of the Sea in recent years. Although this paper does not purport to discuss the complex theoretical problems raised by the vindication of "historic rights" within the ambit of the International Community,⁴ a brief definition of some of the terms involved seems to be unavoidable.

First, the term "historic rights" shall be used to indicate those rights which a state has acquired *vis-à-vis* one or more other states by effectively exercising those rights, with the acquiescence of the state or states concerned.⁵ In other words, this expression will be used to indicate those *special* rights acquired by a state in derogation to the existing general rules which would otherwise apply to the situation at hand.

In addition, when referring to the Law of the Sea, it is best to distinguish between kinds of "historic rights" according to their content; that is to say, according to the extent of the *imperium* due to the state which has acquired the right in question. On the one hand, state practice shows that a state may acquire full sovereignty over bodies of water adjacent to its coasts which, according to the existing general rules, would be beyond the limits of its maritime domain. This situation is covered by the doctrine of "historic waters,"⁶ one aspect of which is represented by the theory of

Tunisia - Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?, 77 AM. J. INT'L L. 219 (1983); Rodriguez, *La Sentencia del Tribunal Internacional de Justicia, de 24 de Febrero de 1982, en el Asunto Relativo a la Plataforma Continental Entre Tuenz y la Jamuhiriyyi Arabe Libia*, 35 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL [R.ESP.DER.INT.]

4. With special reference to "historic bays," see Goldie, *Historic Bays in International Law: An Impressionistic Overview*, 11 SYR J. INT'L L. & COM. 211 (1984).

5. This definition is borrowed from Sperduti, *Sul Regime Giuridico dei Mari*, 43 RIVISTA DI DIRITTO INTERNAZIONALE [RIV. DIR. INT.] 58, 72 (1960) See also Y.Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 38 (1965).

On international acquiescence see MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143 (1954); MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115; Sperduti, *Prescrizione, Consuetudine e Acquiescenza in Diritto Internazionale*, 44 RIV. DIR. INT. 3 (1961); Mosconi, *La Dottrina dell'Estoppel in Diritto Internazionale*, 16 DIRITTO INTERNAZIONALE [DIR.INT.] 388 (1962).

6. In the Fisheries Case, the International Court of Justice gave the following definition of "historic waters:" "By 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title." Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 132 (Judgment of Dec. 18). According to L.J. BOUCHEZ, *supra* note 1, at 281, "[h]istoric waters are waters over which the coastal

"historic bays."⁷ On the other hand, the general category of "historic rights" also covers those special rights a state may acquire, in derogation of existing general rules relating to the exercise of a limited authority over certain portions of the high seas, without at the same time involving a claim of full sovereignty. One example of this type of "historic rights" is that of historic fishing rights which a state might have acquired in particular areas of the high seas.⁸

If one accepts this definition of terms, it follows that our investigation should be carried out by examining separately, on the one hand, Tunisia's claims of full sovereignty over maritime areas adjacent to her coasts, and, on the other, her claims to exclusive,

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." A similar definition is given by Y.Z. BLUM, *supra* note 5, at 261:

The term 'historic waters' is applied nowadays in respect of maritime areas in general, with reference to bodies of water which—in spite of their being situated beyond the normal limits of a State's maritime domain—are treated as if they were part of the maritime appurtenance of the littoral State. This term denotes all waters which . . . are subject to the riparian State's authority in derogation of the normally applicable rules of international law.

7. See L.J. BOUCHEZ, *supra* note 1, at 199: "Historic bays are a species of the genus of historic waters. In other words, historic waters are the category of which historic bays form a part." The same view was expressed by Y.Z. BLUM, *supra* note 5, at 262: "[F]rom the legal point of view, the theory of 'historic bays' forms only one aspect of the more general doctrine of 'historic waters' . . ."

On "historic" bays and waters see also Anzilotti, *Baie Storiche: Loro Caratteri; Rapportie Fra Gli Stati Costieri*, 11 RIV. DIR. INT. 362 (1917); JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 383 (1927); BOURQUIN, *LES BAIES HISTORIQUES* 37 (1952); Florio, *Baie Storiche*, 2 *NOVISSIMO DIGESTO ITALIANO* 200 (1968); *Les Baies Historiques*, Memorandum Préparé par le Secrétariat de l'Organisation des Nations Unies, U.N. Doc. A/CONF. 13/1, reprinted in I UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 1 (1958) [hereinafter cited as I UNCLLOS OFFICIAL RECORDS (1958)]; *Juridical Regime of Historic Waters, Including Historic Bays*, Study Prepared by the Secretariat, U.N. DOC.A/CN.4/143 (1962), reprinted in [1962] 2 Y.B. INT'L L. 1.

8. See L.J. BOUCHEZ, *supra* note 1, at 238: "As regards claims to historic rights over parts of the sea, a distinction must be made between (1) historic rights resulting in sovereignty over a certain part of the sea, and (2) historic rights establishing special fishing rights." The same distinction was insisted upon by Y.Z. BLUM, *supra* note 5, at 247-48, who rightly added that:

Both categories of such rights may justly be termed "historic rights." It would appear, however, that only the first kind of historic rights relates to "historic waters" properly so-called, whereas the second deals with what may be termed "non-exclusive historic rights," in the sense that they do not imply a claim of full sovereignty.

On the distinction between full sovereignty and "sovereign rights" for limited purposes, as referred to in this article, see generally Sperduti, *supra* note 5, at 61-63.

though less far-ranging, rights over specific areas of the high seas. Both these types of claims must be examined as to their conformity to general international law. Wherever it appears impossible, or simply difficult, to justify Tunisia's claims in light of the general rules in force, it will be necessary to ascertain whether those claims can be justified on the basis of a "historic title."

II. THE DELIMITATION OF TUNISIA'S TERRITORIAL SEA AND THE THEORY OF "HISTORIC WATERS"

A. RECENT TUNISIAN LEGISLATION ON TERRITORIAL WATERS: THE ADOPTION OF A TWELVE-MILE LIMIT FOR THE TERRITORIAL SEA

The most recent Tunisian provisions on the delimitation of her territorial sea are the law of August 2, 1973 n. 73-49⁹ and the decree of November 3, 1973, which deals more specifically with the drawing of baselines.¹⁰ The 1973 law fixes the breadth of Tunisia's territorial waters at twelve nautical miles from the baselines. In order to determine these baselines, it adopts a combination of the traditional method, based on the low-water mark, and the method of straight baselines. It makes particular reference to straight baselines to be drawn in the shoaly areas of Chebba and the Kerkennah Islands, and to the closing lines of the Gulfs of Tunis and Gabès.¹¹

It seems unnecessary to devote much attention to the adoption of a twelve-mile limit for the territorial sea. In this respect the 1973 Tunisian law appears to conform with current international law, or at least is part of a widespread trend on the part of states which has been sanctioned by the 1982 United Nations Convention

9. Law No. 73-49 of August 2, 1973, reprinted in *Journal Officiel de la République Tunisienne* 1189 (31 juillet/3-7 août 1973) [hereinafter cited as 1973 Tunisian Law].

10. Decree No. 73-527 of November 3, 1973, reprinted in *Journal Officiel de la République Tunisienne* 1679 (2 - 6 Novembre 1973) [hereinafter cited as 1973 Tunisian Decree].

11. 1973 Tunisian Law, *supra* note 9, art. 1:

La mer territoriale tunisienne est constituée, de la frontière tuniso-algérienne à la frontière tuniso-libyenne et autour des îles, des hauts-fonds de Chebba et des îles Kerkennah où sont installées des pêcheries fixes et des hauts-fonds découvrants d'El Bibane, par la partie de la mer qui s'étend jusqu'à une limite fixée à 12 milles marins à partir de lignes de base. Les lignes de base sont constituées par la laisse de basse mer ainsi que par les lignes de base droites tirées vers les hauts-fonds de Chebba et des îles Kerkennah où sont installées des pêcheries fixes, et par les lignes de fermeture des golfes de Tunis et de Gabès. Ces lignes de base seront précisées par décret.

on the Law of the Sea.¹² There seems, therefore, to be no need to appeal to the theory of "historic waters" in order to justify Tunisia's decision.

In any case, one could add that the adoption of the twelve-mile limit, which goes back to 1973, has not provoked official protests from other Mediterranean states which are most affected by Tunisia's decision. Even Libya, which also has a twelve-mile territorial sea, expressly stated in her memorial to the International Court of Justice on the dispute with Tunisia over the delimitation of the continental shelf that she "does not contest Tunisia's claim to a 12-mile territorial sea."¹³ With regard to Italy, which in 1974 also adopted a twelve-mile territorial sea,¹⁴ one should note the 1979 Shipping Ministry decree establishing a biological resources protection area which expressly refers to Tunisia's twelve-mile territorial limit.¹⁵

12. Third United Nations Convention on the Law of the Sea, art. 3, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF/62/122 (1982), *reprinted in* 21 I.L.M. 1261, 1272 (1982) [hereinafter cited as 1982 Convention]: "Breadth of the Territorial Sea. Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." According to a number of legal writers, the 12-mile limit for the breadth of the territorial sea can currently be regarded as part of customary international law. See ROUSSEAU, 2 DROIT INTERNATIONAL PUBLIC 363 (1980); B. CONFORTI, LEZIONI DI DIRITTO INTERNAZIONALE 189-90 (2 ed. 1982). According to D.P. CONNELL, THE INTERNATIONAL LAW OF THE SEA 166 (1982), "the twelve-mile limit must be accepted as enjoying the same status and relative position as the three-mile limit previously enjoyed." The adoption of a 12-mile territorial sea by Tunisia was regarded as being in conformity with customary international law by F. MOUSSA, *supra* note 1, at 36-40.

13. Libyan Memorial, *supra* note 2, at 505. Libya adopted a 12-mile territorial sea in 1959. See Act No. 2 of February 18, 1959, *reprinted in* UNITED NATIONS LEGISLATIVE SERIES, NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, U.N. Doc. ST/LEG/SER.B/19, at 14 (1974) [hereinafter cited as UNITED NATIONS LEGISLATIVE SERIES (1974)].

14. Law No. 359 of August 14, 1974 amending Article 2 of the Code of Navigation of 1942, *reprinted in* 218 GAZ. UFF. (August 24, 1974), english translation *reprinted in* [1975] ITALIAN Y.B. INTL L. 332 (1975).

15. Decreto Ministeriale of September 25, 1979, 275 GAZ. UFF. (October 8, 1979). A translation of the 1979 decree is as follows:

The Minister of the Merchant Navy, Considering the necessity to ensure the defense of the biological resources existing in certain zones of the high sea in order to guarantee the fishingness of waters in which operate the Italian fishing-boats; . . . considering that the part of the sea delimited by a line which, starting from the point of arrival of the line of the twelve miles of the Tunisian territorial waters connects, on the parallel of Ras Kapoudia, with the 50m. isobath and follows that isobath to its meeting-point with the line departing from Ras Agadir to the North-East-ZV = 45°, is traditionally recognized as a zone of fishing restocking; *Decreets*: It is prohibited to Italian nationals and to fishing-boats flying the Italian

B. THE CLOSURE OF THE GULF OF TUNIS

Turning now to the more controversial aspect of the 1973 Tunisian measures (the adoption of certain straight baselines for the measurement of the territorial sea) it seems convenient to first examine the legality of the closure of the Gulf of Tunis. Article 1 of the 1973 Tunisian Decree states that the closing line of the Gulf consists of three lines uniting Cape Sidi Ali Mekki, Plane Island, the northern extremity of Zembra Island, and Cape Bon. Article 2(a) of the 1973 Tunisian Law expressly refers to the waters of the Gulf as being "internal waters."¹⁶

The Gulf of Tunis has been considered an example of an "historic bay" by many legal writers,¹⁷ and is classed as such in the memorandum on historic bays prepared by the United Nations Secretariat for the 1958 U.N. Conference on the Law of the Sea.¹⁸ However, before undertaking an investigation of the possibilities of applying the "historic bay" theory to this case, it is convenient first to ascertain if, in present circumstances, the closure of the Gulf of Tunis could not be justified under the existing rules of customary international law.

flag to carry on fishing activities in the zone of the sea as defined in the premises. Libyan Counter Memorial, *supra* note 2, at 60-61.

A reference to Tunisia's 12-mile territorial sea is also present in Article XII of the fishery agreement concluded by Italy and Tunisia in 1976. *Accord du 19 Juin 1976 entre le Gouvernement de la République Tunisienne et le Gouvernement de la République Italienne Relatif à la Pêche dans les Eaux Tunisiennes par des Nationaux Italiennes*, reprinted in 59 RIV. DIR. INT. 859 (1976).

16. According to Article 1(3) of the 1973 Tunisian Decree, *supra* note 9, art. 1(3), the closing line of the Gulf of Tunis consists of "les lignes de base droites joignent le cap Sidi Ali Mekki, l'île Plane, la pointe nord de l'île Zembra et le cap Bon." Article 2(a) of the 1973 Tunisian Law, *supra* note 9, 2(a), states as follows: "Font partie des eaux intérieures: a) les eaux du golfe de Tunis jusqu'à la ligne joignant le cap Sidi Ali el Mekki, l'île Plane, la pointe nord de l'île de Zembra et le Bon."

17. According to G. GIGEL, *supra* note 1, at 663, "Le golfe de Tunis constitue des eaux historiques." The same view was expressed by SERINI, 2 OIR. INT. 575 (1958); DELBEZ, LES PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC 231 (3d ed. 1964); Florio, *supra* note 7, at 200; VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 925 (1970). Other writers have referred to the Gulf of Tunis as a possible example of an "historic bay." See BARILE, I DIRITTI ASSOLUTI NELL'ORDINAMENTO INTERNAZIONALE 179 (1951); B. PALLIERI, DIRITTO INTERNAZIONALE PUBBLICO 425 (8th ed. 1962); CAVARE, 2 LE DROIT INTERNATIONAL PUBLIC POSITIF 683 (2d ed. 1962); M. STROHL, *supra* note 1, at 263; L.J. BOUCHEZ, *supra* note 1, at 221; F. LAURIA, *supra* note 1, at 171; Barrie, *supra* note 1, at 53; ROUSSEAU, *supra* note 12, at 391.

18. BOURQUIN, *supra* note 7, at 8.

To undertake such an examination, the necessary starting points are Article 7 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and Article 10 of the 1982 Montego Bay Convention, both of which deal with bays and are, in substance, identical. Both Articles define 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. In addition, the area of the bay must be as large as, or larger than, that of a semicircle whose diameter is a line drawn across its mouth.¹⁹ Once these criteria have been fulfilled and an indentation has been found to constitute a "bay," a closing line may be drawn across its natural entrance points if the distance between these points does not exceed twenty-four miles.²⁰

Neither the 1958 Geneva Convention (which Tunisia has signed but not ratified) nor the 1982 Montego Bay Convention are binding on Tunisia.²¹ It does, however, appear that the articles just mentioned could at least be regarded as a necessary point of departure for determining where customary international law lies on this matter. The twenty-four mile limit for the closing of bays, for example,

19. Convention on the Territorial Sea and the Contiguous Zone, art. 7(2), *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] is as follows:

For the purposes of these articles, a bay is 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. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

Article 10(2) of the 1982 Convention, *supra* note 12, art. 10(2), defines a "bay" in terms identical to those of the 1958 Convention on the Territorial Sea.

20. Article 7(4) of the 1958 Convention on the Territorial Sea, *supra* note 19, art. 7(4), is as follows: "If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters." The same words are used in Article 10(4) of the 1982 Convention, *supra* note 12, art. 10(4).

21. Tunisia signed the 1958 Convention on the Territorial Sea on October 30, 1958, but has not ratified it. Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1982, U.N. Doc. ST/LEG/SER.E/2 609 (1982). As for the 1982 Convention, which will enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession, Tunisia signed it on December 10, 1982. See 21 I.L.M. 1477 (1982). To date, however, Tunisia has not ratified the convention. See 23 I.L.M. 235 (1984).

can probably be currently regarded as part of existing customary law.²²

The first question is whether the Gulf of Tunis can be regarded as a "bay" in the terms of Article 7 of the Geneva Convention and Article 10 of the Montego Bay Convention. Undoubtedly, it is a well-marked indentation and certainly appears to be more than a mere curvature of the coast. A glance at the map will tell us that much. It is also undeniable that the Gulf would pass the semi-circle test if the straight line joining Cape Sidi Ali Mekki to Cape Bon was taken as the proper diameter. However, a complication arises through the presence of the Islands of Plane and Zembra which, although situated at the entrance to the Gulf, lie seaward of the Cape Sidi Ali Mekka/Cape Bon line.

Both Article 7(3) of the Geneva Convention and Article 10(3) of the Montego Bay Convention deal with so-called "multi-mouthed" bays in the following terms:

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 mounts. . . .²³

This criterion has caused some perplexity, mainly because of its vague wording which makes it difficult to apply to the great variety of concrete situations. It is not clear, in particular, whether it is to be applied only when the islands lie on the line of axis of the headlands of the bay or whether it also contemplates the case of islands lying seaward of such a line.²⁴ Nor should it be overlooked

22. One should observe, *inter alia*, that the 24-mile limit was adopted in 1958 in connection with the tendency of certain states to fix the maximum breadth of the territorial sea at 12 miles. See III UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OFFICIAL RECORDS 145 (1958) [hereinafter cited as III UNCLOS OFFICIAL RECORDS (1958)]. By basing the adoption of the 24-mile limit on its relationship with the supposed limit of the territorial sea, those states seemed to embrace the theory—already suggested by several writers—that coastal states could claim sovereignty over bays whose entrance did not exceed twice the breadth of their territorial sea. See also WESTLAKE, INTERNATIONAL LAW 191 (2d ed. 1910); LE FUR, PRÉCIS DE DROIT INTERNATIONAL PUBLIC 427 (4th ed. 1939); FLORIO, IL MARE TERRITORIALE E LA SUA DELIMITAZIONE 104 (1947). In 1958, the 24-mile limit for bays was not yet a reflection of customary international law, since there was no generally accepted limit to the breadth of the territorial sea. This is no longer true today, where the 12-mile limit is regarded as part of existing customary international law. See 1982 Convention, *supra* note 12.

23. 1958 Convention on the Territorial Sea, *supra* note 19, art. 7(3); 1982 Convention, *supra* note 12, art. 10(3).

24. See Alexander, *Baseline Delimitation and Maritime Boundaries*, 23 VA. J. INT'L L.

that the exact conformity of Article 7(3) of the Geneva Convention and Article 10(3) of the Montego Bay Convention with customary law (not to mention the semi-circle test itself) has been contested by legal writers.²⁵ However, it would seem in this case that the semi-circle test would be satisfied even using as the diameter the sum total of the lengths of the lines across the three mouths of the Gulf of Tunis resulting from the presence of the Islands of Plane and Zembra.²⁶

Having discussed the possibility of the Gulf of Tunis being a "juridical" bay, it remains to be seen whether international law allows for its closure. It must be observed, in this connection, that the distance between the headlands of the Gulf is far greater than that of the twenty-four miles established by customary international law.²⁷ However, as we have seen, the closing line of the Gulf, as described in the 1973 Tunisian Decree, is not constituted by one line joining its entrance points on the mainland, but rather by three straight lines drawn across three mouths resulting from the presence of the Islands of Plane and Zembra.

Article 7(4) of the 1958 Geneva Convention and Article 10(4) of the 1982 Montego Bay Convention seem only to allow for the drawing of one single closing line joining the "natural entrance points" of a bay. In other words, the presence of islands at the entrance of a bay seems to be relevant only for the purpose of applying the semi-circle test, and not as a justification for the drawing of closing lines differing from the line of axis of the headlands, particularly lines more advantageous to the coastal state.²⁸ Nevertheless, considering the ambiguous wording and the vagueness of the codified rules, together with the specific circumstances of the case in point, it would be hasty to conclude that the closing lines

503, 512 (1983). According to D.P. O'CONNELL, *supra* note 12, at 403, "the text is 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."

25. See D.P. O'CONNELL, *supra* note 12, at 393.

26. A number of legal writers have expressed no doubt as to the possibility of the Gulf of Tunis being a "juridical bay." According to M. STROHL, *supra* note 1, at 263, the Gulf can be considered as a bay, "within the meaning of Article 7, paragraph 2 of the 1958 Geneva Convention." The same view is held by F. MOUSSA, *supra* note 1, at 43.

27. The distance between Cape Sidi Ali Mekki and Cape Bon is 38 miles, according to the available nautical charts. [cite].

28. *Hodgson & Alexander, Toward an Objective Analysis of Special Circumstances*, in LAW OF THE SEA INSTITUTE, PAPER No. 13, 10 (1973); BOWELL, THE LEGAL REGIME OF ISLANDS

of the Gulf of Tunis are unlawful.

In this connection, it seems useful to refer to a theory put forward by some legal writers suggesting that, where islands are closely spaced and lie off what would otherwise be a "natural entrance point" of a bay, it may be legitimate to treat the outermost islands as the entrance to the bay rather than the headlands on the main coast. If one agrees with this theory, the lawfulness of the closing lines of the Gulf of Tunis would be established, since the "natural entrance points" of the Gulf would be the Islands of Plane and Zembra, which are about twenty-three miles apart. The opinion of Gidel may also be quoted on this point. When describing the Gulf of Tunis (which he considered to be "des eaux historiques") he referred to its entrance as being of twenty-three miles across, "suivant une ligne tirée entre l'île Plane et l'île Zembra."²⁹ Other writers too, have referred to the entrance of the Gulf as being about twenty-three miles across.³⁰

In any case, if the closing lines of the Gulf of Tunis were considered as not in conformity with the international rules on bays, their lawfulness could probably be established with reference to the more general rules on the straight baseline system: Article 4 of the 1958 Geneva Convention and the almost identical Article 7 of the 1982 Montego Bay Convention.³¹ In fact, it has been held that

IN INTERNATIONAL LAW 31-31 (1972); D.P. O'CONNELL, *supra* note 12, at 413-15.

29. G. GIGEL, *supra* note 1, at 663.

30. According to M. STROHL, *supra* note 1, at 263, "[t]he Gulf of Tunis has a closing line of about 23 miles and an indentation of 22 miles." The same view is expressed by L.J. BOUCHEZ, *supra* note 1, at 221; F. LAURIA, *supra* note 1, at 171; Barrie, *supra* note 1, at 53; F. MOUSSA, *supra* note 1, at 43 n.1. See also BOURQUIN, *supra* note 7, at 8. Even Libya, during the dispute with Tunisia over the continental shelf, referred to the Gulf of Tunis as being "23 nautical miles across." See Libyan Reply, *supra* note 2, at 15.

31. Both Article 4(1) of the 1958 Convention on the Territorial Sea, and Article 7(1) of the 1982 Convention, state the conditions for employing the method of straight baselines in the following terms:

In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

1958 Convention on the Territorial Sea, *supra* note 19, art. 4(1); 1982 Convention, *supra* note 12, art. 7(1).

Once the straight baseline system has been found to be applicable from a general point of view, the drawing of each baseline must satisfy certain fundamental prerequisites. According to Article 4(2) of the 1958 Geneva Convention, and Article 7(3) of the 1982 Convention, 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 regime of internal waters."

coastal states can also apply the rules on the straight baseline system to bays, provided the conditions laid down in the articles just mentioned are satisfied.³² This article does not discuss the validity of such a theory from a general point of view. Neither is there an attempt to provide a straightforward answer as to the conformity of the closing lines of the Gulf of Tunis with the customary rules on the straight baseline system. Given the vagueness and flexibility of those rules, this article confines itself to a few brief remarks which merely purport to describe one of the possible solutions to the problem.

With regard to the general conditions for the adoption of straight baselines, one should observe that the coast of Tunisia is not flat around the area of the gulf. On the contrary, it is as deeply indented and cut into as the coasts of other states in the same region which have adopted a system of straight baselines.³³ The presence of the Plane and Zembra Islands should also be taken into account.³⁴

1958 Convention on the Territorial Sea, *supra* note 19, art. 4(2); 1982 Convention, *supra* note 12, art. 7(3).

32. See Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 INT'L & COMP. L.Q. 73, 79-81 (1959), "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 a system." The same view has been expressed by Ronzitti, *Sommersgibili non Identificati, Pretese Baie Storiche e Contromisure dello Stato Costiero*, 66 RIV. DIR. INT. 5, 35-39 (1983); Ronzitti, *Is the Gulf of Taranto an Historic Bay?*, 11 SYR. J. INT'L L. & COM. 275 (1984); de Guttry, *La Delimitazione delle Acque Territoriali nel Mar Mediterraneo* (unpublished) (1985); de Guttry, *The Delimitation of Territorial Waters in the Mediterranean Sea*, 11 SYR. J. INT'L L. & COM. 377 (1984); See Continental Shelf, *supra* note 3, at 316-17 (J. Evenson dissenting), with specific reference to the Gulf of Gabès.

33. As is well known, the conventional rules on straight baselines emerged from the 1951 judgment of the International Court of Justice in the Fisheries Case. Fisheries Case, *supra* note 6. The Court found that "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 'skjaegaard' along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometric construction . . . 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." *Id.* at 128-29. Despite the words used by the Court in 1951, however, it would be difficult nowadays to maintain that the straight baseline system could only be employed in localities where the coastline is at least as deeply indented and cut into as that of Norway: in fact, subsequent state practice has proved that the attempt thus to restrict the scope of the straight baseline method has failed. See D.P. O'CONNELL, *supra* note 12, at 214. On the practice of states in the Mediterranean regions, see de Guttry, *supra* note 32, at 377.

34. According to Fitzmaurice:

[t]he use of the term "fringe" in paragraph 1 of the article . . . is of interest because it implies, and is intended to imply, that the mere existence of islands off a coast

As to the conformity of these lines with the prerequisites established in the codified rules, it is to be noted, in the first place, that these rules do not place exact limits to the length of straight baselines:³⁵ what is important is that the baselines do not depart to any appreciable extent from the general direction of the coast. If, then, we admit that the general direction of the coast in a bay should be represented by its natural entrance points,³⁶ it follows that the closing lines of the Gulf of Tunis do not depart to any appreciable extent from the general direction of the coast of northern Tunisia.

Coming now to the second prerequisite, it can probably be asserted that the waters within the closing lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. Leaving aside the question of the exact meaning of this prerequisite,³⁷ it should be pointed out that the waters of the Gulf of Tunis do not seem to be of much importance for the routes of international communication since it is quite possible to pass through the Sicilian Channel from east to west and the reverse without having to cross the Gulf itself. While third states do not seem to be particularly affected by Tunisia's decision, at least as far as freedom of navigation is concerned, it is clearly of considerable importance to Tunisia to be able to exercise full sovereignty over the Gulf. In regard to this it should be noted that Tunisia has exercised sovereign rights over the coral reefs in this area from time

is not a ground for using straight baselines. What is required is a continuous fringe . . . sufficiently solid and close the the mainland to form a unity with it, or an extension of it in the seaward direction.

Fitzmaurice, *supra* note 32, at 78. This view has been contradicted by post-Geneva practice and, according to D.P. O'CONNELL, *supra* note 12, at 215-16, can no longer be sustained.

35. It is a well known fact that several attempts were made at the Geneva Convention to introduce arithmetic limits to straight baselines, but all these attempts failed. See Voelkel, *Les Lignes de Base dans la Convention de Genève sur la Mer Territoriale*, 19 AN. FR. DR. INT. 820, 827 (1973).

36. See Ronzitti, *supra* note 32, at 41. See also Johnson, *The Anglo-Norwegian Fisheries Case*, 1 INT'L & COMP. L.Q. 145, 61 (1952), who observed that "baselines across well defined bays must be presumed to follow the general direction of the coast." From a general point of view, one cannot but agree with Alexander, *supra* note 24, at 515, that "no universally accepted criteria exist for determining whether or not a baseline system follows the general direction of the coast."

37. According to Alexander, *id.* at 516, "no systematic analyses of the possible parameters of such a linkage have been made." A possible answer might lie in an assessment of the reasonableness of the coastal state's claim: that is, balancing the interests of the coastal state and those of third states. See Ronzitti, *supra* note 32, at 43.

immemorial.³⁸ An appeal to these traditional rights would also be justified by Article 4(4) of the Geneva Convention and Article 7(5) of the Montego Bay Convention, which state that,

Where the method of straight baselines is applicable . . . 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.

It should be understood, however, that these traditional rights (the exact content of which need not be examined here) would not come into consideration as "historical rights" in the sense in which this expression is used in this paper (that is, as rights acquired in derogation to the normally applicable rules), but would rather come into consideration as one of the factors having some bearing on the concrete application of rules of customary international law.³⁹

It seems, therefore, that the Tunisian decision to close the Gulf of Tunis can in any case be justified in light of the existing law. It is, however, necessary to point out that the juridical regime of waters within the closing lines will differ according to whether the closure is justified on the basis of the international rules on bays,

38. According to F. MOUSSA, *supra* note 1, at 19 n.7, the Bey of Tunis had asserted a right to license the exploitation of the coral reefs along the northern coast of Tunisia since 1117. Foreigners were allowed to fish in this area on payment of certain sums of money. In this connection, it might be interesting to quote Article 15 of a Treaty concluded on May 20, 1604 between Henry IV of France and the Turkish Sultan Amat. According to the Treaty, French nationals were permitted to fish:

du Poisson & Corail . . . en particulier aux lieux de la Jurisdiction de nos Rioaumes d'Alger & Thunis, sans qu'il leur soit donné aucun trouble ni empeschement. Confirmons toutes les permissions qui ont été donnés par nos Aieuls . . . sans qu'elles soient sujettes à autre confirmation qu'a celle qui en été faite d'ancienneté.

See (entire text of this clause), *reprinted* in T. SCOVAZZI, *LA PESCA NELL'EVOLUZIONE DEL DIRITTO DEL MARE* 83 (1979). By a treaty of October 26, 1832, the Bey of Tunis conceded the exclusive right to exploit the coral reefs to France, in exchange for an annual revenue of 13,500 piasters. See F. MOUSSA, *supra* note 1, at 19. When describing Tunisian sedentary fisheries, Gidel observed that "les fonds coralligènes de la côte Nord sont l'objet d'un fermage du Gouvernement Tunisien" G. GIDEL, *supra* note 1, at 491. With specific reference to the Gulf of Tunis, which he considered to be "des eaux historiques," Gidel added that "les Etats étrangers n'ont jamais protesté contre les réglemations diverses appliqués dans les eaux de ce golfe." *Id.* at 663.

39. Johnson, rightly pointed out with reference to the Fisheries Case: by laying so much stress . . . on the flexibility of the general rules of international law relating to delimitation . . . and by including "long usage" as a factor to be considered in assessing the validity, even under general international law, of straight baselines drawn, not across bays only, but across sea areas "sufficiently closely linked to the land domain to be subject to the regime of internal waters," the Court

or of the more general rules on the straight baseline system. In the former case, the waters of the Gulf would come under the category of internal waters to all effects: in particular, that so-called "right of innocent passage" would not apply.⁴⁰ In the latter case, Article 5(2) of the Geneva Convention and Article 8(2) of the Montego Bay Convention would have to be taken into consideration. These articles require that coastal states, which have adopted the straight baseline system, allow innocent passage in those areas within the baselines which had previously been considered as part of their territorial sea or of the high seas.⁴¹

The conclusion to be drawn at this point is that there is no need in the present situation to appeal to the doctrine of "historical waters" in order to justify the decision to close the Gulf of Tunis. It may be added that Tunisia's decision does not seem to have provoked adverse reactions on the part of other states. But this silence can probably be explained as expressing a conviction that the closure of the Gulf conforms with existing law, rather than as implying acquiescence to an exceptional and unjustified claim.

The 1973 legislation was in fact 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. A decree of July 26, 1951, on fishing included the Gulf in a fishing zone reserved for

immeasurably reduced the scope of "historic waters" as waters specially exempted, by virtue of an historic title, from general rules of law.

Johnson, *supra* note 36, at 163-64. Blum added that "the Fisheries Case, no doubt, represented an attempt to incorporate, as it were, the doctrine of historic waters into general international law and to transform what was always considered as an exception to the rule into one aspect of the general norm." Y.Z. BLUM, *supra* note 5, at 286. The same considerations are valid with regard to the rules on straight baselines laid down in the 1958 Geneva Convention and in the 1982 Convention in which effect was given to the principles enunciated by the International Court of Justice in 1951. 1958 Convention on the Territorial Sea, *supra* note 19, art. 4; 1982 Convention, *supra* note 12, art. 8. On the relationship between the controversial character of the standard rules and the doctrine of "historic waters," see also D.P. O'CONNELL, *supra* note 12, at 417. A similar opinion was expressed by BOURQUIN, *supra* note 7, at 37, with specific reference to "historic" bays, at a time when no certainty existed as to the "territoriality" of bays.

40. See L.J. BOUCHEZ, *supra* note 1, at 109.

41. 1958 Convention on the Territorial Sea, Article 5(2) is as follows:

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, as provided in Articles 14 to 23, shall exist in those waters.

1958 Convention on the Territorial Sea, *supra* note 19, art. 5(2). Similar provisions are contained in Article 8(2) of the 1982 Convention, *supra* note 12, art. 8(2).

French and Tunisian nationals only.⁴² The Gulf was then claimed as "territorial" sea by Laws No. 62-35 of October 16, 1962⁴³ and No. 63-49 of December 30, 1963.⁴⁴ Finally, as we have seen, the Gulf was included in Tunisian internal waters in 1973.

Certain of the states most affected by these claims have expressly adopted a favorable attitude towards them. Italy expressly recognized the "territoriality" of the waters of the Gulf of Tunis in the fishery agreements she concluded with Tunisia in 1963 and 1971.⁴⁵ After the enactment of the 1973 Tunisian legislation, another fishery agreement concluded by Italy and Tunisia expressly mentioned the baselines for the measurement of Tunisia's territorial sea when defining the areas of "Tunisian waters" within

42. Decree of July 26, 1951, *reprinted in* Journal Officiel de la République Tunisienne, July 31, 1951, at 950 [hereinafter cited as 1951 Tunisian Decree].

43. Law No. 62-35 of October 16, 1962, *reprinted in* Journal Officiel de la République Tunisienne, October 12-16, 1962, at 1224 [hereinafter cited as 1962 Tunisian Law]. The text of the 1951 Tunisian Decree, *supra* note 42, as modified by the 1962 law is as follows:

Est dénommée mer territoriale tunisienne: a) de la frontière tuniso-algérienne à Ras Kapoudia et autour des îles adjacentes la partie de la mer comprise entre la laisse de basse mer et une ligne parallèle tracée à 6 milles au large, à l'exception du golfe de Tunis qui, à l'intérieur de la ligne cap Farina, île Plane, île Zembra et cap Bon, est entièrement compris dans ladite mer. Au large de la mer territoriale délimitée ci-dessus, une zone est réservée dans laquelle, seuls pourront être autorisés à pratiquer la pêche les navires battant pavillon tunisien. La zone de pêche est fixée à 12 milles à partir de la ligne de base qui sert de point de départ pour mesurer la largeur de la mer territoriale telle qu'elle est déterminée au paragraphe a) ci-dessus.

Libyan Memorial, *supra* note 2, at 533.

44. Law No. 63-49 of December 30, 1963, *reprinted in* Journal Officiel de la République Tunisienne, December 31, 1963, at 1870 [hereinafter cited as 1963 Tunisian Law]. The 1963 law is also published in Tunisian Memorial, *supra* note 2, at 408. With regard to waters adjacent to the coast of Tunisia, this law confirmed the previous law of October 16, 1962. For text *see infra* note 106.

45. Accord du 20 août 1971 entre le Gouvernement de la République Tunisienne et le Gouvernement de la République italienne relatif à la pratique, par les Pêcheurs Italiens, de la Pêche dans les eaux Tunisiennes, article 1(a) [hereinafter cited as 1963 Agreement]:

Le Gouvernement de la République italienne reconnaît que la zone de pêche réservée aux navires battant pavillon tunisien est définie comme suit: a) De la frontière tuniso-algérienne à Ras Kapoudia et autour des îles adjacentes: La partie de la mer contiguë à la mer territoriale et comprise entre la ligne de 6 milles et la ligne de 12 milles mesurés à partir de la laisse de basse mer, Le golfe de Tunis à l'intérieur de la ligne joignant le cap Farina, l'île Plane, l'île Zembra et le cap Bon est entièrement compris dans la mer territoriale.

Text of the 1963 Agreement is *reprinted in* 58 RIV. DIR. INT. 840 (1975), as well as Tunisian Memorial, *supra* note 2, annex 5, at 214. The 1963 Agreement was replaced by another fishery agreement concluded by Italy and Tunisia on August 20, 1971. *See* 58 RIV. DIR. INT. 845 (1975) [hereinafter cited as 1971 Agreement]. Article 1 of the 1971 Agreement is also *reprinted*

which Italian vessels would be allowed to fish along the northern coast of Tunisia.⁴⁶

Libya, for her part, vigorously contested the validity of the Tunisian baselines during the dispute over the delimitation of the continental shelf.⁴⁷ However, for obvious reasons, Libya concentrated her efforts on demonstrating the invalidity of the baselines drawn in the region of the Gulf of Gabès.⁴⁸ As regards the Gulf of Tunis, Libya's attitude was far more cautious and might be interpreted as in fact an acceptance of Tunisia's claim.⁴⁹

in Tunisian Memorial, *supra* note 2, annex 6, at 218. Article 1(a) of the 1971 agreement repeats Italy's recognition of the "territoriality" of the Gulf of Tunis in terms identical to those employed in the 1963 agreement. On these agreements, see Scovazzi, *La Pesca Nelle Acque Comprese Fra Italia e Tunisia*, 50 RIV. DIR. INT. 731 (1975).

46. Article 1(a) of the 1976 fishing agreement between Italy and Tunisia is as follows:

Le Gouvernement de la République tunisienne autorisera des bateaux italiens à pratiquer la pêche dans les eaux tunisiennes. Cette autorisation s'exercera dans les zones et aux conditions indiquées ci-apres: a) Zone entre la frontière tuniso-algérienne et le cap Bon: Cette zone est définie par la partie de la mer s'étendant entre le méridien passant par la frontière tuniso-algérienne et la partie est due parallèle passant par le cap Bon et comprise entre la ligne des 6 milles et celle des 12 milles mesurés à partir des lignes de base servant à la délimitation des eaux territoriales tunisiennes.

Accord du 19 juin 1976 entre le Gouvernement de la République Tunisienne et le Gouvernement de la République Italienne relatif à la pêche dans les eaux Tunisiennes par des Nationaux Italiens, Article 1, *reprinted in* 59 RIV. DIR. INT. 859 (1976) [hereinafter cited as 1976 Agreement]. On this agreement, which terminated in 1979, see Scovazzi, *L'Accordo di Pesca Italo-Tunisino del 19 Giugno 1976*, 59 RIV. DIR. INT. 761 (1976).

47. With reference to Articles 1 and 4 of the 1973 Tunisian Law, *supra* note 9, and to Article 1 of the 1973 Tunisian Decree, *supra* note 10, the Libyan Memorial, *supra* note 2, at 478, stressed that Libya "does not admit the validity of these baselines in international law and also denies that they are opposable to Libya in the context of the present case."

48. See *infra* text accompanying notes 50-85.

49. The Libyan Memorial states that the fact that the 1963 Tunisian Law, *supra* note 44, only claimed sovereignty over the Gulf of Tunis (and not over the Gulf of Gabès) led to the conclusion that "only the Gulf of Tunis (and not the Gulf of Gabès) merited closure by a straight closing line on the basis that it was an 'historic' bay." Libyan Memorial, *supra* note 2, at 502. Again in her reply to the Court, Libya pointed out that:

the 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. . . . The same Law, however, did close the Gulf of Tunis, which is 23 nautical miles across; there is thus clear evidence on the record that although Tunisia itself officially treated the Gulf of Tunis as a juridical bay in 1963, the "Gulf of Gabès" was not so considered in the slightest degree.

Libyan Reply, *supra* note 2.

These statements could, of course, be interpreted as an attempt on the part of Libya to strengthen her refusal to consider the Gulf of Gabès as an "historic" bay by drawing

C. THE CLOSURE OF THE GULF OF GABÈS

Without a doubt the most important new feature of the 1973 Tunisian legislation was the decision to close the Gulf of Gabès, thus including in Tunisia's internal waters a vast sea area, which had previously been considered partly Tunisian territorial waters and partly high seas. In fact, until 1973, the traditional low-water mark constituted the internal limit of Tunisia's territorial sea in this area, while the breadth of the territorial sea had been fixed at six nautical miles by Tunisian Law No. 63-49 of December 30, 1963.⁵⁰ The waters of the Gulf of Gabès were therefore included in Tunisia's territorial sea up to a distance of six miles from the low water mark, while beyond that limit they were part of an exclusive fishery zone claimed by Tunisia, which will be examined in the second part of this paper.⁵¹

According to Article 1(7) of the 1973 Tunisian Decree, the closing line of the Gulf of Gabès is a line joining the buoy ("balise") of Samoun, which is sited off the Kerkennah Islands (34 34' 54'' and 11 03' 38'' E) and Ras Turques, at the north-eastern extremity of the island of Jerba. Article 2(b) of the 1973 Tunisian Law defines the waters of the Gulf of Gabès up to the line joining Ras-Es-Moun and Ras Turques as "internal waters."⁵²

The choice of a buoy as base point for drawing the closing line of the Gulf is explained by the fact that this line is a continuation of a system of straight baselines drawn around the Kerkennah Islands. All these baselines were drawn using light buoys as base points; consequently, when drawing the closing line of the Gulf of Gabès, the starting point was the last base point previously used (the buoy of Samoun). Leaving aside the problems raised by the lines drawn around the Kerkennah Islands, which will be discussed

attention to Tunisia's different treatment of the Gulf of Tunis, without taking any position on the validity of Tunisia's claims over this latter bay. This author, believes, however, that the same statements, seen in the context of Libya's general attitude towards the closure of the Gulf of Tunis, might also be interpreted as indicative of Libya's acceptance of Tunisia's claim.

50. 1963 Tunisian Law, *supra* note 44, art. 1. For the text of this article see *infra* note 106.

51. See *infra* text accompanying notes (point VI).

52. Article 1(7) of the 1973 Tunisian Decree, *supra* note 10, describes the closing lines as "la ligne droite de fermeture du golfe de Gabès joignant la balise Samoun, définie ci-dessus, et Ras Tourgueness." Article 2(b) of the 1973 Tunisian Law, *supra* note 9, states that: "Font partie des eaux intérieures: . . . b) les eaux du golfe de Gabès jusqu'à la ligne joignant Ras-Es-Samoun et Ras Tourgueness."

shortly,⁵³ we now intend to analyze the lawfulness of the closing line of the Gulf of Gabès without taking into account the use of a buoy as one of the base points. Should in fact the use of light buoys as base points be considered unlawful, the question of whether the Tunisian government can close the Gulf or not would remain open.

Another preliminary question must be dealt with in order to "clear the ground": what exactly is meant by the geographical expression "Gulf of Gabès?" Libya, during the dispute with Tunisia over the continental shelf, contested the validity of the 1973 Tunisian baselines, basing her case, *inter alia*, on the fact that she considered the expression "Gulf of Gabès" to refer to the area of sea between Ras Yonga, on the mainland, and the north-western extremity of the island of Jerba. According to Libya, these alone should be considered as the "natural entrance points" of the Gulf in the terms of Article 7 of the 1958 Geneva Convention.⁵⁴ Tunisia, on the other hand, considers the extent of the Gulf to be much wider. Whereas the 1973 Tunisian measures seemed to consider Ras-Es-Moun and Ras Turques as the natural entrance points of the gulf during the dispute with Libya over the continental shelf, Tunisia seemed to go even further, suggesting that Ras Kaboudia should be considered as the northernmost entrance point of the Gulf.⁵⁵

Whichever the case may be, it must be stressed that the dispute over the natural entrance points of the Gulf of Gabès is irrelevant to our investigation, since the closure of the Gulf cannot be based on the general rules on bays. It is true that the Gulf does present the characteristics of a "bay" in the terms of Article 7 of the Geneva Convention and Article 10 of the Montego Bay Convention, even considering the closing line adopted by Tunisia as the proper diameter for the purposes of the semi-circle test.⁵⁶ It cannot be ignored, however, that this line, which is about forty-five nautical miles long, far exceeds the maximum limit established by customary international law for the closing of bays.

Tunisia herself has not based her decision to close the Gulf of Gabès on the international rules of "juridical" bays. Neither the

53. See *infra* text accompanying notes 85a-100.

54. See Libyan Memorial, *supra* note 2, at 484, 504. See also Libyan Counter Memorial, *supra* note 2, at 36-39.

55. See Tunisian Memorial, *supra* note 2, at 62, 77. See also Tunisian Reply, *supra* note 2, at 21-22.

56. In this sense, see M. STROHL, *supra* note 1, at 263; F. MOUSSA, *supra* note 1, at 43.

1973 Tunisian Law nor the 1973 Tunisian Decree provided any legal justification for the closure of the Gulf. Moreover, during the dispute with Libya over the continental shelf, Tunisia expressly quoted Article 7(6) of the Geneva Convention, according to which provisions concerning "juridical" 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."⁵⁷ According to Tunisia, the decision to close the Gulf of Gabès can be based both on the doctrine of "historical bays" and on the general rules on the straight baseline system.

In spite of Libya's objections,⁵⁸ it must be agreed that if the Gulf of Gabès proved to be an "historic bay," the disagreement over its natural entrance points would become immaterial for establishing the lawfulness of the closing line adopted by Tunisia. In fact, "historic bays" are a special case under the more general category of "historic waters" which covers all sea areas over which a coastal state has acquired full sovereignty through effective display of authority and the acquiescence of third states.⁵⁹ It follows that the coastal state can qualify as internal waters all the areas of sea over which it has "historically" exercised full sovereignty, irrespective of the natural characteristics of the coast. It is, therefore, necessary to ascertain whether the Gulf of Gabès can, in effect, be considered as an "historic bay" or, rather, whether the region of the Gulf of Gabès can qualify as "historic waters."

The Gulf of Gabès has been cited by several legal writers as a possible example of an "historic bay."⁶⁰ This opinion is usually based on that of Gidel, who allegedly included the Gulf in the category of "historic waters." It should be observed, however, that Gidel was in fact rather cautious when analyzing the juridical regime of the Gulf. While he did not hesitate to describe the Gulf of Tunis

57. See Tunisian Reply, *supra* note 2, at 18 20.

58. According to the Libyan Reply, "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." Libyan Reply, *supra* note 2, at 18.

59. On the relationship between "historic bays" and "historic waters," see *supra* notes 6 7.

60. See, e.g., CAVARE, *supra* note 17, at 638; M. STROHL, *supra* note 1, at 263; L.J. BOUCHEZ, *supra* note 1, at 221 22; DELBEZ, *supra* note 17, at 231; Florio, *supra* note 7, at 295; Barrie, *supra* note 1, at 53; ROUSSEAU, *supra* note 12, at 391. See also Continental Shelf, *supra* note 3, at 316 17.

as "des eaux historiques,"⁶¹ when dealing with the Gulf of Tunis, he confined himself to observing that:

[t]out ce golfe fait partie de la zone spongifère et les profondeurs n'y atteignent pas 50 mètres. Il est soumis effectivement à la juridiction tunisienne, sans que celle-ci ait jamais rencontré aucune opposition de la part des Gouvernements étrangers à l'occasion des mesures prises contre les pêcheurs de toute nationalité poursuivis pour contravention aux règlements de pêche tunisiens.⁶²

This passage, rather than establishing once and for all the "historic" character of the Gulf of Gabès, clearly brings into focus what, in the opinion of the present writer, is the principle question in this particular case: Whether it is admissible for a vast extent of sea to be qualified as internal waters on the strength of rights "historically" acquired by a coastal state only for fishing purposes.

During the dispute with Tunisia over the continental shelf, Libya pointed out, *inter alia*, that: (a) there was no proof that previous to 1973 Tunisia had denied innocent passage of foreign vessels in the area over which she claimed "historic rights"; and (b) as a consequence, one could not properly discuss acquiescence of third states until after 1973, when, for the first time, the waters of the Gulf of Gabès were claimed as internal waters.⁶³

Faced with these objections, Tunisia merely appealed to the great antiquity of her rights. According to Tunisia, these rights had been acquired in a far-off period of history, when the present distinction between the various maritime zones was yet unknown. Seen in this light, the 1973 Tunisian measures merely "achevaient l'évolution tendant à réaménager le statut juridique de l'ensemble de la zone des titres historiques, pour l'adapter aux circonstances maritimes contemporaines."⁶⁴

Tunisia's reply to Libya's objections is not convincing. Undoubtedly, as Tunisia pointed out, "historic rights" acquired in bygone ages can extend over areas of sea or sea-bed which can nowadays be qualified as internal waters, territorial waters, a fishery zone, or the continental shelf. But this can only mean that in order to evaluate the concrete significance of any "historic rights," the exact nature of the power effectively exercised by the coastal

61. See *supra* note 17.

62. See G. GIDEL, *supra* note 1, at 663.

63. Libyan Memorial, *supra* note 2, at 506; Libyan Reply, *supra* note 2, at 12.

64. See Tunisian Reply, *supra* note 2, at 15-20.

state with the acquiescence of third states must first be ascertained. An analysis of this kind is indispensable today when determining if, and to what extent, claims to delimit any maritime zone in derogation to existing international rules can be justified on the basis of any "historic rights" previously acquired.⁶⁵ In the opinion of the present writer, a state cannot claim a vast area of sea as internal waters on the sole basis of "historic rights" previously acquired for fishing purposes, unless it is possible to consider that those "historic rights" were in fact indicative of a right of full sovereignty. It is undoubtedly true that "*the manner in which sovereign rights are exercised is closely connected with the nature and structure of the territory.*" Similarly, it is equally clear that sovereignty over maritime areas can be exercised through the regulation of fishery, navigation, security, and other matters, so that "the exercise of all such regulations can be alleged in support of effective authority over the water area."⁶⁶ However, as Bouchez rightly points out, "the coastal State must leave no doubt about its *intention to claim the water area as part of the national territory.*"⁶⁷ It is one thing to claim sovereignty over an area of sea, it is another thing entirely to claim exclusive rights for limited purposes over portions of the high seas.⁶⁸

The question of the exact nature and extent of the "historic rights" claimed by Tunisia in the region of the Gulf of Gabès will

65. It seems interesting to quote, in this connection, the opinion voiced by the 1962 study on the Juridical Regime of Historical Waters:

In principle, the scope of the historic title emerging from the continued exercise of sovereignty should not be wider in scope than the scope of the sovereignty actually exercised. If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea.

Juridical Regime of Historic Waters, Including Historic Bays, *supra* note 7, at 23. The same is true when it is necessary to ascertain whether the coastal state has effectively claimed full sovereignty over a body of water, or simply more limited rights as over an area of high seas.

66. L.J. BOUCHEZ, *supra* note 1, at 249. In this sense, see also G. GIGEL, *supra* note 1, at 663 (III); M.S. McDUGAL & W. T. BURKE, *THE PUBLIC ORDER OF THE OCEANS* (1962); Y.Z. BLUM, *supra* note 5, at 254-61; Juridical Regime of Historic Waters, Including Historic Bays, *supra* note 7, at 14-15.

67. L.J. BOUCHEZ, *supra* note 1, at 249.

68. On this distinction see *supra* note 8. The distinction seems to have been disregarded by François. When discussing the Tunisian sedentary fisheries in the region of the Gulf of Gabès, he observed that "le droit de la Tunisie de considérer comme faisant partie des *eaux territoriales* toute la zone à l'intérieur de la ligne de fonds de 50 mètres du Ras Kapoudia à la frontière tripolitaine ne saurait donc être sérieusement contesté." François, *supra* note 1, at 97 (emphasis added). In fact, Tunisia had never claimed this water area as territorial waters, but simply as part of a reserved fishery zone, as François himself recognized.

be examined in the second part of this paper.⁶⁹ It must be stressed immediately, however, that until 1973 Tunisia had laid no claim to full sovereignty over the Gulf of Gabès: she had simply claimed sovereign rights for the limited purpose of exploiting the natural resources of the sea and of the sea-bed. Moreover, she had made it clear on various occasions that her exclusive fishery rights in the area were considered as rights acquired *beyond her territorial sea*.⁷⁰ Finally, whenever the attempt had been made to infer from those exclusive fishery rights the "territoriality" of the Gulf of Gabès, third states had expressed their dissent. In this light it is appropriate to mention an important statement made by Italy in 1912 during a dispute with France, who was at the time responsible for Tunisia's foreign relations. The dispute arose after the capture of the French postal steamer *Tavignano* by Italian destroyers off the coast of Tunisia. France tried to prove that the incident had taken place in Tunisian territorial waters, basing her case, *inter alia*, on the traditional fishing rights claimed by the Beys of Tunis in the area where the vessel was seized. The Italian government rejected this argument in the following terms: "De l'avis du Gouvernement royal, il n'y a pas lieu de s'occuper de ce prétendu domaine de la Régence car, en tout cas, il ne saurait y être question que d'un droit exclusif de pêche, qui n'empêcherait pas la mer d'être libre à tout autre égard."⁷¹ Again, by Law No. 62-35 of October 16, 1962, Tunisia attempted to include the whole region of the Gulf of Gabès in her territorial sea.⁷² The 1962 Law, however, was

69. See *infra* text accompanying notes 114-135.

70. This position had been made clear, in the first place, by France, while acting as protecting power in Tunisia. That France did not regard Tunisia's rights to sedentary fisheries as synonymous with sovereignty over the superadjacent waters was made clear, for example, in 1911 during a dispute with Italy, which arose after the capture of two Italian fishing boats off the Kerkennah Islands. On that occasion, France repeatedly stated that Tunisia's rights in the area were merely "droits . . . à réglementer la pêche . . . en dehors de la limite des eaux territoriales tunisiennes." Libyan Reply, *supra* note 2, at 1-15.

On the position of France, see *infra* note 99. As for Tunisia's post independence practice, the 1963 Tunisian Law, *supra* note 44, made it clear that the waters of the Gulf of Gabès beyond the six mile limit were regarded as part of a contiguous fishery zone, beyond the territorial sea. See *infra* note 106.

71. III ITALIAN PRACTICE IN INTERNATIONAL LAW 1434 (2d ser. 1979).

72. The 1962 Tunisian Law, Article 1, is as follows:

Est dénommée mer territoriale tunisienne: b) de Ras Kapoudia à la frontière tuniso-libyenne, la partie de la mer limitée par une ligne qui, partant du point d'aboutissement de la ligne des 12 milles décrite ci-dessus, rejoint sur le parallèle de Ras Kapoudia l'isobath de 50 mètres et suit cet isobathe jusqu'à son point de rencontre avec une ligne partant de Ras Aghdir en direction du nord-est ZV = 45°.

opposed by Italy⁷³ and was quickly repealed by Law No. 63-49 of December 30, 1963, which made a clear distinction between Tunisia's six-mile territorial sea, to be measured from the low-water mark, and a contiguous fishery zone which extended beyond the territorial sea, up to the fifty-metre isobath.⁷⁴

It must, therefore, be concluded that Tunisia's decision to close the Gulf of Gabès could not be based on the theory of "historic bays." The 1973 Tunisian legislation could at best be regarded as the beginning of a process aimed at the formation of a new "historic title," which would allow Tunisia to qualify the Gulf of Gabès as internal waters. The attitude of third states should be examined in this light in order to ascertain whether Tunisia's claim has met with general acquiescence within the international community. It would be difficult, however, to speak of general acquiescence of third states in view of Libya's strong opposition to the 1973 baselines.⁷⁵ One could also mention, the attitude of Malta, which has apparently also contested the Tunisian baselines.⁷⁶ Even Italy, which has

1962 Tunisian Law, *supra* note 43, art. 1.

The adoption of a bathymetric criterion for the measurement of Tunisia's territorial sea was criticized by Conforti, *La Disciplina della Pesca Costiera nella Prassi Internazionale Recente*, 2 ANNUARIO DI DIRITTO INTERNAZIONALE [AN. DIR. INT.] 132,140-41 (1966).

73. See 27 RELAZIONI INTERNAZIONALI 639 (1963); F. MOUSSA, *supra* note 1, at 29-30.

74. See *infra* note 106.

75. See 1963 Tunisian Law, *supra* note 47, art. 1. According to the Libyan Memorial, *supra* note 2, at 506, manifest in 1973, "Libya took the opportunity of reserving its position with regard to the 1973 Tunisian Law, and all its implication, in the discussions between the parties which were currently being held. This reservation was reiterated by the Libyan Note of 20 January 1979 to Tunisia (attached as Annex 1-27)." See also *id.* at 550. According to the Tunisian Counter-Memorial, *supra* note 2, at 14, however, the 1973 legislation, "régulièrement notifiée à la Libye dès sa publication, n'a jamais fait l'objet d'une protestation de la part de ce pays, jusqu'à la date du 29 janvier 1979."

With regard to the question of whether Libya has standing to oppose the closing line of the Gulf of Gabès, it is also necessary to refer to a theory according to which, in the period of time before the definitive consolidation of an historic title, the principle of reciprocity would involve an obligation to respect an exceptional claim, on the part of those states which "have proceeded to the assertion of similar exceptional claims." Francioni, *The Gulf of Sirte Incident (U.S. v. Libya) and International Law*, 5 ITALIAN Y.B. INT'L L. 85, 100-01 (1980-81). In this respect, it seems interesting to recall that, while stressing the validity of the closing line of the Gulf of Gabès, Tunisia pointed out that: "une attaque sur ce point est d'ailleurs signifière, et difficilement recevable, de la part d'un Etat qui a fermé le Golfe de la Syrte par une ligne de base droite longue de 465 Km., en l'absence de toute justification historique." Tunisian Counter-Memorial, *supra* note 2, at 19.

76. According to the Libyan Reply, *supra* note 2, at 20, it should be noted that "another State, Malta, similarly has not accepted the 1973 baselines of Tunisia. This fact was placed on the record by Malta in the oral hearings before this Court in connection with Malta's request to intervene in the present proceedings." Malta's Application to Intervene, and the

adopted a favorable attitude toward the close of the Gulf of Tunis, cannot be said to have acquiesced in Tunisia's claim to close the Gulf of Gabès, at least as matters stand at present.⁷⁷

As to the second justification put forward by Tunisia, namely that the closure of the Gulf of Gabès could be based on the general rules on the straight baseline system, it is again necessary to stress that the great flexibility of these rules might well justify Tunisia's claim. It is hardly surprising that Judge *ad hoc* Evenson, in his dissenting opinion annexed to the 1982 judgment of the International Court of Justice, agreed entirely with Tunisia's opinion.⁷⁸ Indeed, Libya's assertion that the Tunisian coastline does not conform with the conditions laid down in Article 4 of the 1958 Geneva Convention since, "unlike the Norwegian coast, it is not deeply indented"⁷⁹ seems nowadays untenable.⁸⁰ It would also be difficult to agree with Libya that the Kerkennah Islands are not "part of an island fringe" but merely "two localised and isolated islands."⁸¹

consequent proceedings, see Memorial of Tunisia, *supra* note 2.

77. As previously discussed, *supra* notes 72-74, Italy's protest against the 1962 Tunisian Law (which attempted to include the whole region of the Gulf of Gabès in Tunisia's territorial sea), caused the Law to be repealed in 1963. In the fishery agreements concluded by Italy and Tunisia in 1963, 1963 Agreement, *supra* note 45, and 1971, 1971 Agreement, *id.*, the region of the Gulf of Gabès was "recognized" by Italy as part of Tunisia's "reserved fishery zone." The agreement of 1976 only referred to the baselines drawn by Tunisia along its northern coast, 1976 Agreement, *supra* note 46, and not to those adopted in the region of the Gulf of Gabès, which was again regarded as a "reserved fishery zone." Moreover, the Italian Shipping Ministry Decree of September 25, 1959, GAZ. UFF. ITAL., *supra* note 15, considered the Tunisian "reserved fishery zone" beyond the twelve-mile limit as a zone of high seas.

78. Continental Shelf, *supra* note 3, at 316-17 (J. Evenson, dissenting). In Judge Evenson's opinion, the closing line of the Gulf of Gabès should have been regarded as "a natural continuation of the system of straight baselines drawn outside the Archipelago of Kerkennah continuing to the Island of Jerba and then on the mainland." *Id.*

79. Libyan Memorial, *supra* note 2, at 503.

80. See *supra* note 33.

81. Libyan Memorial, *supra* note 2, at 503. As previously discussed, *supra* note 34, it is not at all clear how many islands constitute a fringe in terms of Article 4(1) of the 1958 Geneva Convention. 1958 Convention on the Territorial Sea, *supra* note 19, art. 4(1). It is a well known fact that the rules of both the 1858 Convention and the 1982 Convention have been subject to criticism for not laying down exact criteria to determine when the method of straight baselines may be employed. According to D.P. O'CONNELL, *supra* note 12, at 208-91, these difficulties could be overcome by considering the "general direction of the coast" concept as the decisive criterion of when the method may be used, and not as a mere condition for the lawfulness of each straight baseline. If this view is correct, the possibility of employing the method of straight baselines in the region of the Gulf of Gabès would be, generally speaking, incontrovertible. See also *supra* note 36.

As far as the closing line of the Gulf of Gabès is concerned, it can probably be asserted that it does not depart to any appreciable extent from the general direction of the coast, if the island of Jerba and the southernmost of the Kerkennah Islands are taken as the entrance points, as the 1973 Tunisian Law has done.⁸² In addition, when it comes to deciding whether the waters within the closing line are "sufficiently closely linked to the land domain to be subject to the regime of internal waters," the particular natural and historical characteristics of the Gulf of Gabès cannot be ignored: the close relationship between land and sea, due mainly to the considerable shallowness of the waters; the existence of centuries-old sedentary fisheries, which constitute an important economic resource; and the constant manifestations of state authority for the purpose of regulating the exploitation of these fisheries.⁸³

These circumstances, although insufficient to classify the Gulf of Gabès as an "historic bay," can certainly play an important role when applying the rather flexible rules on straight baselines. The same circumstances might also justify the adoption of the closing line of the Gulf of Gabès as a "particular baseline" in the terms of Article 4(4) of the Geneva Convention and Article 7(5) of the Montego Bay Convention.⁸⁴ In any case, if the closure of the Gulf were considered lawful on the basis of the rules on straight baselines, it would again be necessary to point out that, according to Article 5(2) of the Geneva Convention and Article 8(2) of the Montego Bay Convention, innocent passage of foreign vessels would have to be allowed within the closing line of the Gulf.⁸⁵

D. OTHER STRAIGHT BASELINES ADOPTED BY TUNISIA

To conclude the first part of this investigation, the emphasis will now turn to the other straight baselines adopted by Tunisia in 1973. Leaving aside the line drawn from Sidi Garus, at the southeastern extremity of Jerba, to Ras Marmor on the mainland, whose lawfulness seems incontrovertable, the remaining lines are those drawn around the shoals fringing the Kerkennah Islands. As has

82. See *supra* note 36.

83. See *infra* text accompanying notes 96-98.

84. 1958 Convention on the Territorial Sea, *supra* note 19, art. 4(4); 1982 Convention, *supra* note 12, art. 7(5). See also *supra* note 39.

85. 1958 Convention on the Territorial Sea, *supra* note 19, art. 5(2); 1982 Convention, *supra* note 19, art. 7(5). See *supra* note 41.

already been pointed out, these lines have been drawn using a number of buoys as base points.^{85a}

During the dispute with Libya over the delimitation of their continental shelves, Tunisia justified the adoption of the baselines in question using the same arguments employed to justify the closing line of the Gulf of Gabès.⁸⁶ On the one hand, she appealed to the existence of "historic rights" which allowed her to modify the juridical regime of the waters in the area; on the other hand, she called upon the rules of customary international law on the adoption of the straight baseline system.⁸⁷ However, the baselines in question do not seem, at a first glance, to respect existing customary law. Although, as has already been observed, the possibility of employing the straight baseline system in this area can probably be admitted from a general point of view,⁸⁸ "it has been held that the lines drawn around the Kerkennah Islands depart to a considerable extent from the general direction of the coast."⁸⁹

If this view is correct, the intimate relationship of the waters within the baselines with the land domain, a relationship upon which Tunisia based much of her argument, would not be sufficient to justify Tunisia's decision. Article 4(2) of the Geneva Convention and Article 7(3) of the Montego Bay Convention,⁹⁰ as well as the judgment of the International Court of Justice in the Anglo-Norwegian

85a. According to the 1973 Tunisian Decree, these buoys are:

a) Chebba No. 1	35°08'40"	11°12'43"
b) Maruka	35°01'20"	11°29'11"
c) El Barani	34°55'21"	11°33'09"
d) El Mzebla	35°51'27"	11°38'14"
e) Sakib Hamida No. 1	34°45'17"	11°33'58"
f) Sakib Hamida No. 2	34°43'48"	11°33'23"
g) Oued Bou Zrara No. 1	34°42'36"	11°29'03"
h) Oued Bou Zrara No. 2	34°41'22"	11°26'42"
i) Oued Mimoun No. 4	34°40'25"	11°19'40"
j) Oued Saadoun	34°39'10"	11°14'14"
k) Samoun	34°34'54"	11°03'38"

86. 1973 Tunisian Decree, *supra* note 10, art. 1(6). Neither the 1973 Tunisian Decree, *supra* note 10, nor the 1973 Tunisian Law, *supra* note 9, expressly qualify the water areas within these baselines as internal waters. However, in the Tunisian Counter-Memorial, *supra* note 2, at 18, Tunisia made it clear that, "si l'on examine le tracé des lignes de base tunisiennes entre Ras Kapoudia et Ras Es-Samoun on constatera qu'il a précisément pour objet . . . de rattacher expressément cette partie des îles et des hauts-fonds aux eaux intérieures."

87. See Tunisian Counter-Memorial, *supra* note 55, at 17-18.

88. See *supra* notes 80-81 and accompanying text.

89. See de Guttry, *supra* note 32.

90. 1958 Convention on the Territorial Sea, *supra* note 19, art. 4(2); 1982 Convention, *supra* note 19, art. 7(3). See *supra* note 31.

Fisheries Case,⁹¹ all make it quite clear that straight baselines can in no case depart to any appreciable extent from the general direction of the coast.

In addition, Article 4(3) of the Geneva Convention and Article 7(4) of the Montego Bay Convention do not admit the use of "low-tide elevations" as base points, unless "lighthouses or similar installations which are permanently above sea-level have been built on them," or unless "the drawing of baselines to and from such elevations has received general international recognition."⁹² It certainly cannot be said that the straight baselines drawn around the Kerkennah Islands have received general recognition on the part of third states (suffice it to recall Libya's vehement protest during the dispute over the continental shelf).⁹³ Since light buoys were used as base points for drawing these lines, the problem is then to establish whether these buoys can be considered as equivalent to "lighthouses or similar installations" in the terms of the articles just mentioned. That buoys could be so considered was denied by Libya in her memorial to the International Court of Justice, which characterized the base points used by the 1973 Tunisian Decree as "low-tide elevations the use of which as base-points is prohibited by law."⁹⁴ An entirely different view, however, was expressed by Judge *ad hoc* Evensen in his dissenting opinion annexed to the 1982 judgment of the International Court of Justice.⁹⁵

91. According to the Tunisian Counter-Memorial, *supra* note 55, at 17 n.18, même si l'article 4 (of the 1958 Geneva Convention) est, dans une certaine mesure, l'expression de la coutume, celle-ci . . . a été, d'abord et avant tout formulée par la Cour Internationale de Justice elle même, dans l'affaire anglo-norvégienne des pêcheries. C'est donc l'arrêt de la Cour qui seul permet, aujourd'hui encore, d'identifier dans ces dispositions conventionnelles ou dans les tendances récentes, ce qui participe de la codification, ou, au contraire, du développement progressif du droit international.

It is undoubtedly true, as Tunisia pointed out, that the court insisted on the close relationship of the sea areas within the baselines with the land domain. But it is also true that the court stressed that "the drawing of baselines must not depart to any appreciable extent from the general direction of the coast." *Fisheries Case*, *supra* note 6, at 133.

92. For a detailed analysis of problems regarding the drawing of baselines from low-tide elevations, see M.S. McDUGAL & W.T. BURKE, *supra* note 66, at 387.

93. See Libyan Memorial, *supra* note 2, at 478.

94. *Id.* 503-04.

95. Continental Shelf, *supra* note 3, at 315-16 (J. Evenson, dissenting). According to Judge Evensen,

light buoys seem to have been positioned on most of these low-tide elevations. 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. It is further an indisputable fact that new technology has made

The validity of the baselines in question seems, therefore, to be the subject of controversy. However, it remains to be seen whether these baselines can be justified in light of Article 4(4) of the Geneva Convention and Article 7(5) of the Montego Bay Convention which allow for the drawing of "particular" baselines on the basis of economic and historical factors.⁹⁶ According to Judge Evensen, "the historic and economic facts of the region concerned fully meet these requirements."⁹⁷ The region of the Kerkennah Islands is in fact characterized by the presence of a large number of shoals no more than two to three metres below the surface. These shoals make the waters totally unsuitable for navigation, and have allowed for the erection of fishing structures by the local inhabitants since far-off times. These fisheries fall into the category of so-called "fixed" or "structural" fisheries since they are erected by driving piles into the sea-bed. The public authorities initially only sanctioned and regulated private deeds of possession, but later attempted to gradually bring the shoals under the regime of state property ("domain public"). It should be added that these manifestations of state authority, in particular the claim to include the area of the fixed fisheries in the Tunisian "domain public maritime"—irrespective of their distance from the coast—does not seem to have ever provoked protests by third states.⁹⁸

In any case, should the possibility of applying the rules on straight baselines be denied, it seems that the peculiar natural and historical characteristics of the region concerned would also allow for the application of the doctrine of "historic waters." Contrary to what has been said on the closure of the Gulf of Gabès, which is only partly included in the region of the fixed fisheries, it would seem in this case that the claim that this region was state property was in fact indicative of a claim of full sovereignty.⁹⁹ Moreover, it

the installation of light beacons a simple and inexpensable operation; and they can be installed within hours.

Id.

96. 1958 Convention on the Territorial Sea, *supra* note 19, art. 4(4); 1982 Convention, *supra* note 19, art. 7(5). See *supra* note 38 and *supra* text accompanying note 39.

97. Continental Shelf, *supra* note 3, at 316.

98. See G. GIDEL, *supra* note 1, at 491-92; Francois, *supra* note 1, at 97; Papandreou, *supra* note 1, at 61; F. MOUSSA, *supra* note 1, at 44-45. See also The Tunisian Memorial, *supra* note 2, at 89-97; Tunisian Reply, *supra* note 2, at 27.

99. According to the Instructions on Navigation and Sea Fisheries issued by the Tunisian Director of Public Works, para. 28, "la diplomatie maritime considère généralement comme faisant partie de la mer territoriale d'un pays, . . . les bancs exploitables attenants à la côte

would be excessive to ask for proof of "historic" denial of innocent passage in order to qualify this area as internal waters, since it is difficult to see how this right could ever have been exercised by foreign vessels in such extremely shallow waters. If, therefore, the lack of protests on the part of third states is considered as implying acquiescence, it follows that previous to 1973 Tunisia had acquired full sovereignty over the whole region of the fixed fisheries. It goes without saying, however, that if the theory of "historic waters" is to be applied, it should be verified whether the area over which Tunisia had "historically" acquired sovereignty effectively corresponds to that included within the baselines adopted in 1973.¹⁰⁰

III. TUNISIA'S "HISTORIC RIGHTS" BEYOND THE TERRITORIAL SEA

A. THE EXCLUSIVE FISHERY ZONE

Having concluded the investigation into recent Tunisian practice relating to claims of full sovereignty over maritime areas, the emphasis will now turn to Tunisia's claims relating to the exercise of more limited rights beyond her territorial sea. In this connection, the exclusive fishery zone proclaimed in 1951 must be examined. Article 3 of the Decree of July 26, 1951, which reorganized Tunisian legislation on fishery control defined this zone in the following terms:

Au large des côtes tunisiennes, une zone est réservée dans laquelle seuls pourront être autorisés à pratiquer la pêche les navires

ferme, quelle que soit leur étendue, . . . et même certaines étendues de mer libre dont l'exploitation par un Etat a été consacrée par l'usage." Instruction sur le Service de Navigation et des Pêches Maritimes du 31 Décembre 1904, reprinted in the Tunisian Memorial, *supra* note 2, annex 87, at 411. 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 the fixed fisheries, which did not extend beyond 10 to 12 miles from the coast and which was regarded "comme faisant partie du Domain public maritime de la Régence," and the much wider region of the sponge fisheries, which was regarded as an area over which "un usage immémorial reconnu par les principales Puissances, attribuée à la Tunisie l'exploitation et la police des bancs d'éponges situés sur le littoral, même en dehors de la mer territoriale." *Id.* annex 87, para. 29 (emphasis added). It would seem, therefore, that, while this latter region was regarded as an area of high seas, over which Tunisia had acquired "historic" rights for the purpose of exploiting and regulating sponge fisheries, the region of the fixed fisheries was in fact included in Tunisia's "territorial sea."

100. See Y.Z. BLUM, *supra* note 5, at 238-40.

battant pavillon français ou tunisien. La zone de pêche réservée comprend: a) de la frontière algero-tunisienne au Ras Kapoudia et autour des îles adjacentes, la partie de la mer comprise entre la laisse de basse-mer et une ligne parallèle tracée à 3 milles au large à l'exception du golfe de Tunis, qui à l'intérieur de la ligne Cap Farina, île Plane, île Zembra, Cap Bon, est entièrement compris dans ladite zone; b) du Ras Kapoudia à la frontière de Tripolitaine, la partie de la mer limitée par une ligne qui, partant du point d'aboutissement de la ligne de 3 milles décrite ci-dessus, rejoint sur le parallèle du Ras Kapoudia l'isobathe de 50 mètres et sui cette isobathe jusqu'a son point de recontre avec une ligne partant u Ras-Ajdir en direction du Nord-Est ZV-45 °.¹⁰¹

It should be noted that the area described under "a," after having been extended to twelve miles from the low-water mark by Law No. 62-35 (1962) and Law No. 63-49 (1963),¹⁰² is now totally included in Tunisia's internal waters.¹⁰³ Thus, it might be concluded that this part of Article 3 of the 1951 Decree is no longer in force—a fact which also transpires from Article 7 of Law No. 73-49 (1973) on the territorial sea.¹⁰⁴

On the other hand, the area described under "b" is today only partly included in Tunisia's internal waters and territorial sea. This explains why the 1973 Law specifies in Article 5 that: "Demeurent d'application les dispositions de l'alinéa b) de l'article 3 du décret du 26 juillet 1951 modifié par la loi n. 63-49 du 30 décembre 1963 et relatif à la zone réservée, en matière de pêche, aux seuls navires tunisiens."¹⁰⁵ The reservation of the exclusive right for Tunisian vessels to fish in the zone had been effected by the Laws of 1962 and 1963, after Tunisia had become independent.¹⁰⁶

101. 1951 Tunisian Decree, *supra* note 42, art. 3.

102. Law No. 62-35, *supra* note 43; Law No. 63-49, *supra* note 44.

103. *See supra* text accompanying notes 9-49.

104. According to the 1973 Tunisian Law, art. 7: "Sont abrogées toutes dispositions contraires à la présente loi et notamment celles du paragraphe premier de l'article 3 du décret du 26 juillet 1951 tel que modifié par la loi n° 63-49 du 30 décembre 1963." 1973 Tunisian Law, *supra* note 9, art. 7.

105. *Id.* art. 5.

106. As previously discussed, the 1962 Tunisian Law, *supra* note 43, attempted to include the whole area of the Gulf of Gabès in Tunisia's "territorial sea." *See supra* note 72. Because of protest from Italy, the Law was repealed by the 1963 Tunisian Law, *supra* note 44. Articles 1 & 3 of the 1963 Law read as follows:

Article premier. L'article 3 du décret du 26 juillet 1951 (22 Chaoual 1370) portant refonte de la législation de la police de la pêche tel qu'il été modifié par la loi n° 62-35 du 16 octobre 1962 (18 Joumada 1382) est abrogé et remplacé par les dispositions suivantes:

The creation of the exclusive fishery zone in 1951 was part of a well-known process which aimed at extending the rights of coastal states to fisheries beyond the external limit of their territorial sea. This process culminated in the affirmation of the so-called "Exclusive Economic Zone" by the Montego Bay Convention in 1982.¹⁰⁷ Tunisia herself has recognized, with specific reference to the 1963 Law, that the creation of her exclusive fishery zone, "se situe dans la ligne de l'évolution qui conduit aujourd'hui la IIIème Conférence des Nations Unies sur le droit de la mer à proner la constitution de 'zones économique exclusives' en bordure du litoral des puissances côtières."¹⁰⁸

It must be pointed out, however, that not all legal writers are in agreement over the question of the "exclusive economic zone," as described in the 1982 Convention, being already part of customary international law. According to one view, the exclusive economic zone should be considered, from the point of view of customary international law, as a series of rights of the coastal state, each of which has its own history and a different degree of general acceptance.¹⁰⁹ In addition, one should note the fact that, as some

"Article 3 (nouveau). Est dénommée mer territoriale tunisienne: de la frontière tuniso-algérienne à la frontière tuniso-libyenne et autour des îles adjacentes, la partie de la mer comprise entre la laisse de basse mer et une ligne parallèle tracée à 6 milles au large à l'exception du golfe de Tunis qui a l'intérieur de la ligne cap Farina, île Plane, île Zembra et cap Bon, est entièrement compris dans ladite mer.

Une zone contigue à la mer territoriale tunisienne telle qu'elle est définie ci-dessus est réservée dans laquelle seuls les naviers battant pavillon tunisien pourront être autorisés à pratiquer la pêche.

Cette zone est définie:

a) de la frontière tuniso-algérienne à Ras Kapoudia par la partie de la mer comprise entre la ligne des 6 milles et celle des 12 milles marins mesurés à partir de la laisse de basse mer:

b) de Ras Kapoudia à la frontière tuniso-libyenne: par la partie de la mer limitée par une ligne qui partant du point d'aboutissement de la ligne des 12 milles marins mentionnées au paragraphe a) ci-dessus rejoint sur le parallèle de Ras Kapoudia l'isobathe de 50 mètres et suit cette isobathe jusqu'à son point de rencontre avec une ligne partant de Ras Ajdir en direction du nord-est ZV 45°."

1963 Tunisian Law, *supra* note 44, arts. 1 & 3.

107. 1982 Convention, *supra* note 12, art. 55. On the E.E.Z. see Queneduc, *La Zone Economique*, 79 R. G. DR. INT. P. 321 (1975); Phillips, *The Exclusive Economic Zone as a Concept in International Law*, 26 INTL & COMP. L.Q. 585 (1977); D.P. O'CONNELL, *supra* note 12, at 533; B. CONFORTI, *LA ZONA ECONOMICA ESCLUSIVA* (1983).

108. Tunisian Counter-Memorial, *supra* note 55, at 16.

109. See T. TREVES, *LA CONVENZIONE DELLE NAZIONI UNITE SUL DIRITTO DEL MARE* 26 (1983).

writers have already pointed out, the bathymetric criterion used by Tunisia to delimit her exclusive fishery zone does not seem to conform to state practice.¹¹⁰ The Montego Bay Convention itself has adopted a spatial criterion for delimiting the exclusive economic zone, by imposing the maximum limit of 200 nautical miles from the baselines of the territorial sea.¹¹¹

Finally, any discussion on the lawfulness of Tunisia's fishery zone cannot ignore the close proximity of islands belonging to Italy and, more generally, the presence of other states facing, or adjacent to, the eastern coast of Tunisia. This raises complicated problems over the delimitation of the exclusive economic zones belonging to each of the states concerned. According to Article 4(1) of the Montego Bay Convention,

The delimitation of the exclusive economic zone between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

So far, Tunisia has not proclaimed an "exclusive economic zone" strictly speaking, nor has she concluded any agreement with the interested states aimed at delimiting their respective exclusive economic zones. It has been persuasively held that, in the absence of a delimitation agreement, none of the opposite or adjacent states can claim, *vis-à-vis* the others, exclusive authority over the areas in which the respective economic zones overlap or are, in any case, in dispute.¹¹²

All these factors make it necessary to ascertain whether the Tunisian fishery zone can at present be justified on the basis of an historic title and, in any case, to analyze the attitude of the other states concerned towards Tunisia's claim. An investigation of this kind is justified by the fact that, as we have already seen, Tunisia has for a long time exercised sovereign rights over fisheries in the region of the Gulf of Gabès.¹¹³ The exact nature and extent of those rights must now be examined.

110. See Scovazzi, *supra* note 45, at 743-44.

111. 1982 Convention, *supra* note 12, art. 57.

112. B. CONFORTI, *supra* note 107, at 9-11.

113. See *supra* text accompanying notes 50-100.

B. TUNISIA'S "HISTORIC RIGHTS" OVER SEDENTARY FISHERIES

In order to ascertain the exact nature and extent of the "historic rights" claimed by Tunisia, it seems convenient to start from the detailed description given by Tunisia herself during the dispute with Libya over the delimitation of the continental shelf.¹¹⁴ According to this description, Tunisia's "historic rights" essentially concerned the exploitation of those fisheries commonly known as "sedentary fisheries." When describing these fisheries, Tunisia has referred to a distinction widely used by legal writers: on the one hand, she referred to fisheries for the capture of mobile species depending on installations fixed on the sea-bed (the so-called "fixed" or "structural" fisheries); on the other, she also mentioned fisheries of "sedentary" species, such as sponge fisheries.¹¹⁵

Tunisia's rights over the "fixed" fisheries have already been mentioned in connection with the straight baselines drawn in the region of the Kerkennah Islands. It seems, however, that these rights cannot be relevant when discussing Tunisia's claims to sovereign rights beyond the territorial sea. Although Tunisia claims exclusive jurisdiction over the "fixed fisheries" whatever their distance from the coast, it must be pointed out that in fact these fisheries do not extend beyond ten to twelve miles from the coast and are today entirely included in Tunisia's territorial sea or internal waters.¹¹⁶

The same cannot be said of Tunisia's rights over the sponge fisheries, which extend over a much wider area than that of the "fixed" fisheries and which Tunisia has considered for a long time

114. See Tunisian Memorial, *supra* note 2, at 73.

115. *Id.* at 88. On the well-known distinction between "fixed" or "structural" fisheries and fisheries of sedentary species, see G. GIDEL, *supra* note 1, at 448; Papandreou, *supra* note 1, at 4-5; Y.Z. BLUM, *supra* note 5, at 331.

116. See Instructions on Navigation and Sea Fisheries, *supra* note 99, para. 29; G. GIDEL, *supra* note 1, at 491. According to Francois, *supra* note 1, at 97, however, the fixed fisheries would extend up to 17 miles from the coast. In this sense, see also D.P. O'CONNELL, *supra* note 12, at 451-52. Be that as it may, it must be stressed that these fisheries are nowadays entirely included in Tunisia's territorial sea or internal waters as a consequence of the straight baselines adopted in 1973. As Gidel correctly pointed out,

"la question des pêcheries sédentaires ne soulève de difficultés que si ces pêcheries se trouvant au delà de la limite extérieure des eaux territoriales. Pour autant qu'elles sont situées à l'intérieur de cette limite les mesures prises à leur égard par l'Etat riverain sont l'exercice pur et simple des droits qui lui appartiennent sur la mer territoriale."

G. GIDEL, *supra* note 1, at 489.

as subject to her exclusive jurisdiction. At least from the 19th century, the Beys of Tunis asserted a right to control and license the exploitation of the sponge beds in the whole area of the Gulf of Gabès. They conceded the exploitation of these fisheries both to their own nationals and to foreigners as a way of increasing their revenues. Several writers have quoted the concession granted in 1836 to a Greek merchant named Cotulma to work the sponge beds between Souza and Jerba. Following this, in 1846, the Bey granted the concession to his minister Ben Ayed, and the previous concession to the merchant Cotulma was revoked. Finally, in 1869 a decision was made to farm out the exploitation of the sponge beds, declaring the revenue therefrom to be state revenue and not, as it had been, part of the Bey's private income.¹¹⁷ A series of decrees was then issued by Tunisia to regulate sponge fishing by nationals and foreigners. At the same time octopus fishing was regulated.

One could mention the decrees issued in 1906, as examples of Tunisian legislation on sedentary fisheries. Article 1 of the Decree of July 17, 1906 defined sponge fishing as being "libre sur toute l'entendue des bancs tunisiens aux conditions et charges ci-apres."¹¹⁸ This Decree obliged all sponge fishers to take out a license, which would be granted on payment of certain taxes. At the same time, the boats used for sponge fishing were rendered liable to inspection by Tunisian agents and penalties were introduced for anyone contravening the provisions of the Decree.¹¹⁹ The Decree of July 16, 1906 on octopus fishing abolished the use of fishing licenses and declared the fishing and selling of octopus "free" on condition that certain sums of money be paid.¹²⁰

A precise delimitation of the zone within which Tunisia claimed sovereign rights for the exploitation of sponge and octopus fisheries was effected for the first time by the "Instructions on Navigation and Sea Fisheries" issued by the Tunisian Director of Public Works on December 31, 1904. Paragraph 64 of the Instructions delimited the "zone of surveillance" within which the Tunisian authorities could exercise their control of fishing activities in the following terms:

117. On Tunisian sponge fisheries, See G. GIGEL, *supra* note 1, 492-93; François, *supra* note 1, at 97; Papandreou, *supra* note 1, at 61.

118. Decree of July 17, 1906, Journal officiel de la République Tunisienne 751, art. 1 (1906). The Decree is reprinted in Tunisian Memorial, *supra* note 2, annex 87, at 411.

119. Tunisian Memorial, *supra* note 2, annex 87, at arts. 2, 14.

120. Decree of July 16, 1906, *supra* note 118, arts. 2 & 3. Tunisian Memorial, *supra* note 2, annex 87, at 411.

Instruction pour le Service des chaloupes gardes-pêche chargées de la surveillance de la Pêches des Eponges et des Poulpes. 62.— Les gardes-peche . . . sont affectés à la surveillance de la pêche dans la partie de mer délimitée: 1° Du côté de terre, par le rivage, depuis le cap Africa jusqu'à la frontière tripolitaine; 2° Du côté du large, par la ligne des fonds de 50 mètres jusqu'à sa recontre: Au Nord, avec une ligne Est et Ouest partant du cap Africa; Au Sud, avec une ligne partant du ras Ashdir et se dirigeant vers le Nord-Est.¹²¹

The 1904 Instructions thus adopted for the first time the fifty-metre isobath limit, which was later to be used in the 1951 Decree and in the 1963 Law as the seaward limit of Tunisia's exclusive fishery zone. The choice of the fifty-metre isobath was advocated mainly to simplify surveillance. In fact, on the one hand, the techniques in use at the time did not allow the exploitation of the sponge beds beyond this limit; on the other, the choice of a bathymetric criterion would make it easier, by the use of soundings, to determine when the "zone of surveillance" had effectively been violated by fishermen.¹²²

With regard to this delimitation, it must be pointed out that Tunisia, in her 1981 memorial to the International Court of Justice, asserted that the adoption of the fifty-metre isobath limit in 1904 was of a merely provisional nature and could not imply renunciation of rights previously acquired over all the "Tunisian" sponge beds, even when these were situated beyond the fifty-metre isobath.¹²³ Nevertheless, it seems that the international prominence of the delimitation effected in 1904 could not be invalidated by such an assertion. From that date on, in fact, the fifty-metre isobath marked the limit within which Tunisia intended effectively to exercise sovereign rights on sedentary fisheries.

Third states on the whole adopted a favorable attitude towards Tunisia's claims. In fact, the various rules and regulations issued by Tunisia before 1951 on sponge and octopus fishing did not meet with any protest from other states. On the contrary, several writers

121. Instructions on Navigation and Sea Fisheries, *supra* note 99, para. 62, at 325.

122. *Id.* para. 29. See also Tunisian Memorial, *supra* note 2, annex 80.

123. According to the Tunisian Memorial, *supra* note 2, at 99, "la Tunisie a étendu très loin vers l'est ses activités de pêche pour couvrir des espaces maritimes très éloignés des côtes et atteignant en certains endroits des profondeurs de près de 100 mètres." As a consequence, the choice of the 50-metre isobath by the 1904 "Instructions," Instruction on Navigation and Sea Fisheries, *supra* note 99, "n'équivalait pas pour autant à une renonciation de souveraineté sur des espaces situés au-delà de l'isobathe de 50 m.", since "l'Administration territoriale considérait cette limite comme étant une frontière provisoire." *Id.* at 102.

have even quoted some episodes, which seem clearly to denote acquiescence of third states. For example, the concession granted to the Bey's minister Ben Ayed in 1846 was effected through Beylical decrees notified to foreign consuls, without any official protest being raised despite representations from the Greek merchant Cotulma, whose concession had been revoked.¹²⁴ In addition, according to many writers, the Bey's exclusive jurisdiction over sponge and octopus fishing was implicitly recognized by a convention concluded on March 23, 1870, between the government of the Bey and its French, English, and Italian creditors, who were represented by their respective governments. On the basis of this convention, the Tunisian government's debt was to be reduced in exchange for various revenues to be ceded by the Bey; among these were revenues deriving from the exploitation of sponge and octopus fishing.¹²⁵ An episode which took place in 1875 is also of interest in this respect: a Greek captain and a French merchant attempted to protest over the system of allocation of the sponge beds by invoking the principle of the freedom of the high seas, but their protests met with no support from their consuls.¹²⁶

Even Libya, during the dispute with Tunisia over the continental shelf, acknowledged that, "Evidence of the general recognition of Tunisian proprietary rights and ancillary rights to protection and control over the sedentary species asserted is not in issue. For the fact is that such rights existed."¹²⁷ However, Libya pointed out that before 1951 Tunisia's rights over sedentary fisheries had never purported to exclude foreigners from the exploitation of these fisheries.¹²⁸ In addition, she disputed the exact geographical extent of Tunisia's "historic rights," asserting that, "the sedentary species, on which the claim to historic rights depends, were never fished throughout the maritime zone now claimed by Tunisia."¹²⁹

124. See G. GIDEL, *supra* note 1, at 492; Francois, *supra* note 1, at 97; Papandreou, *supra* note 1, at 61-62. See also the Tunisian Memorial, *supra* note 2, at 99-100.

125. See G. GIDEL, *supra* note 1, at 492 n.2; Papandreou, *supra* note 1, at 62; L.J. BOUCHEZ, *supra* note 1, at 222; F. LAURIA, *supra* note 1, at 171. The text of the 1870 Convention appears in J. DE CLERG & A. DE CLERG, 15 RECUEIL DES TRAITES DE LA FRANCE 540 (Supp. 1888). A copy of this page is reprinted in the Libyan Counter Memorial, *supra* note 2, annex 32.

126. See G. GIDEL, *supra* note 1, at 492; Francois, *supra* note 1, at 97; Papandreou, *supra* note 1, at 62; L.J. BOUCHEZ, *supra* note 1, at 222; D.P. O'CONNELL, *supra* note 12, at 452.

127. See the Libyan Counter-Memorial, *supra* note 2, at 53.

128. *Id.* at 44.

129. *Id.* at 42-44.

There is no doubt that the first assertion is correct. The above discussion has demonstrated that the claim to the right to exclude foreign fishermen from the exploitation of the natural resources of the sea was only advanced in 1951. Before that date, Tunisia had simply claimed sovereign rights for the limited purpose of regulating sponge and octopus fishing, mainly as a means of increasing her revenues. These rights did not exclude the activity of foreigners in the area, although they had to conform to the rules laid down by the territorial sovereign. This fact has also been underlined by all the writers who have examined the Tunisian fisheries from a legal point of view.¹³⁰

As far as the exact geographical extent of the Tunisian rights is concerned, it must be admitted that it would be difficult to ascertain up to what limit sponge and octopus fishing was actually carried out. As for the attitude of third states, the best authorities have it that the 1904 Instructions adopting the fifty-metres isobath limit received wide notoriety without ever raising objections.¹³¹ However, it would seem that this assertion could not be accepted without some reservations. In fact, it can be seen from the documentation annexed to Libya's 1981 reply to the International Court of Justice that in 1911 Italy challenged Tunisia's unilateral delimitation of her "zone of surveillance."

The dispute arose after the capture of the Italian vessels "Torino" and "Unione" by Tunisian agents while fishing for sponges off the Kerkennah Islands without being in possession of the required license. An aide-mémoire sent to the French Minister for Foreign Affairs from the Italian government on May 3, 1911, asserted that Tunisia's rights beyond the three-mile limit of her territorial sea had been claimed on the mere basis of "décrets, arrêtés, etc. . . . , actes unilatéraux d'administration intérieure n'engageant que la partie que les a émis, et ne pouvant même pas, par reconnaissance tacite, constituer un rapport juridique d'obligation internationale."¹³² From a further letter sent on May 15, 1911, from the French Resident-General at Tunis to the French Minister for Foreign Affairs, it is evident that already in 1900 and 1903 the

130. See G. GIDEL, *supra* note 1, at 493; Francois, *supra* note 1, at 97; Papandreou, *supra* note 1, at 63, 99.

131. Francois, *supra* note 1, at 97; Papandreou, *supra* note 1, at 63.

132. Aide-Mémoire Italien au Ministère des Affaires Etrangères en date du 3 Mai 1911, reprinted in Libyan Reply, *supra* note 2, annex I-15.

question of the area over which the Tunisian Regency claimed "historic rights" had been the object of a correspondence between the French and the Italian governments. The Resident-General had proposed the adoption of the fifty-metre isobath as a limit to this area, but the Italian government replied that it would find the choice of the thirty-metre isobath preferable.¹³³

In any case, the conclusion to be drawn at this point is that before 1951 Tunisia had acquired sovereign rights for the limited purpose of regulating sponge and octopus fisheries over an area of sea adjacent to her south-eastern coast.¹³⁴ These rights were acquired through effective manifestations of state authority and the acquiescence of third states.¹³⁵ However, as to the exact geographical extent of Tunisia's "historic rights," it seems necessary to adopt a more cautious attitude, since Tunisia's unilateral delimitation of her "zone of surveillance" seems to have been the subject of controversy.

133. Lettre du Resident Général a Tunis au Ministère des Affaires Etrangères en date du 15 Mai 1911, *reprinted in* Libyan Reply, *supra* note 2, at annex I-15. The matter was finally settled by an attempt at creating an arbitration commission. However, the commission never met and the Italo/Libyan war prevented the matter from being taken any further. See Sovereignty, Frontiers and the Historical Background, Libyan Counter Memorial, *supra* note 2, annex 6, at 53-54.

134. Tunisia's rights to sponge fisheries have been recognized by many legal writers. In addition to those quoted *supra* note 18, see also Hurst, *Whose is the Bed of the Sea?*, 4 BRIT. Y.B. INT'L L. 41 (1923-1924); F. DURANTE, LA PIATTAFORMA LITORALE NEL DIRITTO INTERNAZIONALE 30 (1955); G. PALLIERI, *supra* note 17, at 447-48; L. CAVARE, *supra* note 17, at 639; T. SCOVAZZI, *supra* note 38, at 15-16, 173; D. P. O'CONNELL, *supra* note 12, at 451-52.

135. The above analysis has been conducted on the basis of the doctrine of "historic rights" as referred to in this paper. See *supra* text accompanying notes 1-8. Tunisia's rights to sponge fisheries have therefore been treated as rights acquired in derogation of the normally applicable rules of international law. It must be pointed out, however, that the nature of the coastal state's rights to sedentary fisheries has been the subject of controversy for a long time. As is well known, many writers have explained these rights as rights acquired pursuant to the law, rather than in derogation of it. Certain writers have invoked the doctrine of "occupation," since they would regard the sea-bed as *terra nullius* and rights to sedentary fisheries as sovereign rights over the sea-bed. See, e.g., D.P. O'CONNELL, *supra* note 12, at 450. Others have relied on the formation of a rule of customary international law, which would safeguard the coastal state's interests to sedentary fisheries without imposing spacial limits to its jurisdiction. See, e.g., T. SCOVAZZI, *supra* note 38, at 171. A detailed analysis of the nature of the coastal state's rights to sedentary fisheries would clearly go beyond the scope of this investigation. Let it be added that, according to Y.Z. BLUM, *supra* note 5, "whatever the juridical basis of exclusive State claims to sedentary fisheries on the high seas, it would appear that the process of formation of these rights is, in fact, identical with that observed in the emergence of historic rights in general, namely, assertion of exclusive State authority, on the one hand, and acquiescence in such exclusive authority, on the other hand." *Id.* at 332.

C. "HISTORIC RIGHTS" OVER SEDENTARY FISHERIES AND
TUNISIA'S "EXCLUSIVE FISHERY ZONE"

Having thus examined the nature and extent of the "historic rights" claimed by Tunisia, it remains to be seen what relevance these rights may have in establishing the international validity of Tunisia's "exclusive fishery zone." It is this author's opinion that the creation of the fishery zone in 1951 could not have been justified on the sole basis of the "historic rights" previously acquired by Tunisia. Apart from the question of whether other states had in fact accepted Tunisia's unilateral delimitation of her own "historic rights," it should be recalled that those rights only related to surveillance and control over sponge and octopus fisheries. Given this, it must be admitted that the 1951 Decree effectively put forward a completely new and different claim.

In one respect, if the content of Tunisia's "historic rights" is considered, it must be stressed that those rights did not exclude foreigners from the exploitation of sponge and octopus fisheries, whereas the 1951 Decree established, for the first time, an "exclusive fishery zone," initially reserved to Tunisian and French vessels and successfully restricted to Tunisian vessels only.¹³⁶

In addition, it must be pointed out that Tunisia's "historic rights" only related to sponge and octopus fishing, whereas the 1951 Decree, while retaining the fifty-metre isobath as the seaward limit of Tunisian jurisdiction, claimed for the first time a reserved zone relating to *all* biological resources of the sea.¹³⁷ It may be added that an historical analysis seems to confirm our reservations as to the adoption of the bathymetric criterion itself. It has been shown that the fifty-metre isobath was adopted for the first time in 1904 for practical and economic reasons strictly related to the sedentary character of the species over which Tunisia claimed exclusive jurisdiction at that time. It does not seem, however, that those same

136. Tunisia herself has recognized that, "[a]lors que l'Instruction du 31 décembre 1904 instituait . . . une zone de surveillance, le décret de 1951 a établi pour la première fois, une zone de pêche réservée dans laquelle seuls pourront être autorisés à pratiquer la pêche les navires battant pavillon français ou tunisien." Tunisian Memorial, *supra* note 2, at 103 (emphasis added).

137. This circumstance was clearly pointed out by T. SCOVAZZI, *supra* note 135, at 16. It may be added that, whatever the nature of the coastal state's rights to sedentary fisheries, *see supra* note 136, these rights do not per se affect the status of the superadjacent waters. *See, e.g.,* Papandreou, *supra* note 1.

practical and economic reasons could justify the retention of the bathymetric criterion for the purpose of delimiting a reserved zone in which sovereign rights are claimed over all biological resources, whether sedentary or not.

If, therefore, Tunisia's "historic rights" could not per se justify the creation of the "exclusive fishery zone," it seems necessary to analyze the attitude of third states after 1951, when for the first time Tunisia claimed the right to exclude foreigners from fishing in the area within the fifty-metre isobath. In this respect we shall confine ourselves to a few brief observations, since only a few of the most closely affected states have taken a stance over the creation of Tunisia's reserved zone.

Italy seems to have taken a favorable attitude towards Tunisia's claim in the fishery agreements she concluded with Tunisia in 1963, 1971 and 1976, in which express mention was made of Tunisia's "exclusive fishery zone." Article 1(b) of the fishery agreement signed on February 1, 1963,¹³⁸ stated that:

Le Gouvernement de la République Italienne reconnaît que la zone de pêche réservée aux navires battant pavillon tunisien est définie comme suit: . . . b) *de Ras Kapoudia à la frontière tuniso-libyenne*: la partie de mer limitée par une ligne qui, partant du point d'aboutissement de la ligne de douze milles mentionnée ci-dessous, rejoint, sur le parallèle de Ras Kapoudia, l'isobathe de cinquante mètres et suit cette isobathe jusqu'à son point de rencontre avec une ligne partant de Ras Aghdir en direction du Nord-Est-ZV = 45°.

Article 1(b) of the fishery agreement signed on August 20, 1971,¹³⁹ repeated Italy's "recognition" in the same terms as those of the 1963 agreement. Finally, Article 12 of the fishery agreement concluded on June 19, 1976, again mentioned the Tunisian reserved zone, "que le Gouvernement Italien reconnaît comme zone de pêche réservée aux seuls navires tunisiens."¹⁴⁰

138. See 1963 Agreement, *supra* note 45.

139. *Id.*

140. 1976 Agreement, *supra* note 46, art. 12. It is not clear why Article 12 of the 1976 Agreement, *id.*, as well as Article 13, *id.* art. 13, common to the agreements of 1963, *supra* note 45, and 1971, *id.*, accorded "le passage inoffensif, c'est-à-dire sans pêche" to Italian fishing-boats in Tunisia's "zone de pêche réservée," since the concept of innocent passage is properly confined to territorial waters. Italy, however, has always regarded this zone as an area of high seas. See *supra* text accompanying notes 72-74. By improperly using the term "innocent passage," the articles just mentioned probably purported to make it clear that even fishing boats had a right to navigate within Tunisia's reserved fishery zone, provided they did not fish.

None of these arguments continues in force. The 1976 agreement terminated in 1979 and has not been replaced by any further bilateral treaty, since the conclusion of fishery agreements with non-member states comes today within the exclusive competence of the European Economic Community.¹⁴¹ This circumstance could be of importance in deciding whether Tunisia's "exclusive fishery zone" is at present opposable to Italy, in the absence of an agreement on the delimitation of their exclusive economic zones. It has in fact been held that the conclusion of the said agreements should not be interpreted to imply Italy's acquiescence to Tunisia's claim. According to this view, Italy's "recognition" of Tunisia's reserved zone was only accorded with a view to obtaining the right for Italian fishermen to fish within certain sea areas along the coasts of Tunisia. As a consequence of the termination of these governments' agreement, Italy's acceptance of Tunisia's reserved zone should be considered as no longer effective.¹⁴²

It will not be possible here to discuss the complex issues connected with the value and forms of recognition and acquiescence in international law. Suffice it to confine the discussion to mentioning two recent examples of contemporary Italian practice which seems to be a cautious confirmation of Italy's favorable attitude towards Tunisia's claim. The already mentioned Shipping Ministry Decree of September 25, 1979, although defining the zone claimed by Tunisia as an area of high seas, has prohibited Italian nationals and vessels flying the Italian flag from fishing in the zone, which is "traditionally recognized as a zone of fish re-stocking."¹⁴³ A statement made by the Italian Undersecretary for Foreign Affairs during a parliamentary debate on October 16, 1979, can also be quoted in this connection: Mr. Zamberletti declared, *inter alia*, that the Tunisian fishery zone is "recognized by Italy as a fishing reserve that Tunisia has assigned for repopulation."¹⁴⁴

Turning now to the attitude of the European Communities, we should consider a statement made in 1979 before the European Parliament by Mr. Cheysson, then member of the Commission. Referring to the Tunisian government's refusal to conclude any further fishery agreements with other countries, Cheysson declared,

141. See 5 ITALIAN Y.B. INT'L L. 311 (1980-81).

142. Scovazzi, *supra* note 45, at 738.

143. See *supra* note 15.

144. Statement of Mr. Zamberletti, Italian Undersecretary for Foreign Affairs, 5 ITALIAN Y.B. INT'L L. 309 (1980-81).

inter alia, that Tunisia had the right to refuse fishing concessions to fishermen of all foreign countries. It would not seem, however, that this statement could be considered as indicative of the EEC recognition of Tunisia's reserved zone. The circumstances under which Cheysson's statement was made seem to indicate that he was in fact referring to the sea area within the twelve-mile limit of Tunisia's territorial waters.¹⁴⁵

Among the states which have adopted a negative attitude towards Tunisia's claim, first place is taken by Libya. Actually, it does not seem that Libya had ever openly opposed the creation of Tunisia's "exclusive fishery zone" before the dispute over the continental shelf arose. In her memorial to the International Court of Justice, however, Libya asserted that she had never acquiesced in Tunisia's claim. With specific reference to Tunisian Law No. 63-49 (1963), she stated, *inter alia*, that "The validity in international law of this type of attempt to create a contiguous exclusive fishery zone was questionable, and was not admitted by Libya."¹⁴⁶ In addition, Libya also challenged the lateral delimitation of the reserved zone unilaterally effected by Tunisia.¹⁴⁷ This last point seems to deserve closer examination, since the International Court of Justice referred to it in its judgment of February 24, 1982.

As already discussed, Tunisia had unilaterally adopted the 45° ZV (Zenith Vertical) line North-East, starting from Ras Ajdir, as the eastern limit of her "exclusive fishery zone." This line, which was first expressly mentioned in the 1951 Decree and then confirmed by subsequent Tunisian legislation, was found by the International Court of Justice not to be opposable to Libya, "even as a mere inchoate maritime boundary between the two countries."¹⁴⁸ Having stressed, from a general point of view, that no state may unilaterally establish international maritime boundary lines, the Court rightly observed that the line adopted by Tunisia "originally intended only as the limit of an area of surveillance in the context of specific fishery regulations, constitutes a unilateral claim, but was never a line plotted for the purpose of lateral maritime delimitation, either in the seas or in the continental shelf."¹⁴⁹ The Court found

145. See 22 O. J. EUR. COMM. (No. 245) 228-30, 232-33 (1979).

146. Libyan Memorial, *supra* note 2, at 476.

147. See Libyan Counter-Memorial, *supra* note 2, at 55-62; Libyan Reply, *supra* note 49, at 20-25.

148. Continental Shelf, *supra* note 3, at 68.

149. *Id.*

instead that the line perpendicular to the coast was the only lateral boundary opposable to Libya of the area claimed by Tunisia as subject to "historic rights." This line had apparently been proposed by Italy, who at that time exercised sovereignty over Tripolitania, in 1914, and had been tacitly accepted by the authorities of the neighboring French Protectorate as a *de facto* boundary between the fishery zones claimed by the two colonial powers.¹⁵⁰

Without discussing in detail the precise legal status the Court attributed to the line perpendicular to the coast,¹⁵¹ it should be stressed that the fact this line has been found to be opposable to Libya does not per se imply that Libya is in any way bound to respect the reserved fishery zone created by Tunisia in 1951. In fact, the tacit compromise reached by France and Italy in 1914 only related to exclusive jurisdiction over sponge fisheries; whereas, as already discussed, the creation of Tunisia's "exclusive fishery zone" amounted to a qualitatively and quantitatively new claim which could not be based on the rights previously acquired over sedentary fisheries.

D. "HISTORIC RIGHTS" AND TUNISIA'S CONTINENTAL SHELF AND EXCLUSIVE ECONOMIC ZONE

To close this part of the investigation, some brief comments will be made on the possible relevance of Tunisia's "historic rights" for the purpose of delimiting her continental shelf and exclusive economic zone. During the dispute with Libya over the continental shelf, Tunisia claimed that the delimitation of the continental shelf between herself and Libya must not encroach at any point

150. *Id.* at 70.

151. According to the Court:

the evidence of the existence of such a *modus vivendi*, resting only on the silence and lack of protest on the side of the French authorities responsible for the external relations of Tunisia, falls short of proving the existence of a recognized maritime boundary between the two Parties . . . But in view of the absence of agreed and clearly specified maritime boundaries, the respect for the tacit *modus vivendi*, which was never formally contested by either side throughout a long period of time, could warrant its acceptance as a historical justification for the choice of the method for the delimitation of the continental shelf between the two States, to the extent that the historic rights claimed by Tunisia could not in any event be opposable to Libya east of the *modus vivendi* line.

Continental Shelf, *supra* note 3, 70-71. Later the Court added that the line perpendicular to the coast "is the only lateral boundary opposable to Libya of the area claimed by Tunisia as subject to historic rights" *Id.* at 86. These passages were persuasively criticized in the separate opinion of Judge Ago. *Id.* at 95.

upon the area within which she possessed "historic rights." According to Tunisia, "Dans le cas des droits historiques sur les pêcheries sédentaires, l'Etat acquiert des droits souverains sur le fond de la mer."¹⁵² As a consequence, "[d]e tels droits historiques ne peuvent être ignorés ou remis en cause dans la délimitation des zones de plateau continental où ils s'exercent."¹⁵³ In other words, as the International Court of Justice observed, Tunisia tried to draw a parallel between the modern recognition of the rights of coastal states over the continental shelf, and the asserted recognition by third states of her rights over banks and shoals off her coasts, which were capable of being exploited centuries before the continental shelf became of economic and legal significance.¹⁵⁴

At the same time, Tunisia stressed the importance of her "historic rights" with a view to the future delimitation of her exclusive economic zone. In this respect, she observed, on the one hand, that the new Law of the Sea includes the area of her "historic rights" in the exclusive economic zone.¹⁵⁵ On the other hand, however, she added that this circumstance "ne saurait avoir pour conséquence d'amputer la Tunisie des droits qu'elle a acquis par un exercice immémorial et qu'elle a conservés en dépit du régime de haute mer qui s'appliquait, en principe, au delà des trois milles."¹⁵⁶

Libya made no statement regarding the relevance of "historic rights" for the purpose of delimiting the exclusive economic zone, but challenged Tunisia's contention that her "historic rights" over sedentary fisheries could be equated to sovereign rights over the continental shelf. In the first place, Libya questioned the nature and extent of Tunisia's "historic rights" asserting that they did not amount to sovereignty over the sea-bed and that they had never been exercised throughout the area claimed by Tunisia.¹⁵⁷ In addition, she stressed that these rights could not "deprive a neighboring State of a shelf area which, according to the law, appertains to it *de jure* and *ab initio*."¹⁵⁸

It is a well-known fact that the 1982 judgment of the International Court of Justice avoided the question of whether Tunisia's "historic rights" were relevant for the purpose of delimiting her

152. Tunisian Memorial, *supra* note 2, at 75.

153. *Id.* at 110-11.

154. Continental Shelf, *supra* note 2, at 72.

155. See Tunisian Reply, *supra* note 55, at 29.

156. *Id.*

157. See *supra* notes 129-30.

158. Libyan Reply, *supra* note 2, at 20. See, Libyan Counter-Memorial, *supra* note 2, at 73.

continental shelf. The reason given for this was that the actual delimitation arrived at was such that it would leave Tunisia in the full and undisturbed exercise of her "historic rights," whatever they may be."¹⁵⁹ However, the Court did make some important remarks which could throw some light on the matter. In the first place, the Court observed, from a general point of view, that "historic rights" must enjoy respect and be preserved as they have always been by long usage.¹⁶⁰ However, in the specific case of the delimitation of the continental shelf, the Court seems to have denied the relevance of any existing "historic rights," since "basically, the notion of historic rights or waters and that of the continental shelf are governed by distinct legal régimes in customary international law. The first régime is based on acquisition and occupation, while the second is based on the existence of rights 'ipso facto' and 'ab initio'."¹⁶¹ According to the Court, therefore, Tunisia's "historic rights" would perhaps have been relevant for the purpose of delimiting her exclusive economic zone, but not for the purpose of delimiting her continental shelf.¹⁶²

In fact, it seems difficult to agree with Tunisia's assertion according to which the mere evidence of her "historic rights" over sedentary fisheries would be a sufficient basis on which to delimit her continental shelf and exclusive economic zone. With regard to the continental shelf, Tunisia's claim could only be justified if it were first proved that her "historic rights" actually amounted to sovereign rights over the sea-bed.¹⁶³ Secondly, it would have to be verified whether these "historic rights" could survive the establishment of the customary rules on the continental shelf. According to one view, the continental shelf doctrine of "inherency" should be viewed as deliberately aimed against the operation of any

159. Continental Shelf, *supra* note 2, at 77.

160. *Id.* at 73.

161. *Id.* at 74.

162. *Id.* "While it may be that Tunisia's historic rights and titles are more nearly related to the concept of the exclusive economic zone, which may be regarded as part of modern international law, Tunisia has not chosen to base its claims upon that concept." *Id.*

163. It is well known that not all legal writers are in agreement over the question of the coastal state's rights to sedentary fisheries being in fact sovereign rights over the sea-bed. According to the Libyan Counter-Memorial, *supra* note 2, at 45, "there seemed to be general agreement that, whether or not ownership of the sea-bed was possible, the phenomenon of sedentary fisheries and rights thereto had nothing to do with sovereignty over the sea-bed." In the same sense see, e.g., F. DURANTE, *supra* note 135, at 27-29. On the other hand, according to Judge Jimenez de Arechaga's separate opinion,

the relevance of historic rights with respect to sponge fisheries is decisive in this particular case, when account is taken of the fact that the taking of sponges adhere-

"historic rights" previously acquired.¹⁶⁴ If this view is correct, it follows that, in so far as the area of "historic rights" claimed by a coastal state over the sea-bed might overlap with the area of the continental shelf appertaining to a neighboring state, these "historical rights" might only survive if it were proved that they have in fact continued to be exercised with the acquiescence of the state concerned *after* the establishment of the customary rules on the continental shelf.¹⁶⁵ Such does not seem to be the case with regard to the area of the continental shelf over which Tunisia claims

ing to the sea-bed constitutes a form of exploitation of one of the natural resources of the shelf, according to Article 2, paragraph 4, of the Continental Shelf Convention—a provision which the Court found in 1969 to be part of customary international law. Consequently, the taking of sponges in the area was really an exploitation of shelf resources . . . long antedating the Truman proclamation."

Continental Shelf, *supra* note 2, at 122 (Opinion of Jimenez de Arechaga). An evaluation of this question would go beyond the scope of our investigation.

164. D.P. O'CONNELL, 2 THE INTERNATIONAL LAW OF THE SEA 713 (1984). O'Connell added that,

this view appears to have been conceded by Tunisia in the *Continental Shelf Case* when it argued that any delimitation should not encroach upon its historic rights with respect to fisheries and sponges. It based this argument not on the historic rights themselves, but on its straight baseline system enclosing the Gulfs of Tunis and Gabès; since the seabed of neither the territorial sea nor internal waters is legally continental shelf, Tunisia argued that these areas should be excluded from consideration in any calculations of proportionality. The Court rejected this argument, without making any finding as to the validity or opposability to Libya of Tunisia's baselines.

Id. This author finds it hard to agree with this interpretation of Tunisia's position. It is undoubtedly true that Tunisia relied on her "historic rights" as a justification for the baselines adopted in 1973 and that she claimed that the areas between these baselines and the low-water mark should be excluded from the proportionality calculations. However, it is no less true that Tunisia also claimed that her "historic rights" would be per se sufficient to exclude any claim on the part of Libya over the area subject to them. The Court examined both these arguments. *See* Continental Shelf, *supra* note 3, 75.

165. According to the separate opinion of Judge *ad hoc* Jimenez de Arechaga, "a new legal concept, consisting in the notion introduced in 1958 that continental shelf rights are inherent or 'ab initio,' cannot by itself have the effect of abolishing or denying acquired and existing rights. That would be contrary to elementary legal notions and to basic principles of intertemporal law." *Id.* at 123-24. It is respectfully submitted that if, from a general point of view, it is true that the "basic principles of intertemporal law" require that no retroactive application should be given to any legal norm, it is none the less true, as J.T. Woodhouse pointed out, that "though a law cannot change past facts it can *alter the rules applicable* to those facts. Moreover, a law can go further and (as it were by a fiction) declare that these rules are changed as from some date in the past, i.e., those responsible for the law governing past events and to pretend or assume that other rules governed." Woodhouse, *The Principle of Retroactivity in International Law*, 41 GROTIIUS TRANSACTIONS 78 (1955). If, therefore, O'Connell's view is accepted that the customary rules on the continental shelf are deliberately aimed against the survival of previously acquired rights, in so far as they encroach upon

"historic rights," since the International Court of Justice has found that the lateral delimitation unilaterally effected by Tunisia is not opposable to Libya.¹⁶⁶

With regard to the exclusive economic zone, it should be stressed that Tunisia's "historic rights" only related to protection and control over sponge and octopus fisheries. Whereas the exclusive economic zone, as defined by the 1982 Montego Bay Convention, is an area of sea over which the coastal state has sovereign rights for the purpose, *inter alia*, of exploring and exploiting all the natural resources of the sea and the sea-bed.¹⁶⁷ It seems, therefore, that Tunisia could not unilaterally claim the whole area over which her "historic rights" extended as part of her exclusive economic zone. Thus, a much more relevant factor than the old "historic rights" over sedentary fisheries might be the "exclusive fishery zones" proclaimed by Tunisia in 1951, insofar as it is in fact opposable to the interested states.¹⁶⁸

It cannot be denied, of course, that Tunisia's "historic rights" could operate as an important factor when negotiating delimitation agreements with the interested states. This does not, however, necessarily mean that the delimitation should not in any case encroach upon the area over which the "historic rights" extended. This paper does not purport to discuss the way in which "historic rights" might operate as a "special circumstance" to be taken into account in negotiating agreements to delimit the continental shelf or exclusive economic zone.¹⁶⁹ In fact, it has been persuasively held that, since the delimitation must be effected by agreement, it would be pointless to discuss from a strictly legal point of view how the interested states should act and what circumstances they should take into account in reaching that "equitable solution" referred to in Articles 74 and 83 of the 1982 Montego Bay Conventions. Once an agreement has been reached, it would be valid despite the circumstances considered by the parties and whether or not the solu-

a shelf are appertaining to a neighboring state, it would follow that those rights could only be *reacquired* through the acquiescence of the state affected. The situation is not very different to that described by Y.Z. BLUM, *supra* note 5, at 242-30, with regard to the emergence of the customary rule on the freedom of the high seas.

166. See *supra* text accompanying notes 115-135.

167. 1982 Convention, *supra* note 12, art. 56.

168. See *supra* text accompanying notes 136-151.

169. On "special circumstances" for the delimitation of the continental shelf and E.E.Z. see, e.g., D.P. O'CONNELL, *supra* note 164, at 705.

tion arrived at was equitable, since there are no rules of *jus cogens* on the delimitation of the continental shelf or exclusive economic zone.¹⁷⁰ If this view is accepted, it follows that, rather than discussing the possible relevance of any "historic rights" in reaching a delimitation agreement, it is much more useful to enquire into the situation as between the interested states in the absence of such an agreement. This is in fact what has been attempted in the foregoing discussion with specific reference to Tunisia's claims to "historic rights" and, more generally, to her claims to sovereign rights over areas of sea or of sea-bed beyond her territorial sea.

IV. CONCLUSION

This investigation has been divided into two parts. The first dealt with Tunisia's claims of full sovereignty over waters adjacent to her coasts, and the second dealt with Tunisia's claims to exclusive, though less far-ranging, rights over bodies of water beyond her territorial sea. Wherever it appeared difficult to justify both these types of claims in light of existing rules of international law, an attempt has been made to ascertain whether these claims can be based on the doctrine of "historic rights."

As for Tunisia's claims of full sovereignty over adjacent sea areas, Tunisian Law No. 73-49 (1973) has adopted a twelve-mile territorial sea, whereas the baselines from which the territorial sea is to be measured have been chosen by adopting a combination of the traditional low-water mark and the straight baseline methods. In particular, straight baselines have been drawn around the shoals fringing the Kerkennah Islands and across the Gulfs of Tunis and Gabès. It has been found, in the first place, that there is no need to appeal to the doctrine of "historic rights" in order to justify Tunisia's decision to adopt a twelve-mile territorial sea since the twelve-mile limit for the territorial sea seems by now to be part of existing customary international law. The same conclusion has been reached with regard to Tunisia's decision to close the Gulf of Tunis: the closing line of the Gulf seems in fact to conform with the international rules on "juridical" bays, at least if the islands of Plane and Zembra, which are about twenty-three miles apart, are taken as its "natural entrance points."

170. B. CONFORTI, *supra* note 107, at 9-10.

The closure of the Gulf of Gabès has raised more difficult problems. Tunisia's decision cannot, in fact, be based on the international rules on "juridical" bays, since the closing line of the Gulf far exceeds the twenty-four mile limit established by customary international law. Neither can the Gulf be qualified as an "historic bay," since the claim of full sovereignty over its waters was only advanced by Tunisia in 1973. Tunisia's "historic rights," on the other hand, only related to surveillance and control over sedentary fisheries.

Finally, as far as the lines drawn around the Kerkennah Islands are concerned, it has been found that their conformity to the general rules on the straight baseline system is, to say the least, controversial. However, it has been submitted that their validity could be established both with reference to Article 4(4) of the 1958 Geneva Convention, which allows for the drawing of "particular" baselines, and by appealing to the doctrine of "historic waters." The peculiar natural and historical characteristics of the region concerned make it possible to regard Tunisia's "historic rights" over sedentary fisheries as indicative of a right of full sovereignty.

With regard to Tunisia's claims to exclusive rights not amounting to full sovereignty over water areas beyond her territorial sea, the international validity of the "exclusive fishery zone" unilaterally proclaimed by Tunisia in 1951 has been discussed. Within the zone, which has been delimited by adopting the fifty-metre isobath, only vessels flying the Tunisian flag are allowed to fish. Although the creation of the "exclusive fishery zone" should be regarded as part of the process which culminated in the affirmation of the exclusive economic zone by the 1982 Montego Bay Convention, it has been thought necessary to ascertain whether the validity of this zone can at present be established on the basis of an "historic title" and, in any case, to analyze the attitude of other states concerned about Tunisia's claim.

The conclusion has been reached that the creation of the "exclusive fishery zone" could not be based on the mere strength of the "historic rights" previously acquired by Tunisia over sedentary fisheries. On the one hand, those "historic rights" did not include the exclusion of foreigners; on the other, they only related to sponge and octopus fisheries, whereas the "exclusive fishery zone" purports to exclude foreigners from the exploitation of all biological resources of the sea. As for the attitude of third states

after 1951, it would be difficult to speak of general acquiescence in Tunisia's claim, since the creation of the "exclusive fishery zone" has been vigorously opposed by Libya as well as other states concerned that have adopted a rather cautious attitude.

Finally, some brief comments have been made on the relationship between "historic rights" over sedentary fisheries and Tunisia's claims relating to the delimitation of her continental shelf and exclusive economic zone. It has been submitted that, in the absence of delimitation agreements with the other states concerned, Tunisia could not appeal to her "historic rights" over sponge and octopus fisheries in order to claim exclusive authority over areas of continental shelf or exclusive economic zone which are in dispute.