THE LEGAL STATUS OF THE GULF OF SIRTE IN INTERNATIONAL LAW

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by

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ABSTRACT

In 1973 Libya claimed the Gulf of Sirte. Its claim was based on historic and vital interests and it stated that the Gulf was part of Libyan internal waters over which Libya exerts full sovereignty and that the Gulf was an historic or vital bay.

The thesis analyses the Libyan historic and/or vital bay claim over the Gulf. Although the doctrine of historic and/or vital bays is not codified, it is not a new doctrine in international law. It is argued that, as an exception to the general rules on bays, the coastal State has the right, by virtue of historic and vital interests, to claim and appropriate a bay adjacent to its coast.

Chapter one deals with the scope of the research including the legal significance of the claim to Libya. The chapter discusses the methodology used and reviews the 1973 Declaration and international reaction to it, including the US-Libyan incidents. The geographical and historical background of the Gulf of Sirte are also reviewed.

In chapter two the evolution of the concepts of bays, historic bays and waters in international law are discussed. The chapter deals with definitional issues, the evolution and codification of the law of bays, and assess the law applicable in the field of historic and/or vital bays, and the requirements of customary international law.

Chapter three analyses the Libyan immemorial usage and the effective Libyan exercise of sovereignty over the Gulf of Sirte. Chapter four discusses the concept of acquiescence and

whether there has been international acquiescence in the Libyan claim. Chapter five deals with the concept of protest and its application to the Libyan claim. It analyses the protests made at the Libyan claim and discusses a number of the protests made by States which have made similar claims to that of Libya. The issue of reciprocity is examined prior to detailed consideration and evaluation of the protests.

Chapter six discusses the vital bay theory in a theoretical context, in State practice and its implementation by the tribunals. It also analyses the Libyan vital interest9s in the Gulf of Sirte and assesses the Libyan vital bay claim.

Finally, chapter seven provides an overview of the Libyan historic and vital bay claim over the Gulf of Sirte in a regional framework and in the context of the changing law of the sea. Proposals are made concerning the formulation of new rules when necessary on the codification of existing rules, on State practice and emerging trends relating to historic and/or vital bays. It is recommended that special attention should be given to the legitimate and genuine interests and needs of coastal States and the proposals made by Developing States in this regard.

To my parents,

to my wife and children,

to my cousin, Elhadi Emberesh,

and to the memory of those who died while defending the Libyan sovereignty over the Gulf of Sirte.

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ABBREVIATIONS

Académie de Droit International, Recueil des Cours (Recueil).
Acta Scandinavia Juris Gentium (ASJG).
Admiralty (ADM).
Aerial Defense Identification Zone (ADIZ).
Al-Jaridah Al-Rasmmiyah, Tripoli (Libyan Gazette).
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Publishing, publisher, published (Pub.).
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INTRODUCTORY CHAPTER: BACKGROUND TO THE LIBYAN CLAIM OVER THE GULF OF SIRTE

I. The Scope of the Research

In 1973, Libya[1] issued a Declaration,[2] the object of which was to lay a claim over the Gulf of Sirte[3] which is situated on the North African coast. From the outer limits of the Gulf, along the closing line of latitude 32° 30' North, the Gulf encompasses a water surface area of 23,531 square miles.[4] It is surrounded by Libyan land territory in three directions: east, west and south, and its northern flank is connected with the high seas of the Mediterranean. It has two headlands: (i) one in Ras (Cape) Al Zarrug near Misurata in the west and the other (ii) in Benghazi in the east. According

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[1] Libya was known in the past as the State of Tripoli or Tripolitania and Cyrenaica, or as the United Kingdom of Libya, the Arab Republic of Libya which became subsequently the Great Socialist People's Libyan Arab Jamahiriya, hereafter referred to as Libya.

[2] See the Libyan Foreign Office Doc. (L.F.O Doc.), Dept. of Treaties and Legal Affairs, 1973. See also the Note Verbal of Oct. 19th, 1973 presented by the Permanent Mission of Libya to the United Nations (UN) Secretariat and reproduced in National Legislation and Treaties Relating to the Law of the Sea, UN Doc. ST/LEG/SER.B/18 (1976), pp.26-27.

[3] The term "Gulf of Sirte" will be used in this thesis. However, "Sirte" is variously spelled: "Surt", "Syrte", "Sirt" and "Sidra". All these names refer to the same geographical feature.

[4] See L.F.O. Doc. The Gulf of Sirte Study, unpublished report by MENAS for the Libyan Government, Frere Chomley, Paris, 1986, p. 19. See also Map No.1 (Official Map attached to the 1973 Law).

Map No. 1 .Official Map attached to the 1973 Law.

to this Declaration, the Gulf is part of the Libyan territory. It is closed by a line which is drawn between the above-mentioned headlands; it extends north offshore to latitude 32° and 30' North. The same line also constitutes a baseline from which the Libyan territorial sea is measured, and the waters enclosed therein are Libyan internal waters and thus form an integral part of Libya, under its complete sovereignty.[5]

1.1. Necessity of the Study of the Libyan Claim over the Gulf of Sirte

This thesis is intended to analyse the legal status of the Gulf of Sirte. The emphasis is placed on Libya's position, as stated in the Law of October 9th, 1973, which was followed by the Libyan Declaration of October 19th, 1973.[6] Libya's action in closing off the Gulf on historic grounds and of it being crucial to its security led to the reaction of several States insofar as this claim is concerned, among which the US protest was particularly strong. It also led to armed confrontation between Libya and the US as the latter's warplanes crossed the closing line of the Libyan-claimed Gulf in August 1981 and March 1986.[7]

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[5] See supra note 2. For more details about the geographical co-ordinnates, see infra section 5, 5.1.2.

[6] The Law was published in the Official Gazette of Libya, No.5, Special Supp., Oct. 15th, 1973. See also the Libyan **Note Verbal**, op. cit., supra note 2.

[7] As will be analysed in chapter 5, section 3, 3.3. See also Keesing's Contemporary Archives, Keesing's Pub., Bristol, 1981, p.31181; hereafter cited as Keesing's; Clyde R. Mark, 'Libya-U.S. Relations', in Issue Brief IB86040, Foreign Affairs and National Defence Division, Congressional Research

This study will examine whether there is a 'reasonable' and 'lawful'[8] basis for Libya's claim. State practice shows that from earlier times, States have exercised sovereignty over large areas. Moreover, the thesis will investigate the claim that the Gulf of Sirte constitutes a unique body of waters, partly because of its geographical location and partly because of its geological features.

Until recently, there has been no serious attempt at analysing the Libyan claim, and this thesis is the first major work which is entirely devoted to the study of the Libyan claim of historic and vital bay over the Gulf of Sirte. The facts regarding the Gulf of Sirte and the Sirte Basin to its south have so far virtually been ignored or hardly considered. Foreign States' attention was drawn to the Gulf of Sirte when the US Navy conducted a series of naval manoeuvres in the northern part of the Gulf of Sirte particularly in August 1981 and March 1986.[9] As a result, the attitude of foreign States to the merits of Libya's position changed when the problem was discussed by the UN Security Council.[10]

Service, Washington, D.C., Dec. 12th, 1986, pp.11-18; L.F.O., Dept. of Treaties and Legal Affairs Docs. No.45, 1981 and No.18, 1986.

[8] In the Fisheries Case, the International Court of Justice (ICJ) considered the drawing of a closing line by Norway along its coast, which was "founded on the vital need of the population" as "reasonable and legitimate", ICJ Reports, 1951, p.142.

[9] Keesing's, op. cit., 1981, at p.31181; Clyde, op. cit., pp.11-18; see also L.F.O., Dept. of Treaties and Legal Affairs Docs., op. cit., 1981 and 1986.

[10] See the Emergency Session debate of the UN Security Council, UN Security Council Doc. S/PV2669 on March 26th, 27th, 31st, 1986, and UN Security Council Docs. of August 1981; and L.F.O., The Gulf of Sirte Study, op. cit., p.80; and

The Libyan claim has not been subjected to an objective and detailed study which takes into account not only the legal aspects but also the historical, economic, geographical, security and strategical dimensions. The few attempts made in this field[11] have been confined to a very narrow legal approach, i.e., customary international law regarding historic bays and that too only in the light of the US-Libyan incidents. Such an approach which could be characterised as traditionalist is not methodologically appropriate. The whole corpus of international law and the historical, geographical, political, security and strategical context of the claimed area should be taken into account in order to reach a maximum of objectivity in analysing the Libyan claim. There is therefore, an urgent need to attempt such an analysis.

It is hoped that this thesis will make a modest contribution to the literature available on this issue. For the purposes of this study, the approach adopted herein will be restricted to examining only the international law of the sea and will not deal with issues outside this such as the use of force or the rules of peaceful settlement of disputes. Also, this approach will be confined to examining questions such as internal waters, historic bays and vital bays rather than the territorial sea, continental shelf or the exclusive economic zone (EEZ). The Libyan Declaration purports to draw a closing line in the Libyan-claimed Gulf whereby the waters enclosed therein are to be considered Libyan internal waters.

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chapter 5, section 2, 2.2.2.

[11] For an exhaustive list of material on this issue, see the Bibliography of this thesis.

The Libyan claim is particularly important not only for Libya, North Africa, and the Mediterranean region, but also for the international community of States. It is important to answer the question whether this claim, be it based upon historical title or vital interests, is a valid one or not and whether it complies with existing international law on this issue or fits into emerging trends in this field.

A number of international law principles will be examined in this analysis of the status of the Gulf of Sirte, in particular the concepts of both historic and vital bays as the third paragraph of the 1973 Declaration provides that Libya has, throughout history and without any objection from foreign States, exercised its jurisdiction over this Gulf.[12] It appears then that this claim is clearly based on the concept of an historic bay.

1.2. The Methodology Proposed

This study is divided into seven chapters. The first chapter is of an introductory nature which details the scope of the research to be conducted in this study, viz., that there is a necessity to analyse the Libyan claim over the Gulf of Sirte, and for this purpose to propose an original methodology which will allow an impartial and scientific examination of this claim (section one). Both the Libyan claim and the protests it generated will be briefly explained (sections two and three). In this context, particular

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[12] For an exact quotation, see infra note 17.

attention will be given to the US-Libyan incidents which occurred in the Gulf of Sirte as the US protest seems to be prominent (section four). Moreover, it is important to describe the physical and historical background of North Africa, Libya and the Gulf of Sirte. Further, it is also necessary to situate such a claim in its geographical context, i.e., Libya and North Africa (section five).

The second chapter will be devoted to the historical evolution of the law of bays and gulfs in the light of the development of the law of the sea as a whole. An historical background of the concept of bays and gulfs will be examined, namely, how the high seas were first seen as **"mare liberum"** which meant that they did not belong to any one; and how the idea of **"mare clausum"** which meant that the sea is capable of appropriation, was gradually developed. Hence, adjacent waters, particularly bays, first small bays, then large bays were enclosed.

For an historic bay claim to be valid, customary international law requires that the claimant State must satisfy three criteria: (i) an immemorial usage over the bay claimed, and (ii) an effective exercise of its authority over such a bay, and (iii) that foreign States must have acquiesced in this claim.[13] In trying to deal with the Libyan claim, a similar methodology has been adopted, hence chapters three, four, and five will deal respectively with the Libyan immemorial usage and the effective exercise of Libyan

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[13] O'Connell, D.P., The International Law of the Sea, Shearer, I.A., (ed.,)., Clarendon Press, Oxford, 2 Vols., Vol.1 (1982), Vol.2 (1984), at Vol.1, p.427.

authority over the Gulf of Sirte, the international acquiescence in the case of the Libyan claim, and the various protests to the 1973 Libyan Declaration.

Chapter three will examine the claim of Libyan immemorial usage in the Gulf of Sirte, and for this purpose, a brief analysis of the historical aspect of the Libyan usage in this Gulf is necessary and this, in turn, will lead to a brief discussion of the Libyan maritime history, i.e., the impact of the concepts of bays and territorial waters on this Gulf. In addition to dealing with the issue of the substance of Libyan usage as illustrated by the Libyan regulations on the delimitation of maritime zones and fisheries, this chapter will also try to answer the question whether the Libyan claim has been interrupted, as well as to the issues of prescription and the relative aspect of the Libyan usage in this Gulf. The legal significance of the history of the Gulf of Sirte, both in recent times and prior to the 1973 Declaration, will also be looked at in the context of historic and vital bays with particular reference to State practice.

Moreover, this chapter will also look at the effective exercise of the Libyan authority over the Gulf of Sirte, and for this purpose, it is necessary to examine the effectiveness concept. Furthermore, the formality of the 1973 Libyan Declaration will also be dealt with in order to assess whether Libya has the intention to act as sovereign over this Gulf and through which acts such intention is expressed. Further, an evaluation of the material display of the Libyan authority over this Gulf will be conducted so as to better appraise the material manifestation of this Libyan authority over the Gulf

of Sirte.

Chapter four deals with the issue of international acquiescence in the context of the Libyan claim over the Gulf of Sirte. Hence, an examination will be made of the concept of acquiescence, i.e., its various definitions, its purpose, the different schools of thought, and the notification and awareness aspects. Also, a more practical approach will be adopted in order to discover whether there is international acquiescence in the 1973 Libyan Declaration over this Gulf, and to deal with similar concepts such as recognition, toleration and silence and their impact on the Libyan claim. Moreover, the issue of estoppel insofar as acquiescence is concerned will also be addressed. Further, taking into account other similar claims, a comparative approach will be adopted in dealing with the criterion of acquiescence in the case of the Libyan claim.

Chapter five deals with the response of other States to the 1973 Libyan Declaration. Because the concept of protest is important in this context, it will be analysed. The US protest will also be examined in detail, since it appears to be the strongest.

Chapter six looks at the theory of vital bays in international law, which is another alternative for the Libyan claim. Although this theory is as old as the appearance of the historic bays theory, it still did not gain strong ground among the old nations who shaped most of the international rules. Nevertheless, many States used this theory or its rationale (i.e., vital interests) including States which are traditionally in favour of the old international legal order

which is being challenged by the emergence of a new international order (both economic and legal). In this context, Libya enclosed the Gulf of Sirte because it was essential for its economic and strategic needs, so these needs will be discussed.

In chapter seven, this study discusses whether the Libyan claim over the Gulf of Sirte fits into contemporary State practice and the new emerging trends in international law of the sea insofar as historic and vital bays are concerned. This chapter will examine whether according to customary international law, the Gulf of Sirte constitutes an historic bay or not; it will also assess the strength and reasonableness of the Libyan historic bay claim. Moreover, it is important to underline the fact that the political context (i.e., the poor relationship between Libya and the US) has greatly influenced the existence of some protests to this claim.

Furthermore, it is also very relevant to put the Libyan historic bay claim within its regional context: the Mediterranean region, so as to stress the existence of very similar claims in this area and to see whether this Libyan claim could fit within a sort of 'Mediterranean practice' regarding historic bays. Besides, the Libyan claim could also be regarded as a vital bay claim which needs to be analysed within the recent State practice in this field, particularly that Libya has somehow moderated its claim by allowing foreign ships to navigate in this Gulf, which it regards as internal

waters.[14]

Finally, proposals will be made so as to suggest remedies to the deficiencies of customary international law insofar as historic bays are concerned such as the need for a new conventional regime in this field which must provide for new definitions and rules on historic and vital bays. In so doing, reference to recent State practice such as the archipelagic waters concept and to Third World and other recommendations must be made in order not to alienate the special and vital needs of the newly-independent States and to arrive at a compromise between the above needs and those of the maritime powers. It is only in this context that the Libyan claim over the Gulf of Sirte would best be suited.

II. The 1973 Libyan Declaration over the Gulf of Sirte

Previously to this Declaration, Libya claimed a zone called a "restricted zone" whose radius was 100 miles around Tripoli where foreign aircraft and ships were only allowed by express authorization of the Libyan authorities.[15] In fact, this zone was the forerunner of the 1973 Declaration.[16]

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[14] See the 1985 Libyan **Notice to Mariners** in infra notes 51-2 which will also be discussed in infra chapter 3, section 3, 3.4., notes 196-9; chapter 5, section 3, 3.3.1. (C), note 189; and chapter 6, note 243.

[15] See Rovine, A.W.L., Digest of United States Practice in International Law, US Dept. of State Pub., No.8756, Washington, (1973), pp.302-303. See also chapter 6, section 3, 3.3., note 243.

[16] See Lahouasnia, A., The Delimitation of Internal Waters Along the Mediterranean Coast of the Maghreb With Particular Reference to Historic Bays, Ph.D., Univ. of Bristol, Fac. of Law., March 1989, p.88.

On October 10th, 1973, the then Libyan Arab Republic announced that the Gulf of Sirte constituted part of its territory and thus under its complete sovereignty. This Declaration was based on the Law of 9th October, 1973 by which Libya enclosed the Gulf. This law was in turn, based on historical as well as security reasons. The text of the law reads as follows:

> "The Libyan Arab Republic announces that the Gulf of Sirte, which is located within its territory and surrounded by land on its East, South and West sides, and extending North offshore to latitude 32 degrees and 30 minutes, constitutes an integral part of the territory of the Libyan Arab Republic and is under its complete sovereignty.
>
> As the Gulf penetrates Libyan territory and forms a part thereof, it constitutes internal waters, beyond which the territorial waters of the Libyan Arab Republic start.
>
> Through history and without any dispute, the Libyan Arab Republic has exercised its sovereignty over the Gulf. Because of the Gulf's geographical location commanding a view of the southern part of the country, it is, therefore, crucial to the security of the Libyan Arab Republic. Consequently, complete surveillance over the area is necessary to ensure the security and safety of the State.
>
> In view of the aforementioned facts, the Libyan Arab Republic declares that the Gulf of Sirte, defined within the borders stated above, is under its complete national sovereignty and jurisdiction in regard to legislative, juridical, administrative and other aspects related to ships and persons that may be present within its limits.
>
> Private and public foreign ships are not allowed to enter the Gulf without prior permission from the authorities of the Libyan Arab Republic and in accordance with the regulations established by it in this regard.
>
> The Libyan Arab Republic reserves the rights of fishing in the Gulf for its nationals.
>
> In general, the Libyan Arab Republic exercises complete rights of sovereignty over the Gulf of Sirte as it does over any part of the territory of

the State."[17]

The 1973 Declaration was sent as an official document by the Libyan Government to the UN General Assembly on October 19th, 1973, in a **Note Verbal** which justified the closing of the Gulf of Sirte over which it exercised sovereignty rights and immemorial possession.[18] It was also communicated to many States where Libyan Embassies are based.[19]

It is to be noted that this declaration was overlooked by commentators, and there is a slight difference between the Arabic version, which was published in the Official Gazette of Libya, and the English text which was provided by the Permanent Representative of the Libyan Arab Republic to the UN in a **Note Verbal** dated October 19th, 1973. This difference can be seen in the first sentence of the last paragraph of the Decree and the **Note Verbal**.[20] According to the latter, this sentence reads as follows:

> "The Libyan Arab Republic reserves the sovereign rights over the Gulf for its **nationals**". (Emphasis added).

Whereas in the Decree the sentence reads as follows:

> "The Libyan Arab Republic reserves the **fishing rights** for its nationals".[21]

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[17] See supra notes 2 and 6.

[18] Id.

[19] L.F.O., Maritime Boundaries File, No.14, 1973.

[20] For an exact quotation, see supra note 17.

[21] See Official Gazette of Libyan, Special Supp. No.5 of Oct. 9th, 1973 (emphasis added).

The difference can then, be represented in the fact that the words "fishing rights" replaced "sovereign rights". The latter phrase is more general as it includes fishing rights.

This Decree enclosed the waters of the Gulf within a closing line of 300 miles across the Gulf, connecting the two parts of the coast at the cities of Benghazi and Misuratah at a latitude of 32° and 30' North.

The 1973 Declaration, the first legal act which purported to address the specific status of the Gulf of Sirte, and as such, combined both historical and security considerations. It indicated, **inter alia**, that the Gulf "constitutes an integral part of the territory of the Libyan Arab Republic and is under its complete sovereignty".

However, this Libyan assertion of sovereignty was met with reservations and protests from some States. The study will proceed to examine briefly the reaction of these States.

III. International Reaction to the Libyan Claim

At the time of the issue of the Libyan Declaration, no foreign State made an objection in the UN General Assembly to this official Libyan proclamation[22] until some months later. Of the hundred and sixty or so States of the UN, only a few (fourteen) made reservations or protests. Reaction varied from one State to another. In this context, it is possible to distinguish four different types of reaction: First, States

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[22] Rousseau, Ch.., Chronique de Droit International, Vol.78 Revue Générale de Droit International Public (RGDIP) (1974), pp.1177-1179.

which protested; secondly, those who only registered mere reservations; thirdly, those who explicitly recognized the Libyan claim; and fourthly, those who abstained and thus acquiesced to this claim. The reaction of these States will be examined closely later in the thesis.[23]

However, it is important to underline again that among those who protested, the US Government was prominent because in addition to its denial that the Gulf does not meet the historic bays criteria,[24] it also attempted to enforce its alleged rights in this Gulf.[25] The US protest characterised the Libyan claim as an unacceptable violation of international law. It argued that the Gulf of Sirte could not be closed off in accordance with the TSC[26] and did not constitute an historic bay because it did not meet international law standards, such as acquiescence of foreign nations, in order to be regarded as Libyan internal or territorial waters.[27] Further protests were made to Libya in subsequent years following the US-Libyan incidents, and were part of a consistent course of US action.[28]

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[23] See chapters 4 and 5.

[24] See the US protest by the Dept. of State, Vol.68 American Journal of International Law (AJIL) (1974), pp.510-11.

[25] See infra section 4.

[26] The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, hereafter referred to as the TSC.

[27] Vol.68 AJIL (1974), pp.510-11.

[28] See infra section 4.

IV. The US-Libyan Incidents

Prior to 1970, US military aircraft used to fly not only over the Gulf of Sirte without any objection from Libya, but also over all Libyan territory according to Article 8 of the Treaty of 1954.[29] This treaty was terminated in December 1969,[30] after a new regime came to power in Libya.[31] However, US military aircraft continued to fly over the Gulf of Sirte area without the permission of the Libyan authorities.

On March 21st, 1973, a US military aircraft flew over the Gulf and was intercepted by the Libyan Air Force. Libya did not accept the US alleged right of overflight of its territory and protested against the US to the UN Security Council.[32] Libya complained of the incident by letters dated May 30th, 1973 addressed to the President of the UN Security Council. It accused the US of "aggression" and said that "the presence of US naval forces in the Mediterranean constituted a direct threat to the security and safety of the coastal States".

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[29] Agreement between the United States and the United Kingdom of Libya Concerning Defence: Use of Facilities in Agreed Areas in Libya, signed at Benghazi on Sept. 9th, 1954, United States Treaties and other Agreements (USTA), Vol.5, Part 3, Washington, US Government Printing Office (1954), pp.2455-2456. See also chapter 3, section 2, 2.4.1., note 82; and chapter 5, section 3, 3.3., 3.3.1. (A) and (B), note 149, and section 4, note 237.

[30] Ibid., (1972), Vol.23, Part 1, pp.85-86.

[31] On Sept. 1st, 1969, a Revolutionary Council formed by the "Free Officers" and led by Colonel Quadaffi overthrew the King, Idriss, and proclaimed a Republic-the Libyan Arab Republic, referred to hereafter as Libya.

[32] The incident happened because Libya had already established a "restricted area" for security reasons. See Vol.27 Yearbook of the United Nations (YUN), 1973, p.266. See also Rovine, op. cit., 1973, p.302.

Further, Libya was prepared to take all the necessary measures to ensure its safety and defend its sovereignty. The US denied the accusation and said that Libya's establishment of a "restricted area" within a radius of 100 miles from its coast was inconsistent with the Convention on International Civil Aviation and with generally recognized principles of international law.[33]

In fact, incidents between Libyan and US warplanes occurred in the airspace of both the Libyan "restricted area" and of the Gulf of Sirte.[34] Such events led the Libyan Representative at UNCLOS III to speak in favour of allowing the establishment of a zone adjacent to the territorial sea over which the coastal State would exercise supervisory rights and control in certain matters such as security, navigation and customs.[35]

Incidents between US and Libyan aircraft continued to arise in the "restricted area". Libya declared in 1973 that the Gulf of Sirte was to be under its complete sovereignty. However, despite the 1973 Declaration, the US not only issued a strong protest but followed it also by a series of actions (manoeuvres of the Sixth Fleet) in the north-west of the

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[33] See UN Security Council Doc., S/10939. See also Libyan letter UN Security Council Doc., S/10956 dated May 30th, 1973, US letter UN Security Council Doc., A/9002 dated June 18th, 1973, the UN Security Council Report of June 16th, 1972-15 June 1973; and L.F.O., Dept. of Treaties and Legal Affairs Docs., March-May 1973. See also Cuadra, A., Air Defence Identification Zones: Creeping Jurisdiction in the Airspace, Vol.18 Virginia Journal of International Law (VJIL) 1977-1978, pp.485-512.

[34] Rovine, op. cit., (1975), p.451, and (1977), p.636.

[35] UNCLOS III, Official Records (OR), Vol.1, 1974, p.133.

Libyan-claimed Gulf. As a result, the US persisted in carrying out military manoeuvres in the Gulf of Sirte, and this led first, to isolated incidents, and then to several other incidents which reached their climax in 1981, 1986[36] and 1989.[37]

In the exercise conducted in 1980, the US would appear to have adopted measures to lessen the risk of conflict by issuing standing instructions limiting the southerly penetration of US naval forces to 3 miles north of 32° 33' North, in other words, to the north of the closing line.[38]

Nevertheless, Libyan aircraft reportedly fired two air-to-air missiles at an US Hercules aircraft which allegedly penetrated the self-imposed Libyan limits, 200 miles off the Libyan coast. The US aircraft was not damaged, and the Libyan aircraft returned to base after the appearance of US F-14 aircraft.[39]

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[36] **Keesing's**, op. cit., 1981, at p.31181; see also Clyde, op. cit., pp.11-18; and L.F.O., Dept. of Treaties and Legal Affairs Docs., 1981 and 1986.

[37] See infra section 4, 4.1 and 4.2; see also Vol.89 US Dept. of State Bulletin, No.2144 March 1989, p.70, and Vol.93 RGDIP (1989), p.672.

[38] **Keesing's**, op. cit., (1981), p.31181A. See also Neutze for an US Navy account of the 1981 incident; Neutze, D.R., The Gulf of Sirte Incident: A Legal Perspective, Proceedings of the US Naval Institute (Jan. 1982), pp.26-31. In this context, it is important to underline the fact that the then US President, Mr. Carter ordered the US Sixth fleet not to penetrate further south than three miles north of the 32° 30' line so as not to exacerbate the Iranian hostages crisis (**Keesing's**, op. cit., 1981, p.31081); see also chapter 4, section 3, 3.3., notes 161-3 on this issue.

[39] **Keesing's**, op. cit., 1981, p.31182.

4.1. The 1981 Incident over the Gulf of Sirte

An appraisal of the US air and naval activities in the Gulf of Sirte reveals a number of important events which merit discussion. The 1981 US exercises, for example, involved far more serious incidents. On August 12th and 14th, 1981, **Notices to Mariners and Airmen** were published by the US, warning of the impending two-day exercise, and the presence of potential danger. The US exercises were planned to take place in the north-west of the Gulf of Sirte.[40]

On the first day of the exercise, Libyan aircraft which approached the range area were warned of the potential dangers, and turned away back towards the Libyan coastline. On the second day, as reported by the then US Defence Secretary, Weinberger, two Libyan SU-22 aircraft fired one air-to-air missile at two US F-14 aircraft from the carrier USS Nimitz. As a result, the US F-14s fired at the Libyan S-22s, destroying both at a distance varying between 30[41] and 60 miles[42] from the Libyan coast. Both Libya and the US protested at the UN Security Council, and President Reagan repeated earlier US assertions that the F-14 aircraft had only acted in self-defence.

The US alleged that "Libya violated international law by

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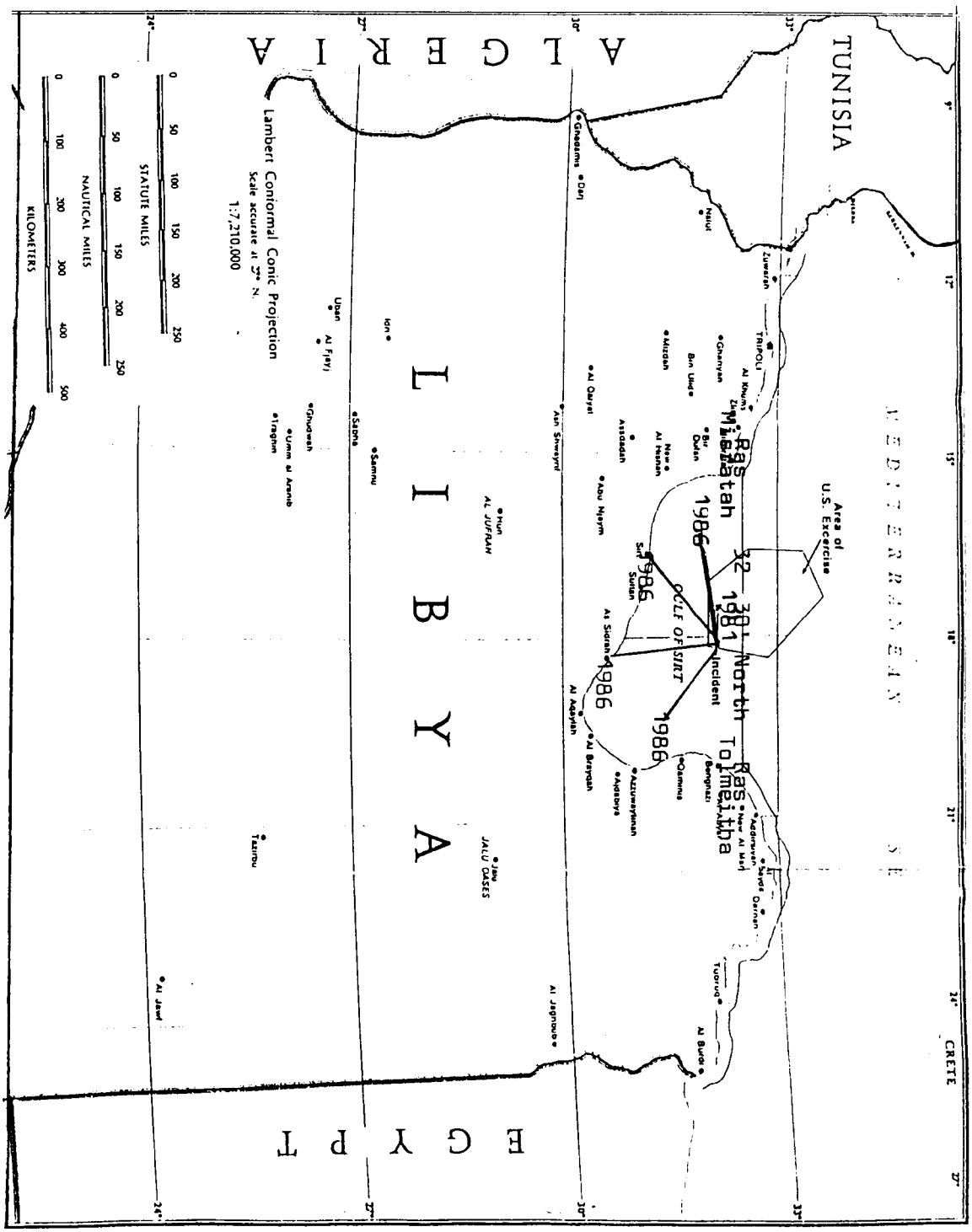
[40] Ibid., p.31181.

[41] Libya maintained in its letter of Aug. 20th, 1981, UN Security Council Doc., S/14636, that eight US aircraft shot down one of the two Libyan aircraft which were over the Libyan territorial waters.

[42] The US Secretary of Defense, US Dept. of State Bulletin, Oct. 1981, p.57. See also Map No.2.



Map No.2 .The US-Libyan Incidents (1986 and 1981)

unilaterally closing the Gulf", and the US President stated on August 20th, 1981, that he had personally ordered the Navy to challenge the Libyan claim to the Gulf of Sirte and to conduct manoeuvres in the disputed area in order to show that "America has the muscle to back up its words".[43]

As to Libya, it accused the US of "aggression"[44], but it recognized that its warplanes fired first.[45] These events led the US to protest to Libya through the Belgian Embassy about the "unprovoked Libyan attack on US aircraft in international airspace".[46] Libya rejected such a protest and accused the US of "violating international law".[47] In the end, both the US and Libya informed the UN Security Council about this incident,[48] and the International Civil Aviation Organisation (ICAO) was also informed by Libya.[49]

Between 1982 and 1985, the US continued to carry out

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[43] Keesing's, op. cit., 1981, p.31182.

[44] Libya announced on Aug. 19th, 1981 that the US had committed aggression against Libya, and that the US Air Force violated the "Libyan space and territorial waters in the Gulf of Sirte" (ibid., p.31182).

[45] Ibid., p.31181.

[46] The US Dept. of State protest was sent to Libya through the Belgian Embassy (see Dept. of State Bulletin, Oct. 1981, op. cit. p.60).

[47] Keesing's, op. cit., (1981) p.31181.

[48] Id.

[49] Libya claimed that the US exercises were stopped earlier because of the "Libyan determination to protect its airspace over Sirte Gulf" [Yussef, S., (ed.)., Arab-American Confrontation, Al Moukif Al Arabi Foundation, Nicosia, Cyprus, 1982, pp.205-6, 225 and 228]. After the aerial confrontation, the Libyans continued patrolling the Gulf of Sirte (ibid., p.206, see also Vol.86 US Dept. of State Bulletin, Oct. 1981, op. cit., p.58).

exercises in the north west part of the disputed area, though these were on a much smaller scale. No major hostile acts occurred between both States during this period.[50]

Regulations aimed at implementing the 1973 Declaration were enacted by the Libyan Department of Transport which issued a **Notice to Mariners**, effective as to June 1st, 1985 restricting foreign shipping and navigation both within the Libyan territorial sea and internal waters including the Gulf of Sirte. Paragraph 10 of this notice requires that foreign vessels comply strictly with instructions pertaining to prohibited zones and zone C, as specified in Article 10, lies within the Gulf of Sirte.[51] In this context, the US not only protested at this Notice, but decided also to defy it as will be shown below.[52]

4.2. The 1986 US-Libyan Incident over the Gulf of Sirte

The US planned successive military manoeuvres off the Libyan coast and within parts of the Gulf of Sirte. The US Sixth Fleet, for example, once again conducted air and surface operations off the Libyan coast.[53] Such exercises started in

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[50] Vol.87 RGDIP (1983) pp.667-668; Vol.88 (1984) p.224, and Vol.89 (1985) pp.142-143.

[51] L.F.O. Doc., 1985.

[52] UN., Office of the Special Representative of the Secretary-General for the Law of the Sea, Law of the Sea Bulletin, UN, New York, hereafter referred to as LOS Bulletin, No.6, Oct., 1985, p.40. See also chapter 3, section 3, 3.4., notes 196-9; and chapter 5, section 3, 3.3.1. (C), note 189.

[53] Manoeuvres started in the first week of Jan. 1986, and a US military presence continued near the Libyan coast (Keesing's, op. cit., 1986, p.34454).

and around the Libyan-claimed Gulf and no confrontation between the two sides took place.[54] Also, on 13th January, 1986, two F-18 aircraft from the US Coral Sea allegedly drove two Libyan Mig-25 aircraft away from a US surveillance aircraft flying over the Gulf of Sirte. No menacing gestures were exchanged. No incidents occurred until 11th February, 1986, when the US Government reported that 25 encounters with Libyan aircraft were recorded, although no hostile exchanges took place. At the same time, it was announced that US surface forces would penetrate the Gulf in accordance with the routine US objection to the Libyan closing line.[55]

The real purpose seems to have been that the US exercises was to draw Libya in military confrontation again after having failed earlier in January. The US went on to challenge the Libyan claim by force and this in turn led to the 1986 confrontation over the Gulf of Sirte.

In this context, a far more prolonged exercise was announced by the US, starting on March 23rd, 1986 and ending on April 1st, 1986, involving air activities within the Tripoli Flight Identification Region (FIR), and the Gulf. The US Sixth Fleet which was ordered to conduct such exercises in and around the Gulf of Sirte comprised 29 warships, including three aircraft carriers with approximately 250 aircraft.[56] The Pentagon did not confirm whether surface units would also

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[54] They were planned from Jan. 24th to 31st, 1986, Vol.90 RGDIP 1986, p.654. But, three American aircraft-carriers (SARATOGA, AMERICA, and CORAL SEA) joined other US warships.

[55] See the letter from the US President to the Congress in Vol.86 US Dept. of State Bulletin, No.2111, June 1986, p.72.

[56] Vol.90 RGDIP 1986, p.654.

cross the line of closure in the Gulf of Sirte, but insisted that the exercise was a routine one, involving no threats or provocation.[57]

On March 24th, 1986, both US air and naval units crossed the closing line, prompting, allegedly, a Libyan response in the form of the firing of six long-range surface-to-air missiles (SA-5). The US reported that none of the missiles struck any US aircraft.[58] Events moved rapidly thereafter. The US alleged that one shore missile site, and two patrol vessels were destroyed by US forces. On March 25th, 1986, a further two Libyan vessels were attacked and destroyed by US units and A-7 aircraft conducted a strike against another shore missile site.[59]

At the request of Iraq, Malta and the USSR, the UN Security Council convened four times without taking action.[60] Libya protested to the UN Secretary-General about the "US threat of aggression".[61] Libya condemned the US act as being of a 'provocative nature'.[62] As to the US, General Walters,

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[57] See the White House Statement dated March 24th, 1986, Vol.86 US Dept. of State Bulletin of May 1986, p.76.

[58] See the statement of the US Representative, General Walters before the UN Security Council, UN Security Council Doc., S/PV/2668, March 26th, 1986, pp.19-20. See also Vol.86 US Dept. of State Bulletin No.2110, May 1986, p.80.

[59] See the UN Security Council Doc., S/PV. 2668., March 26th, 1986, p.22; see Clyde, op. cit., p.7. See also Map No.2.

[60] Ibid., see also the UN Security Council Doc., S/PV.2669, pp.8-10.

[61] See Vol.23, United Nations Chronicle (UN Chronicle) (1986), No.3, April 1986, p.20.

[62] Ibid., p.21; see also the L.F.O., The Gulf of Sirte File, (1977-1986). See also the view expressed by the British Opposition Leader who maintained that 'the US presence in the

its Representative, stated that:

> "...[W]e have been in the area of the Gulf of Sidra sixteen times since 1981. We have been below the line claimed as a boundary by Libya seven times before this current operation."[63]

He went on to assert that by entering the Gulf of Sirte the US was "defending freedom of navigation for all Nations". A similar statement on March 24th, 1986, by a US spokesman in Washington referred to the US exercises as "a peaceful navigational exercise in international waters". The US protested against the "unjustified Libyan attacks in international waters" (i.e., the Gulf of Sirte), they also claimed that they had only used their "right of self-defence".[64]

These declarations contain an exaggeration of reasons for using force against Libya, for in the course of this putative "defensive" action, four Libyan patrol vessels and two missile sites were destroyed by the US Sixth Fleet. This amounted to a disproportionate response to the Libyan defensive action.[65] The US actions met with general condemnation by other States during the 1986 UN Security Council debates.[66] Ambassador

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Gulf was unnecessary provocation' (The Times, March 26th, 1986, p.5).

[63] See the UN Security Council Doc., S/PV2668 March 26th, 1986, p.21. See also Vol.86 US Dept. of State Bulletin No.2110, May 1986, p.80.

[64] Ibid., p.80. See also the statement by the US Representative to the UN Security Council (UN Security Council Doc., S/2668, 1986, at pp.18-22).

[65] As illustrated by the extent of the US armed response.

[66] See the UN Security Council Doc., S/PV.2668-2671, March, 26th to 31st, 1986.

Dubrinin, the Soviet Representative, described the events of March 24th and 25th, 1986, as "premeditated banditry". On March 26th, 1986. He stated:

> "Over the last few months the mailed fist of the US has established a virtually constant presence off the Libyan coast, something unheard of in peacetime".[67]

In Resolution 41/38, adopted on November 20th, 1986 by 79 votes to 28, the UN General Assembly condemned the US aerial and naval military action against Libya in April 1986, describing the attack as a "violation of the Charter of the United Nations and of international law". The resolution urged the US to "refrain from the threat or use of force in the settlement of disputes and differences" with Libya and called upon all other States "to refrain from extending assistance or facilities for perpetrating acts of aggression" against Libya, whose right "to receive appropriate compensation for the material and human losses inflicted upon it" was affirmed.[68]

The US raids on Libyan targets were also condemned by the OAU at the 22nd Assembly of Heads of States and Governments, which took place in Addis Ababa on July 28-30th, 1986.[69]

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[67] See the UN Security Council Doc., S/PV.2669, March 26th, 1986, pp.8-10. During the same debate, the Bulgarian Representative stated that the US Officials have indicated that the US Sixth fleet exercises off Libya during January-March 1986 were 'meant among other things, to collect intelligence information and to be a demonstration of strentgh' (ibid., p.7).

[68] UN General Assembly, OR Forty-First Session, Supp. No.53 (UN Doc., A/41/53) at pp.34-35.

[69] Id. See Thornberry, P., International Law and its Discontents: The U.S. Raid on Libya, Vol.8 Liverpool Law Review (LLR), 1986, pp.53-64. He noted that:

V. Physical and Historical Background of North Africa, Libya and the Gulf of Sirte

An appraisal of the physical and historical background of the area where Libya is located, i.e., the Mediterranean and in particular North Africa, is relevant in order to grasp the proper context of the Gulf of Sirte. As a result, it is important to deal briefly with the geography and geology of the area and of the Gulf before examining its historical aspect and past Libyan maritime practice. However, the varying geographical, geological and historical data of North Africa and in particular of Libya will be referred to in detail when examining the Libyan claim over the Gulf of Sirte inasmuch as they assist in understanding the background and the technicalities of the determination of Libyan internal waters including the Libyan-claimed Gulf.

5.1. Some Geographic Peculiarities of Libya and the Gulf of Sirte

5.1.1. Geographical Location of Libya

Libya is situated on the northern coastline of Africa which is some 4900 kilometres or 3100 miles and whose trend is generally east/west except for the Tunisian and Libyan

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"Most of the reactions to the U.S. action in Libya have been hostile".

He also added that 'it is clear that the intervention in Libya has not been allowed to pass unchallenged in legal terms' (ibid., p.61). See also the Times, April 18th, 1986, where it was stated that the 'American attack on Libya was unlawful'.

coasts which display a significant departure from this trend.[70] Libya lies between the 19° North and the 34° North meridians and between the 9° 30' East and 25° East Meridians.[71] Libya is bordered by Egypt (on the East), Sudan (on the South-east), Tchad and Niger (on the South), Algeria (on the West), Tunisia (on the North West) and its coastline (in particular the Gulf of Sirte) face the Mediterranean Sea (on the North). Libya's surface area is 1,775,500 square kilometres, it is the second largest State in North Africa after Algeria.[72]

The Libyan coast is 1770 kilometres long (1,100 miles) stretches from Ras Ajdir (on the West) to Port Boudia (on the East). It is considered the longest coast in North Africa.[73] It is also characterised by a deep protrusion in its central part, called the Gulf of Sirte which is described below.

5.1.2. Geographical Description of the Gulf of Sirte

The 1973 Declaration delimits the Gulf of Sirte as follows:

> "The Gulf of Sirte located within the territory of the Libyan Arab Republic and surrounded by land boundaries on its East, South and West sides, and extending North

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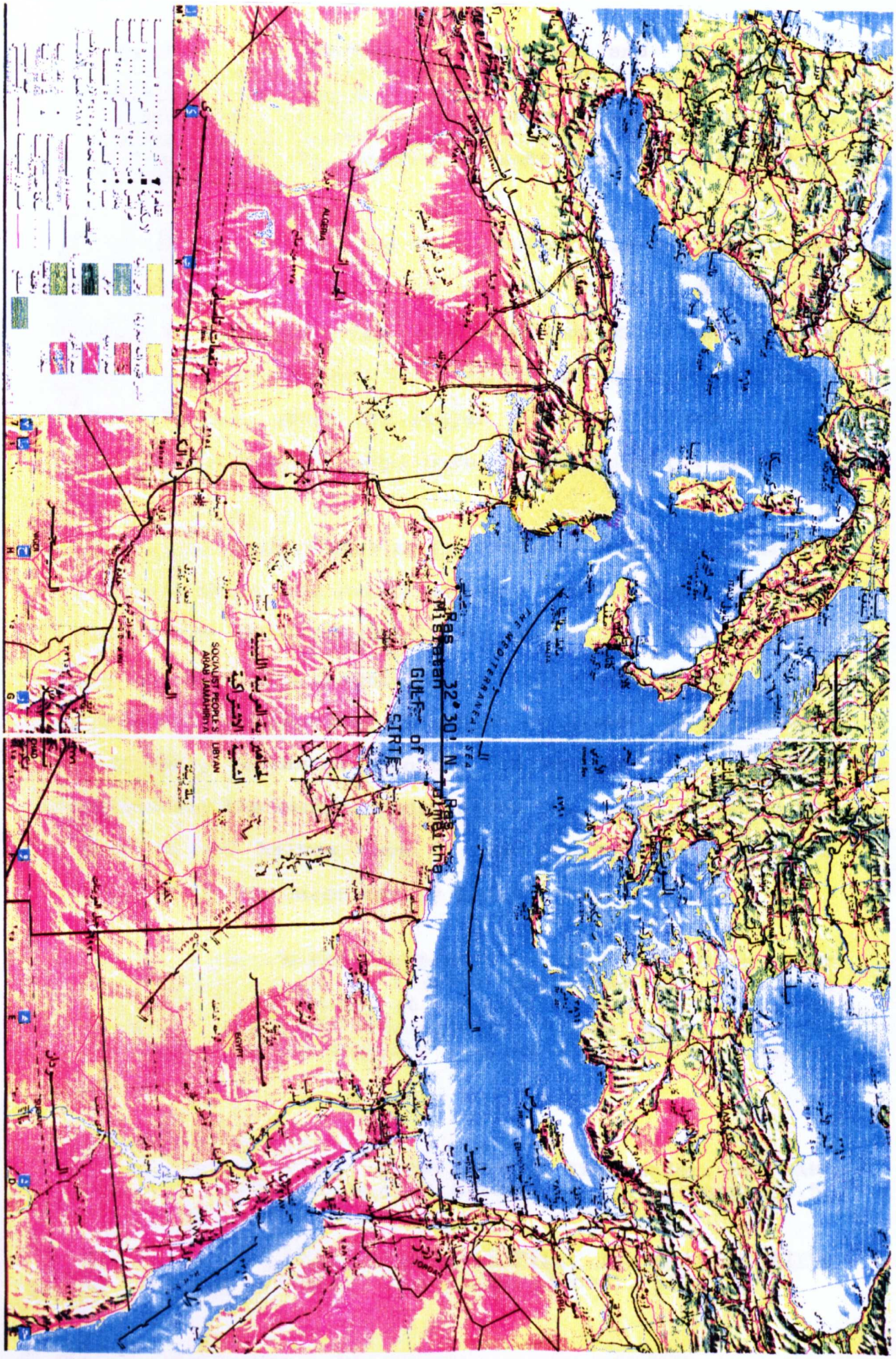
[70] See Map No.3. See also ICJ **Pleadings**, 1982, Vol.1, **Libyan Memorial (LM)**, pp.453-517, at p.482.

[71] **Continental Shelf (Libyan Arab Jamahiriya/Malta)** Case, ICJ Reports 1985, p.13, para.11 at p.20. See also Map No.1.

[72] ICJ **Pleadings**, 1982, Vol.1. **LM**, pp.453-517. para.70. at p.482. See also Map No.3.

[73] Id., see also Annex 2, **Libyan Counter-Memorial (LCM)**, ibid., Vol.3, para.24-42, at p.30.



Map No. 3. North Africa.

> offshore to latitude 32 degrees and 30 minutes, constitutes an integral part of the territory of the Libyan Arab Republic and is under its complete sovereignty. As the Gulf penetrates Libyan territory and forms a part thereof, it constitutes internal waters, beyond which the territorial waters of the Libyan Arab Republic start."[74]

As it appears from Map No.1, the Gulf is not contiguous to any other State, and as a result, it falls within the category of bays and gulfs, the coasts of which belong to a single State. Also, there is no island or other geographical offshore feature along the Libyan coastline in the Gulf of Sirte area which would complicate the delimitation of Libyan waters.

This Gulf constitutes an indentation which has an almost rectangular shape, its coastline being approximately half (478 miles) of the total of the Libyan coast. The Gulf of Sirte coastline occupies a compelling position within the political and economic geographical situation of Libya: it penetrates significantly southward into the Libyan land territory from approximately the central point along its coast, dividing the country in two halves down to the parallel of 30° North latitude.[75] It was described by Tunisia as:

> "...[A] very marked severance in the coast which after the Zarruq, runs in a clear south easterly direction down to the El-Agala, at the southern end of the Gulf of Sirte. Thus, it increasingly breaks away from the Pelagian Sea to acquire a broad north looking window

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[74] Repetition is for the convenience of the Reader. See also supra note 17 and the Official Gazette of Libya, Supp. No.5, Oct. 15th, 1973.

[75] See L.F.O., Maritime Boundaries File: The Gulf of Sirte Description, March 26th, 1986, (unpublished), p.2.

open in the central basin of the Ionian Sea".[76]

The Gulf virtually divides into halves that land area of Libya that contains nearly 90% of its population. Despite the vast proportions of the Libyan landmass - approximately 1,775,500 square kilometres - its population of some 4,224,400 (according to the 1988 census),[77] is largely concentrated within the narrow coastal strip.[78]

The depth of the Gulf of Sirte is some 135 miles, the degree to which the Gulf of Sirte intrudes into the land can be measured from the fact that as compared to its closing line of approximately 300 miles in length, the greatest width landward of the Gulf is 145 miles at 19° 11' East, a ratio of about 2:1. The following statistics of coastal length are noteworthy: The entire Libyan coast is 1100 miles including the Gulf of Sirte whose coastal length measures up to 478 miles, i.e., about half of the Libyan coast or a ratio of 1:2.[79]

These figures serve to illustrate that approximately one half of the Libyan coastline falls within the Gulf of Sirte.

It has two main headlands:[80]

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[76] ICJ **Pleadings**, 1982, **Tunisian Memorial (TM)**, Vol.1, (Unofficial Translation), p.62.

[77] Secretariat General of Planning, **Economic and Social Achievement of 19 Years of Alfatah Revolution, Schedule 4**, Jan. 1989. According to the 1984 Census, the Libyan population was 3,624,200 (ibid., Census Dept. 1984, p.2); see also **The Geographical Digest**, George Philip and Son, London (1986), p.70. See Map No.3.

[78] Anderson, E.W. and Blake, G.H., **El Khalij Project No.5 - The Gulf of Sirte: An Assessment of Uniqueness**, Dept. of Geography, Univ. of Durham, Durham (Nov. 1986), (unpublished), p.16. El Khalij means in Arabic the gulf.

[79] See L.F.O. Doc., The Gulf of Sirte Study, op.cit., p.19.

[80] See Map No.1.

- Misratah, located on the West, and,
- Benghazi, which is situated on the East.

These towns are separated from each other by a distance of 300 miles. Despite the fact that the 1973 Declaration gives no figure,[81] this closing line varies from anything between 275 and 310 miles.[82] However, it clearly appears that such a closing line measures approximately 300 miles.[83]

Using the coastal locations of Ras Misratah and Ras Tolmeitha to the west and east respectively, the Gulf of Sirte can be situated with reference to the following coordinates:

- Ras Misratah: 15° 5' East; 32° 25' North,
- Ras Tolmeitha: 21° 5' East; 32° 46' North,

The closing line of 32° 30' North is compatible with the topographical and geological features which define the Gulf as will be shown below.

5.1.3. Geological Considerations

The geological circumstances concern mainly the presence of oil which was discovered in the Sirte basin in the 1960s. The discovery of this important natural resource transformed

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[81] See the 1973 Declaration, supra note 17.

[82] According to some writers such as Blum, O'Connell, Rousseau and Spinnato. Rousseau mentions 300 miles, (Vol.90 RGDIP, 1986 pp.652-55, at p.653] so does Blum (Blum, Y.Z., The Gulf of Sidra Incident, Vol.80 AJIL 1986, pp.668-677, at p.671); whereas O'Connell (1982), op. cit., only gives 290 miles, Vol.1, p.290, and Spinnato speaks of 275 miles (Spinnato, J.M., Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra, Vol.13, Ocean Development International Law Journal (ODILJ) (1983) pp.65-85 at p.68).

[83] See Map No.1.

the Gulf from being a desert area to a vital centre and heartland of Libya. Such discovery of oil has, as will be illustrated later,[84] led Libya to issue the above mentioned declaration in order to protect its economic interests in the area.

The present sea-area of the Gulf of Sirte in fact comprised a landmass until the end of the Mesozoic era (about 100 million years ago), after which it gradually submerged during the early phase of the Paleozoic period.[85] The maximum encroachment of the sea in the Gulf of Sirte region occurred during the initial Eocene period, when the shoreline extended to the foothills of the Tibesti Mountains. The present shorelines of the Gulf were formed during the late Pliocene age (5 million years ago), and are surrounded by land to the east, south and west.[86]

The geological continuity between the Sirte Basin (lying landward of the Gulf of Sirte) and the Gulf to its north on into the Central Mediterranean and the Ionian Sea was illustrated before the ICJ in the **LCM** in the Continental Shelf (Libyan Arab Jamahiriya/Malta) Case.[87] In geological terms, the Sirte Basin and the Gulf of Sirte are closely linked.

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[84] See chapter 6, section 3, 3.2.

[85] See ICJ **Pleadings** 1982, Annex 2, **LM**, Vol.1, pp.553-571; see also Bishop, W.F., Geology of Tunisia and Adjacent Part of Algeria and Libya, The American Association of Petroleum Geologists Bulletin (1975), Vol.59, No.3; Desio, A, Geology and Archaeology of North Cyrenaica (1968), F.T. Bar, (ed.)., Petroleum Exploration Society of Libya, 10th Annual Field Conference, Tripoli, pp.19-115.

[86] See Desio, op. cit.

[87] ICJ **Pleadings**, 1985, Vol.2, p.56.

Moreover, approximately 60% of the Gulf is 200 metres deep or less, and nearly 2% of the body of water exceeds 1,000 metres in depth. The Sirte coastal plain commences east of the point at which the Jabal Nefusa reaches the sea, and runs along the Gulf until reaching the mountain range of Jabal al Akhdar, to the coast of Benghazi.

As a direct consequence of possessing the most equatorward water in the Mediterranean, the climatic particularities of the Gulf of Sirte are distinctive. This is especially so in the winter when the mean January pressure is higher than in any other Mediterranean bay. The Gulf's southerly position results in the passage of fewer depressions than anywhere else except the coast of Algeria.[88] On avearage, the Gulf is more sheltered than other such locations in the Mediterranean, and it enjoys one of the lowest percentage frequencies of winter gales.[89]

With regard to the circulation of its waters, the Gulf is in fact the only part of the Mediterranean in which the currents flow predominantly in a clockwise direction. The current travels parallel to the coast approximately along the latitude of the closing line of the Gulf, and closely reflects the configuration of the Gulf. Given that the water circulation of the Gulf is virtually self-contained, substantial differences in character exist between the water in the Gulf itself, and that in the adjacent areas of the Mediterranean.

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[88] See Anderson and Blake, El Khalij Project No.5, op. cit., p.1.

[89] Hydrographer of the Navy, Vol.5, Mediterranean Pilot, 1976.

Pollution levels in the Gulf are low,[90] partly because any inputs from the land, apart from the very occasional wadi[91] flows, are limited. Thus, what might be considered a "natural boundary" exists between the waters of the Gulf and those of the rest of the Mediterranean. This coincides broadly with the position of the closing line of the Gulf.

5.2. Historical Background of North Africa and Past Maritime Libyan Practice

5.2.1. Historical Background of North Africa

The Mediterranean region of which North Africa (including Libya) is an essential part has always been the centre of several civilizations which were developed through maritime trade and naval strength. The power which dominated this sea would control both the sea routes and the Mediterranean coasts (ports, harbours,...etc). This could be verified by the history of the Empires of the Phoenicians, Carthage, Rome, the Greeks and the Muslims.[92] By its strategical position between

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[90] Anderson, E.W. and Blake, G.H., El Khalij Project No.7, Mediterranean Pollution and the Gulf of Sirte Dept. of Geography, Univ. of Durham, (unpublished Memorandum), (1986), pp.1-9, at p.5.

[91] The term wadi means a river where the water flows only when it rains as the water descends from mountains and hills through into the sea. Such a wadi is Souf El-Geen.

[92] See Lahouasnia, op. cit., p.8. See also Braudel, F., The Mediterranean and the Mediterranean World in the Age of Philip II, Vol.2, Collins, London, 1973, p.1088. See also Harden, D., The Phoenicians, Thames and Hudson, London, 1962; Warmington, B.H., Carthage, Robert Hale Ltd., London, rev. ed., 1969; Dorey, T.A. and Dudley, D.R., Rome Against Carthage Secker and Warburg, London, 1971; Piquet, V., Les civilisations de l'Afrique du Nord, Librairie Armand Colin, Paris, 1921.

Europe, Africa, the Middle East and even Asia, the Mediterranean became an arena where religious and political rivalries among riparian States who allied themselves to opposing outsider States occurred and still occur.

In the past, the Mediterranean Sea was called by the Romans **"mare nostrum"** (our sea) because they controlled its shipping and its coasts. The same is true for the successive empires who continued the same practice. And this has, in turn led to an important maritime trade which necessitated several ports and harbours since time immemorial.

Attempts have been made in the past and even today by the Mediterranean States, including Libya,[93] to claim sea-areas in particular gulfs and bays adjacent to their coasts. However, the success of these attempts depended on the strength of the navies of the respective States.

Despite the existence of a constant trade between the riparian States, conflicts among the navies of the southern and northern States of this sea did not end even after the Crusades. After the collapse of the Arab Kingdoms in Andalusia, Spain emerged as the naval power to be reckoned with in the Mediterranean Sea.[94]

North African States were previously known as the 'Barbary Powers' and were often involved with European States

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[93] As will be seen in chapter 3, section 3, 3.3. and 3.4.; see also chapter 5, section 4.

[94] According to Strohl, the emergence of the Spanish Nation as a 'leader in exploration' in the fifteenth century was due to the fact that the 'Iberian Peninsula, had for centuries, been the home of thought and enterprise' during the Muslim era (Strohl, M.P., The International Law of Bays, Martinus Nijhoff, The Hague, 1963, p.121).

by trade or war.[95] As will be discussed later,[96] naval activities of the former were sometimes regarded as 'piracy'[97] though committed not by pirates but by Corsairs (on behalf of the North African States). Sometimes, the latter were denied Statehood by European States because of their privileged relationship with the Ottoman Empire, or because of alleged 'piracy'. However, such a view was far from being accepted by all European writers, and in this context, Bynkershoek writes that:

> "...I do not think that we can reasonably agree with Alberico Gentilli and others who class as pirates the so-called Barbary peoples of Africa,...**The peoples of Algiers, Tripoli, Tunis and Salee are not pirates, but rather organized States, which have a fixed territory in which there is an established government, and with which, as with other nations, we are now at peace, now at war. Hence they seem to be entitled to the rights of independent states."**[98]

Today, many more historians hold such opinion as

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[95] Mössner, J.M., The Barbary Powers in International Law (Doctrinal and Practical Aspects), in Alexandrowicz, C.H., (ed.)., Studies in the History of the Law of the Nations, Martinus Nijhoff, The Hague, 1972, pp.197-221 at p.197. See also Joffé, E.G.H., Rossiter, A., Graves, N. and McLachlan, K.S., Sovereignty, Frontiers and the Historical Background, Annex 6, **LCM**, ICJ **Pleadings**, (1982) Vol.3, p.77-141.

[96] See chapter 3, section 2, 2.1.

[97] This view is shared by Gentili (as quoted by Bynkershoek, C.V., in Scott, J.B., (ed.)., The Classics of International Law (Quaestionum Juris Publici Libri Duo), 2nd ed., Vol.2, (The Translation) by Tenney F., Pub. of the Carnegie Endowment of International Peace (Division of International Law), Washington, D.C., Clarendon Press, Oxford, 1930, p.99. For further details, see Rubin, A.P., The Use of Piracy in Malayan Waters, in Alexandrowicz (1972), (ed.), op. cit., pp.111-135 at note 14, p.113. See also Fisher, G., (Sir)., Barbary Legend, Oxford, 1957, pp.137 and seq.

[98] Emphasis added, Bynkershoek, op. cit., p.99, see also chapter 3, section 2, 2.1.

illustrated by Mössner who writes that:

> "...[T]he view that the Barbary Powers were communities possessing the quality of statehood, deserves approval".[99]

Then, it could be maintained that the North African States were regarded as sovereign particularly when they dealt with foreign powers. As a result, their naval activities could not be characterised as 'piracy' because 'piracy' could only be committed by pirates and not by States.[100] Instead, these activities were known as 'corsairing' (la Course) which was that time not restricted to the Mediterranean Sea alone but extended also to the Atlantic, Pacific and Indian Oceans and the Far-East. This activity has been resorted to by several Europeans States.[101]

Moreover, between the 16th and the end of the 18th century, North African States concluded several treaties of peace and concession agreements with European powers. And, in this context, Bynkershoek writes that:

> **"The States-General, as well as other nations, have frequently made treaties with them [the Barbary States]**, and I may refer to our treaties of April 30, 1679, and May 1, 1680, by way of example. Cicero defines as a

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[99] Mössner, op. cit., p.217, see also pp.215-17.

[100] See Birnie, P.W., Piracy, past, present and future, Vol.11 Marine Policy, 1987, pp.163-83 at p.163. For more developments on the issue of piracy, see Dubner, B.H, The Law of International Sea Piracy, Martinus Nijhoff, The Hague, 1980; Botting, D., The Pirates, Time Life Books, Amsterdam, 1978; Fulton, T.W., The Sovereignty of the Sea, Blackwood, W. and Sons, Edinburgh, 1911, reprinted by Kraus Reprint Co., New York (1976); and Lloyd, C., English Corsairs on the Barbary Coasts, Collins, London, 1981.

[101] Birnie (1987), op. cit., p.163. See also chapter 3, section 2, 2.1.

regular enemy 'one that has a commonwealth, a senate, a treasury, the unified support of its citizens, and that shows some respect for treaties and covenants of peace when an occasion is offered to make one'. All these requirements they satisfy; they even have some respect for treaties, as other nations have, though nations are usually more concerned about their own advantage than about treaties. That they should have complete respect for treaties, nor one could require, since we cannot require that even from other nations. And Huber observes that they do not properly deserves to lose the rights and the name of a sovereign state even if they acted with less justice than others".[102]

In the same line of thought, Mössner writes that:

"The number of the relevant legal instruments i.e. treaties and unilateral declarations amounts to 367. Nearly half of the available agreements deal exclusively with the status of foreigners residing in the Barbary countries, with establishing trade agencies and with the grant of concessions".[103]

It is also important to underline the fact that Libya at the time of the Qaramanlis 'ruled as an independent sovereign' State;[104] and along with Algeria and Tunisia,[105] it granted sedentary fisheries concessions (coral and sponge) to European States. Further, these treaties and agreements are nowadays referred to by North African States and in particular by Libya in order to back up their historic claims over certain bays such as the Gulf of Sirte. Internal waters in the 18th and

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[102] Bynkershoek, op. cit., p.99.

[103] Mössner, op. cit., at p.212.

[104] Dyer, M.F., The Foreign Trade of Western Libya 1750-1830, Ph.D. Thesis, Univ. of Boston, 1987, p.63.

[105] For further details on these treaties and agreements see Fischer, P., Historic Aspects of International Concession Agreements, in Alexandrowicz (1972), op. cit., pp.222-261, particularly at p.256.

19th centuries did not have the significance they have today.[106] The then State practice regarding, territorial waters was limited to the 'cannon shot',[107] i.e., a coastal State could only claim a sea margin of 3 miles, as was the case in North Africa. Therefore, the distinction between the territorial sea and internal waters did not exist.[108] The coastal State's authority in the territorial waters depended on the strength of its navy.

The strength of the North African States began to weaken in the middle of the 19th century. As a result, their coast became an easy target for European colonialism. Nevertheless, these States, and in particular, Libya had already acquired a proper maritime practice as will be shown below.

5.2.2. Past Libyan Maritime Practice

The fact that Libya was a maritime power at least in the Mediterranean implies that there existed a Libyan maritime practice. It is evident that such a practice could not have been possible without a strong navy. In this context, it is important to underline the fact that the Libyan navy acquired growing strength, and by 1805 comprised 24 strongly armed vessels. In this context, it has been maintained that Libya

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[106] See Lahouasnia, op. cit., p.11.

[107] This rule was mentioned in several treaties between Libya and European States as will be seen in chapter 3, section 2, 2.2.2.

[108] For more developments on the historical aspects of territorial waters in North Africa, see Annex 6, op. cit., **LCM**, ICJ **Pleadings**, 1982, particularly Section 6. Territorial Waters Concepts and Disputes, p.121.

became strong and that it derived its 'income from taxes on local lands and commerce and from State participation in all corsair ventures'.[109] This maritime practice supposed that certain concepts of the law of the sea, such as the territorial waters concept were known to the Libyan authorities at that time.

Under the Qaramanli Dynasty (1711-1835), Libya became a more autonomous State within the Ottoman Empire, and it is during this period that Libya acquired the status of a significant maritime power, dominating not only the bays and gulfs of the Libyan coast, but also a large area of the high seas in the Mediterranean.

During the 18th century, the breadth of Libyan waters corresponded to that of the cannon-shot rule which was widely accepted by the international community of States. The earliest reference to territorial limits in British records is Article 8 of the 5th March 1675 treaty between "Halil Bashaw, Ibrahaim Dey, Agha Divan and Governors of the Noble City and Kingdom of Tripoli" and Admiral Sir John Narborough. In that treaty the line of sight rule was accepted by the two parties.[110] The Qaramanlis accepted it (definition of territorial waters as cannon-shot rule) in a treaty with Austria-Hungary in 1749.[111] The same rule was later accepted

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[109] Dyer, op. cit., p.63.

[110] Public Record Office (PRO), F.O. 95/519. See also Vol.1, British Foreign and State Papers (BFSP) Part 1 (1812-1814), 1, p.715. See also chapter 2, section 2, 2.1.1., note 81 and section 2, 2.2., note 125; see also chapter 3, section 2, 2.2.1. and 2.2.2., note 28.

[111] ICJ Pleadings, 1982, LCM, p.121.

and introduced in the Treaties between Tripoli and the Kingdom of the Two Sicilies and of Sardinia, both concluded on 29 April 1816 by the British Admiral, Lord Exmouth on behalf of the Italian Kingdoms.[112]

In addition, it seems that the concept of bays was also known to the Qaramanlis. The evidence of this assumption is the mention of the term, bay, on many occasions in the treaty of 1812 between Great Britain and Tripoli,[113] and in the above-mentioned treaty which was concluded between Tripoli and the Kingdom of the Two Sicilies and Sardinia.

Libya's historic maritime activity in the Mediterranean, along its coasts and in particular in the Gulf of Sirte region will be analysed throughout this thesis in order to establish the legitimacy or otherwise of its claim.

It was accepted that Libyans were able to dominate the sea area adjacent to their land territory.[114] There is also evidence that the Ottoman Empire, which ruled over Libya before the Qaramanli Dynasty, exercised a tight control along the southern coasts of the Mediterranean including bays such the Gulf of Sirte. Thus, the Ottoman Empire gave permission for some foreign States, for example, to fish in certain bays and gulfs along the North African coast.[115] The rise of the Ottoman Empire created a situation in which powerful allied

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[112] Vol.3, BFSP (1815-1816), pp.546-548.

[113] Ibid., Vol.1, 1, p.732.

[114] Irwin, R.W., The Diplomatic Relations of the United States with the Barbary Powers (1776-1816), Univ. of North Carolina Press, (1931), p.40.

[115] Dumont, J., Corps universel diplomatique du droit des gens, La Haye, 1726-1731, tome 2, article 15, p.39.

States of that Empire, such as Libya, claimed and exercised control over large parts of the seas with the aim of controlling the lucrative trade of the Mediterranean. From the 16th to the 19th centuries, the Libyan fleet protected the Libyan coast from Derna in the East to the far western borders including the Gulf of Sirte from foreign threat.

The Ottoman Empire and North African States including the Tripolitanian State claimed to be "the sovereigns of the Mediterranean", and "would permit no nation to navigate it without a treaty of peace".[116] As a result, foreign ships were not allowed in the Mediterranean except those belongings to States which concluded treaties with Libya or its allies. And in this context, it was common practice for European States (including Mediterranean ones) to enter into treaties with the Ottoman Empire, the North African States and in particular the Tripolitanian State to that effect. Those States failing to renew their treaties, or who failed to establish proper treaty relations, faced the threat of their ships being sunk or captured.

Several instances could be invoked to sustain such a past practice. On the renewal of its Treaty of 1795 with the Basha, for example, Spain paid $20,000 and presented the Basha with a vessel and 18 skilled artisans,[117] and Venice paid him $ 6,000.[118] Similarly, France paid $10,000, and two

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[116] Irwin, op. cit., p.40.

[117] F.O., 76/5, Lucas to Portland, July 26th, 1796, Feraud, L.C., Annales Tripolitaines, Paris, 1927, p.308.

[118] F.O., 161/10., Lucas to Portland, 30 June 30th, 1795.

vessels.[119] Sweden quickly settled its dispute with the Basha, paying $158,000 immediately, and saw its premium increase from $5,000 to $8,000 yearly.[120]

Further, in 1789, Libya and the US signed a treaty by which American ships were permitted to navigate peacefully in the Mediterranean Sea, in return for the payment of a subsidy to Libya. Article 10 of the Treaty read as follows:

> "The money and presents demanded by the Bey of Tripoli as a full and satisfactory consideration on his part...for this treaty of perpetual peace and friendship, are acknowledged to have been received by him...And no pretence of any periodical tribute or further payment is ever to be made by either party."[121]

Relations between both States failed to live up to "perpetual peace and friendship" and by 1801 Libya severed diplomatic relations with the US. In 1803, the Libyan navy inflicted a heavy defeat on the US, and the vessel, Philadelphia with a crew of 307 men, was captured.[122] Normal diplomatic relations were only restored in 1805, and the US paid $60,000 to redeem its prisoners.

Lastly, in 1816, a peace treaty between the King of the

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[119] Id.

[120] For more details of the treaties concluded between Tripoli and other foreign nations as well as the activities of the Corsairs of Tripoli against foreign powers, see Kola Folayan, Tripoli during the Reign of Yusuf Pasha Qaramanli, Univ. of Ife-Ife, Nigeria, (1979), p.30. It is important to be reminded of the fact that there are have been several letters from the British Consul, specially F.O. 161/10, Lucas to Various Home Officials (1796-7).

[121] Miller, M., Treaties and Other International Acts of the United States of America, Vol.2, US Government Printing Office, Washington, D.C., (1931), pp.364-367.

[122] Kola Folayan, op. cit., pp.35-36.

Two Sicilies and Tripoli was concluded, the former being eager to secure Libyan friendship for the safe passage of his ships. The King paid $58,000 under the treaty to Libya.[123]

It can then be implied that the Gulf of Sirte was a part of the seas over which the Ottoman Empire through the Tripolitanian State exercised effective control until it was in turn succeeded by Italy in 1911.[124] During Italian colonial rule, the Gulf of Sirte served as a vital bay for both Italian fishing and naval operations, and prompted Despois to maintain that the Gulf of Sirte is 'the most decided frontier, natural and human, to be found anywhere in the world'.[125]

The Italians tried to dominate large parts of the Mediterranean, including the Libyan coast and its bays and gulfs. Ernle Bradford commenting on the Italian efforts to control the Mediterranean, wrote:

> "Mare Nostrum Mussolini had proudly called it, reminding his listeners that the whole sea was once again under Roman control, and that it was the intention of fascism to reassert another ancient authority".[126]

However, the Italians were defeated in the Second World War and were not able to establish a stable sovereignty over the Mediterranean. But, there is evidence that the Italians

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[123] Vol.3, BFSP, 1815-1816, pp.546-548.

[124] As will be shown in chapter 3, section 3, 2.3.2.

[125] Despois, J., La colonisation italienne en Libye: problèmes et méthodes, Larose Ed., Paris, 2nd ed., (1972), p.45.

[126] Bradford, Ernle, Mediterranean: Portrait of the Sea, Hodder and Stoughton, London, Sydney, (1971), p.537.

exercised sovereignty over the Gulf of Sirte as they controlled sponge banks beyond the territorial waters limit.[127] The Gulf was also used as a military refuge for Italian war ships, as will be examined later.[128] The legal significance of the Libyan maritime practice and the above-mentioned treaties will be considered later.[129]

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[127] MAE., Correspondance commerciale et politique, 1897-1916, No.28 (1911-1916), Paris.

[128] See chapter 3, section 2, 2.3.2.

[129] Id.

CHAPTER TWO :

HISTORICAL ANALYSIS OF THE CONCEPT OF BAYS AND THE DOCTRINE OF HISTORIC BAYS IN PUBLIC INTERNATIONAL LAW

I. Introduction

Historically, explicit reference to the term "bays" can be discerned in State practice at the beginning of the 16th century though it cannot be asserted that State sovereignty over large areas of the seas bordering their shores, prior to this period, was entirely alien to the then prevalent State activity. Indeed, both Bynkershoek[1] and Selden[2] admitted that although an entire ocean could not be brought under the dominion of a single State, it was nevertheless possible, and legally justifiable, that large parts of the seas were susceptible to appropriation, and that various nations had, at different periods of history, exercised such dominion. In this context, Fulton writes that:

> "The actual application of these large boundaries appears to have been confined to parts of the Mediterranean, where the doctrine took its rise, and where it survived until the 18th century."[3]

Grotius also recognised the validity of State claims to dominion over sea areas, but sought to limit such claims,

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[1] Bynkershoek, C.V., De Dominio Maris Dissertatio (1703), trans. Magoffin (1923) in Scott, J.B., (ed.)., The Classics of International Law; (1930), op. cit., pp.41-105.

[2] Selden, J., Mare Clausum, trans. by M. Nedham, London, 1652, pp.41, and 99-100.

[3] Fulton, op. cit., p.541.

thereby buttressing the doctrine of **mare liberum** to specific instances where exceptional claims could be considered legitimate given the vital interests of the coastal State.[4] Hence, the doctrine of **mare liberum** conceptually admitted the right of States to make claims of jurisdiction over sea areas considered as an integral element of the adjacent land territory, entailing the rightful assertion of sovereignty.

Both the TSC and the 1982 Law of the Sea Convention (LOSC) provide that the rules concerning bays do not apply to historic bays; as a result it appears **prima facie** that such provisions[5] form a kind of exceptional regime. To assert such a view or to verify it, it is necessary to examine and analyse the theory of historic bays and look at its origins, and development. This chapter will examine the historical crystallisation of the concept of bays and gulfs, over which State sovereignty gradually and inexorably encroached as political, economic, and strategic needs acquired growing significance in a rapidly shrinking world.

As will be seen in this chapter, since time immemorial States used to exercise sovereignty over territories similar to the Gulf of Sirte. To assist the following discussion, the chapter will be divided into four sections: this section delimits the issues to be discussed in this chapter and

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[4] Grotius, H., De Jure Belli Ac Pacis, Libri Tres, trans. Kelsey, F.W., Oceana Pub. Inc., New York, Wildy and Sons (1964), London, pp.209 and 212-213. See also Mare Liberum, trans. Magoffin, R.V.D., (ed.)., Scott, J.B., New York, Oxford University Press (OUP), London, (1916), p.37.

[5] See Articles 7 (6) of the TSC and 10 (6) of the LOSC. The latter Convention was adopted on April 30th, 1982, by the Third United Conference on the Law of the Sea (UNCLOS III), Brownlie, I., (ed.)., Basic Documents in International Law, (4th ed.), Clarendon Press, Oxford, (1983), p.127. The LOSC was signed later in the same year, see infra notes 270-1.

outline the relevant considerations involved; section two will discuss the historical background to the doctrine of historic bays from the ancient period to the 19th century; the Islamic State practice regarding the international law of the sea, the origins of this doctrine, and the definitions of bays, historic waters and historic bays. Section three seeks briefly to delineate the development of the law of bays and historic bays between the 18th and the 20th century i.e., the emergence of customary international law through international judicial decisions, the various attempts to codify the rules and definitions on the historic bays doctrine which were made by international bodies, international law conferences, the International Law Commission (ILC), and the Second and the Third UNCLOS. Finally, section four will briefly assess the state of affairs of this theory i.e., the theory of historic bays. Such assessment will undoubtedly help to consider the Libyan claim over the Gulf of Sirte.

II. Historical Background to the Doctrine of Historic Bays

2.1. The Ancient Period to the 19th Century

Levantine peoples took the view that it was possible to create and maintain dominion over the seas,[6] though at this early period of history, the sea was still considered an "area of no-law".[7] In this context, Judge Alvarez stated in the

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[6] Phillipson, Coleman, The International Law of Ancient Greece and Rome, Macmillan and Co., (1911), London, Vol.2, p.367. See also Potter, Pitman B., The Freedom of the Sea in History, Law and Politics, Longman, Green and Co., New York, (1924), p.11.

[7] Johnston, D.M., The International Law of Fisheries, Yale Univ. Press (1965), New Haven and London, p.158.

Fisheries Case, that:

> "...[F]or centuries, because of the vastness of the sea and the limited relations between States, the use of the sea was subject to no rules; every State could use it as it pleased".[8]

The maritime provisions of the Greeks recognised that the status of ports, navigable rivers and possibly small bays differed from that accorded to the open seas, to the extent that the former belonged to the State, although all men had the right to use them.[9]

The Roman jurisconsults recognised in the civil as well as in the public law, that the sea was not subject to appropriation. Ulpianus[10] and Celus[11] both maintained that the sea was, by nature, open to everyone, and Marcianus stated that the sea, its fish and its shores were common to all men.[12] The Romans displayed no particular interest in maritime law, and their maritime activities were largely concerned with military operations.[13] State jurisdiction did not extend seaward from the shore, and the shore was defined as the high-water mark of the flood tide.[14]

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[8] ICJ Reports, 1951, p.145 at p.146.

[9] Fenn, P.T., Justinian and the Freedom of the Sea, Vol.20 AJIL, (1925), pp.716-727 at p.718. See his other work: The Origins of the Right of Fishery in Territorial Waters, Harvard Univ. Press, Cambridge, 1926, p.131.

[10] Ulpianus, Mari Quod Natura Omnibus Patet, p.4 as quoted by Balch, T.W., Is Hudson Bay a Closed or an Open Sea?, Vol.6 AJIL (1912), pp.409-459 at p.410, n.3.

[11] Celus, Maris Communem Usum Omnibus Hominibus Ut Oeris, p.8, as quoted by Balch, ibid., n.4.

[12] Fenn (1925), p. cit., p.727.

[13] Johnston (1965), op. cit., pp.158-9.

[14] Fenn (1925), op. cit., p.723.

The ancient Minean Arab Kingdom, which dominated the Indian Ocean and Arab coastal trade, recognised the need to "protect the adjacent waters which washed their land in order to protect commerce, and protect themselves from attacks of rival States."[15]

However, by the Middle Ages, it became gradually apparent that many sovereigns had begun to claim dominion over parts of the seas, as a reaction partly against piratical activity, but also in order to secure perceived strategic interests. During the reign of King Edward II (1307-1327), bays, gulfs and estuaries were regarded as inter fauces terrae belonging to the countries they bordered if one shore could be reasonably discerned from the other shore. However, the low-water mark remained the extent of the jurisdiction of the common law in coastal areas.[16] The Venetians demanded the payment of fees from all vessels sailing in the Adriatic Gulf and Sea. The claim of Venice to "the sole dominion and absolute sovereignty of the Adriatic Sea" was still maintained in the first quarter of the 17th century.[17] The Venetians claimed ownership over those bays and gulfs bordering their territory, provoking Alphonse de Castro to maintain that their actions contradicted the primitive rights of mankind. He writes :

"...[H]ow much to be suspected is the opinion of

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[15] Ministry of Cultural Affairs, (ed.)., Evolution of the Sea Science and its Impact on the Development of Civilization, Tunis, (1976), p.32.

[16] Fulton, op. cit., p.547.

[17] Verzijl, J.H.W., International Law in Historical Perspective, 10 Vols., A.W. Sijthoff, Leyden, Vol.1 (1968) to Vol.10 (1979), Vol.4, p.13.

> those...who think that the Genoese or the Venetians can without injustice prohibit other nations from navigating the gulfs or bays of their respective seas, as if they had a prescription right to the very water itself."[18]

Similar claims were also made by Genoa in the Ligurian Sea and the Tuscans and Pisans in the Tyrrhenian Sea.[19] The Sultan of Turkey assumed and exercised sovereignty over the seas adjoining his seas,[20] but the Venetian claim went so far as to claim actual ownership, not merely exclusive jurisdiction. Property rights were asserted in relation to the whole Adriatic Gulf and Sea, and also to the islands contained therein. These claims had gone uncontested by other States for a long time because of the Venetians' predominance as a maritime power. The State of Tripoli also predominated in parts of the Mediterranean and controled bays and gulfs along the Libyan coast without protest by other States, as will be seen later in this thesis.[21]

But, in addition to Alphonse's writings, the Venetian claims were also against the doctrine of Bartolus of Sassofrato (1314-1357), the famous lawyer and academic at Pisa and Perugia. Bartolus maintained that a State could exert exclusive rights of jurisdiction within its adjacent waters without there being any claim of ownership over these waters.[22] He did not accept that Venice might have property

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[18] Alphonse de Castro, De PoteState Legis Poenalis, (1558), quoted by Grotius, Mare Liberum, op. cit., p.53.

[19] Selden, op. cit., p.105.

[20] Ibid., p.119.

[21] See chapter 3, section 2.

[22] See Sireni, A.P., The Italian Conception of International Law, Columbia Univ. Press, New York, Morningside Heights (1943), pp.7, and 57-63; Woolf, C.N.S., Bartolus of

rights in the islands on the ground of immemorial usage.[23]

Bartolus introduced a specific extent of seaward jurisdiction of one hundred miles. This limit has been attributed to Bartolus because of his statements on offshore islands which he maintained belonged to a province if they were within a "moderate" distance such as one hundred miles. This "imperium" of one hundred miles was roughly a two-day sea voyage. Such a distance thus made the Adriatic an Italian sea.[24]

Baldus Ubaldus (1327-1406), a pupil of Bartolus, also gave a wide limit to the maritime rights of the Prince of the adjoining territory, but only sixty miles. The boundaries these lawyers suggested were accepted by civilians with some qualifications with regard to the nature of the rights exercised.[25]

Baldus seems to have gone a little further than Bartolus by including sovereignty as well as jurisdiction among the rights of the neighbouring prince. He also maintains that the sea adjoining a State belongs to its territory. Thus, as in the case of Venice, a State had power to impose taxes for the

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Sassoferrato, Cambridge (1913); Bodin (1530-1596) said much the same thing. He was a French lawyer who wrote that although the sea was incapable of appropriation, the Prince of an adjoining country could impose law on those who approach the coast up to a distance of sixty miles from the shore: Bodin, J., De Republica, Book 1, as quoted by Fulton, op. cit., p.540. See also infra notes 25-6 and 66.

[23] As quoted by Sireni, op. cit., pp.3-34 and 74-75. See also Johnston (1965), op. cit., p.161; and Swarztrauber, S.A., The Three Mile Limit of Territorial Sea, US Naval Institute Press, Annapolis, Maryland (1972), p.11.

[24] As quoted by Sireni, op. cit., p.74.

[25] Ibid., pp.7 and 72-73. See also Nys, E., Les origines du droit international, Alfred Castaigne, Brussels (1894), p.381. See also supra note 22, and infra notes 26 and 66.

use of it.[26]

Moreover, further claims were made by the Scandinavian Kingdoms, which claimed extensive dominion over the sea,[27] and Eric X declared that no nation had permission to trade or fish in Norwegian seas without a special licence from the King of Norway.[28] In 1490, John II of Denmark and Norway, and Henry VII of England, agreed by a treaty that English ships would, conditionally upon the issue of the appropriate licences, have the right to conduct fishing activities in the seas between Norway and Iceland.[29]

The Queen City of the Adriatic claimed that the sovereignty of the Lion of St. Mark extended over the northern part of the Adriatic Sea, and exacted tolls from vessels navigating it.[30] Spain claimed sovereignty over the Pacific Ocean and the Gulf of Mexico; and Portugal over the Indian Ocean and that part of the Atlantic south-west of Morocco.[31]

In 1521, a treaty concluded between Charles V and Francis I of France stated, **inter alia**, that ships and mariners belonging to both sovereigns should be safe from attack in bays and harbours.[32] Maritime claims reached a peak when

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[26] As quoted by Fulton, op. cit., p.540. See also supra notes 22 and 25, and infra note 66.

[27] Waultrin, R., La question de la souveraineté des terres arctiques, Vol.15 RGDIP (1908), pp.401-23 at p.403.

[28] Selden, op. cit., p.448.

[29] Ibid., p.450.

[30] Ibid., p.99.

[31] Fulton, op. cit., p.5.

[32] Du Mont, J., Corps universel diplomatic du droit des gens contenant un recueil des traités, Amsterdam, (1726), Vol.4, p.352.

Portugal and Spain began to play an increasingly prominent role in maritime affairs.[33] Indeed, the Papal Bulls of 1493[34] divided the globe between Spain and Portugal by a line drawn from pole to pole a hundred leagues west of the Azores. By the Treaty of Tordessilas of 1494, both sovereigns had moved the line to 370 leagues west of the Cape Verde Islands.[35] In effect, ownership of the high seas was effectively contemplated by this treaty.

It was left to Queen Elizabeth I of England to challenge the Spanish-Portuguese monopoly of the maritime world. In this context, Fulton writes:

> "...[T]he use of the sea and the air is common to all; neither can any title to the ocean belong to any people or private man".[36]

The Dutch, an aspiring naval power, supported the English, so that by the 17th century, the general principle of the freedom of the high seas became an accepted maxim of law.[37]

During the 16th century the concept of "territorial sea" appeared for the first time. It was Gentili (1552-1608) who introduced this concept into the law of the sea, using the term to describe the belt of marginal sea over which the

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[33] Davenport, F.G., European Treaties Bearing on the History of the United States and its Dependencies to 1648, Carnegie Institution of Washington (1917), Washington D.C., pp.13-26.

[34] Verzijl, op. cit., Vol.4, pp.16-19.

[35] Smith, H.A., The Law and Custom of the Sea, 3rd ed. Stevens and Sons (1959), London, p.5.

[36] Fulton, op. cit., p.107.

[37] Smith, op. cit., p.5.

dominion of the littoral State extends.[38] However, although Gentili recognised the freedom of the sea, he did not accept that dominion could be exercised over the high seas, primarily because "the sea belongs to all".[39] For a State to claim exclusive dominion over the high seas constituted an act of usurpation which was unlawful.[40]

State practice gradually gave rise to important questions governing territorial waters, bays and gulfs. The "headland" theory, which originated in England at the beginning of the 17th century, attempted to provide a basis for the future definition of bays. Those bays enclosed by the headlands of the English coast were declared, in a proclamation of James I in 1604, to be internal waters. Merchant shipping was to be protected from attack on the coast near the harbours within straight lines drawn from headland to headland. These lines were based upon "ancient limits"[41] enclosing all the "ins and outs" of the coast. The rights that could be exercised with regard to the bays on the coast of England related only to neutrality, and were not concerned with fishing.

The headland theory (King's Chambers) seems to have been accepted at that time by the Dutch, who sent their delegations to London after James' Proclamation to discuss their rights of fishery within waters which might have been prohibited by this proclamation. A conference was held at which the Dutch

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[38] Gentilli, A., De Jure Belli, Libri Tres (1598), trans. Rolf, 1612, in The Classics of International Law, Scott, (ed.)., op. cit., p.384.

[39] He maintains that "rivers are different from sea", ibid., p.92.

[40] Ibid., p.91.

[41] Selden, op. cit., p.367.

contended for complete freedom of fishing, basing their argument on "immemorial possession, on the existence of treaties and political consideration" and then declared that by the law of nations the sea was as common to all men as the air, which no-one could prohibit. No prince, they said, could "challenge further into the sea than he can command with a cannon except gulfs within their land from one point to another."[42]

The King's Chambers or bays theory has been used as an argument to define bays and gulfs. The English Attorney General made it clear three centuries later that the King's Chambers or bays, "still stand perfectly good".[43] It is also the origin of the baselines system, widely applied nowadays by States after it was first accepted by the TSC (Article 4) and passed intact to Article 7 of the LOSC.[44]

2.1.1. Grotius and the Doctrine of Mare Liberum

The doctrine of **mare liberum** was conceived by Grotius to

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[42] Fulton, op. cit., p.156. The French also protested against James' Proclamation. Jeannin, P., a French lawyer and diplomat wrote that the proclamation:

> "...[E]st à la vérité étrange et injuste; car les princes n'ont à eux que leur ports et havres, et ce à quoi la portée du cannon peut atteindre; mais ce qu'on est plus éloigné et commun à tous par le droit des gens...".

As quoted by Petitot, J., (ed.)., Les négociations du Président Jeannin, Paris (1821-1822), Vol.5, p.517.

[43] North Atlantic Coast Fisheries Arbitration (1910), Permanent Court of International Justice (PCIJ) Vol.2, **Pleadings**, p.4164.

[44] This study is not concerned with the baselines system.

establish the rights of the Dutch to trade with countries of the East. Grotius writes:

> "...[T]he most specific and unimpeachable axiom of the law of nations, called a primary rule or first principle, the spirit of which is self-evident and immutable to wit. Every nation is free to travel to every other nation, and trade with it."[45]

Grotius maintained that all property is premised upon occupation, so that what is incapable of occupation, for example, the open sea, 'cannot be the property of anyone'[46] and therefore remain common to all mankind.[47]

Moreover, agreement between maritime States purporting to allocate control over areas of the seas between them, could not thereby bind other nations.[48] Grotius also maintained that property rights over the seas could not be acquired by custom or long use.[49] He considered it wrong of the Venetians and Genoese to prohibit the navigation of foreign vessels in their gulfs and bays, because no State could acquire the **ius prohibendi** in a **res publica** by prescription.[50]

According to Grotius, a prescriptive right would only be effective and valid if three conditions were fulfilled:

> "Possession not only for a considerable period, but from time immemorial; next, that during all that time no one else shall have exercised the same right of possession unless by permission of that possessor or clandestinely; besides that, ... he shall have prevented other persons

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[45] Grotius, Mare Liberum, op. cit., p.7.

[46] Ibid., p.27.

[47] Ibid., pp.28 and 50-2.

[48] Ibid., p.35.

[49] Ibid., p.48.

[50] Ibid., p.49.

> wishing to use his possession from so doing, and that such measures be a matter of common knowledge and done by the sufferance of those concerned in the matter."[51]

He rejected the Papal Bulls of 1493 and the Treaty of Tordessilas; no physical appropriation or actual possession of the areas concerned could be said to exist. It was entirely irrational to assume that the mere sailing of the seas constituted "occupation". The common use of the seas, by all peoples, could not be restricted.

Grotius again referred to the inviolable character of the sea,[52] and with regard to bays, he stated that:

> "...[I]t would appear that the sea also can be occupied by him who holds the lands on both sides, even though it may extend above as a bay, or above and below as a strait".[53]

Grotius was careful to assert that claims to gulfs or those areas of the sea that could be seen from the shores could not be necessarily contested; instead, the question in issue is the "outer-sea, the ocean".[54] Implicitly therefore, Grotius recognised the right of an adjacent State to exercise sovereignty over bays and gulfs.

2.1.2. The Doctrine of Mare Clausum

Welwood sought to counter Grotius' doctrine on the basis of largely theological principles, by arguing that God's

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[51] Ibid., p.58.

[52] Grotius, De Jure Belli Ac Pacis Libri Tres, op. cit., pp.209-213.

[53] Ibid., p.209.

[54] Grotius, Mare Liberum, op. cit., p.37.

commands to "subdue the earth and rule over the fish" could not be effected except "by a subduing of the waters also".[55] Furthermore, God had never intended the sea to be common, but to be divided among peoples in 'propriété'".[56] Welwood referred essentially to coastal waters, and not to the oceans themselves.[57]

According to Selden, acquisition of maritime areas could only gain effectiveness by occupation, so that to this extent he concurred with Grotius.[58] But Selden took the view that this precept rested upon divine law.[59] Selden believed that the primary elements of sovereignty comprised possession, and long, continuous, uncontested usage. It was inaccurate to suggest that the sea had no limits,[60] nor that it was inexhaustible through careless use.[61]

The doctrine of **mare clausum** was also supported by Pufendorf, although he accepted Grotius' view that an entire ocean could not become a nation's property.[62] Nevertheless,

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[55] Welwood, W., An Abridgement of All Sea Laws, Gathered Forth of All Writings and Monuments, Which Are to be Found Among Any People or Nation Upon Coasts of the Great Ocean and Mediterranean Sea; and Especially Ordered and Disputed for the Use and Benefit of All Benevolent Sea-Farers, within His Majesty's Dominions of Great Britain, Ireland and the Adjacent Isles Thereof, London (1613), deals with the "community" of seas at p.7.

[56] Ibid., p.63.

[57] Ibid., p.72.

[58] Selden, op. cit., p.23.

[59] Ibid., pp.41-42 and 99-100.

[60] Ibid., p.135.

[61] Ibid., p.141.

[62] Pufendorf, S., De Jure Naturae et Gentium Libri Octo (1672), trans. Oldfather, C.H. and W.A., in The Classics of International Law, Scott, (ed.)., op. cit., p.561.

States did possess special rights in waters near their shores: thus, whilst bathing and fishing water were acceptable, as they did not threaten to exhaust the sea, the catching of fish and gathering of other products without limit was unacceptable, as these were harmful to other coastal nations. Pufendorf also viewed coastal waters as a nation's defence against attack, so that it would be impermissible for a warship to pass through coastal waters without a special licence from the coastal power.[63] Thus, there could be important reasons for "peoples making a certain part of the sea their own, to the extent that all other Nations were obliged to recognise uses of it as a kindness on the part of its sovereign".[64]

Pufendorf further maintained that no special act of appropriation was required to claim sovereignty over particular areas of the seas. Authority over adjacent waters was vital for defence purposes, especially in those "parts or places where an easy landing can be made".[65] Pufendorf concurred with Bodin and Baldus that, "a ruler can impose his law upon those who approach within sixty miles of his shores".[66] Moreover, maritime dominion could, if necessary, be extended in the same manner as occupied land could be via expansion into adjacent and vacant areas. The juxtaposition of the Libyan claim over the Gulf of Sirte, and Pufendorf's theory, removes the need to validate the former by vague

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[63] Ibid., p.562.

[64] Ibid., p.563.

[65] Ibid., p.561.

[66] Ibid.; see supra notes 22 and 25-6 about the doctrine of Baldus and Bodin and the 60 mile-limit of territorial waters.

reference to "immemorial usage".

Of bays, Pufendorf asserted that:

> "[They]...belong to that nation whose territory encloses any particular one, the same being true of straits".

If a bay stretched along the coast of more than one State, "their several dominions are understood to extend straight out from their territories to its centre".[67]

It can be suggested then, that during the 17th and 18th centuries, State practice moved closer forward in insisting upon complete sovereignty over bays. The Dutch publicist, Bynkershoek, agreed with both Pufendorf and Selden that large parts of the sea, such as wide bays, could be validly appropriated by coastal nations. However, no ruler or nation could attempt to claim such maritime dominion unless the land surrounding an area of the sea already belonged to that ruler or nation, and the general freedom of the seas for navigation had been established both by usage and by treaty.[68]

De Vattel also argued that the sea adjoining the coasts could be possessed by a State.[69] Moreover, a bay whose entrance could be defended may be occupied and subjected to the laws of the sovereign. This was all the more necessary since the coastal nation could be much more easily attacked and invaded at those places, rather than on the open coasts which were subject to the "winds and impetuosity of the

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[67] Pufendorf, op. cit, p.561.

[68] Bynkershoek, De Domino Maris Dissertatio, op. cit., p.41. See also, Oudendijk, J.K., Status and Extent of Adjacent Waters, A Historical Orientation, Sijthoff, A.W., Leyden (1970), pp.107-15.

[69] De Vattel, E., Le Droit des Gens, trans. Fenwick, C.G., in Scott, The Classics of International Law, op. cit., p.107.

tides".[70]

By the end of the 18th century, no clear rules had been established to delimit the seaward limits of bays, although there is evidence that the "cannon-shot" rule was applied to some extent, within certain bays.[71]

Spain, in 1775, asserted its sovereignty over bays by a Royal Decree, allowing the "detention" of small French vessels loaded with contraband and found at a distance of two leagues from the coast, ports, river mouths and bays.[72] Article 1 of the Tuscany Regulations of 1778 stipulated that "no act of belligerent powers can be committed in seas adjacent to...ports, bays...of the Grand Duchy".[73] In a treaty between Great Britain, Denmark, Norway and the Netherlands, it was stated, inter alia, that:

> "No enemy of Great Britain or Netherlands permitted to capture their ships in...bays or ports of the Dano-Norwegian King".[74]

In 1779, Genoa asserted that "no act of hostility between belligerent powers can be committed in the ports and gulfs".[75] Article 19 of the 1787 treaty between Russia and the two Sicilies declared that:

"...[A]bsolute neutrality shall also be observed in the

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[70] Ibid., p.109.

[71] Fulton, op. cit., pp.464-573.

[72] Crocker, H.G., The Extent of the Marginal Sea, US Government Printing Office (1919), Washington, D.C., p.623.

[73] De Martens, Recueil des traités, 2nd Series (1818), Vol.3, p.25.

[74] Crocker, op. cit., p.518.

[75] De Martens, op. cit., p.53.

ports, harbours, gulfs and all waters without distinction that are comprised under the designation of closed waters".[76]

In 1794, the US and Great Britain agreed in Article 25:

"Neither of the said parties shall permit the ships or goods belonging to the subjects or the citizens of the other, to be taken within cannon-shot of the coast, nor in any of the bays, ports or rivers of their territories".[77]

By an Act of March 1799, the US asserted, for customs purposes, jurisdiction within bays, harbours, etc.[78]

In the 19th century rules concerning bays and other large areas of water were being developed. Kent, in commenting on the extent of territorial waters, urged that the extent of the territorial waters over which the sovereignty of the USA extended, ought to be enlarged. He stated:

"Considering the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and...to assume, for domestic purposes connected with our safety and welfare, the control of the water on our coasts...It is certain that our government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coast, far beyond the reach of cannon-shot, as cruising ground for belligerent purposes...It ought, At least, to be insisted, that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or form a right line from one headland to

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[76] Ibid., p.237.

[77] Crocker, op. cit., p.637.

[78] Ibid., p.704.

another."[79] (Emphasis added).

From the general writings of publicists, and from the evidence of State practice available, a number of general points relating to bays prior to the 20th century may be made:

(1) Sovereignty over bays came to be considered similar to that over ports and harbours, the only difference being one of terminology.

(2) Various methods were utilised to limit the seaward extent of bays - these included the "cannon-shot" rule (proposed by Galiani in 1782),[80] and the range of vision rule, which was applied in the Treaty of Peace and Commerce of March 5, 1675, between Great Britain and Tripoli.[81]

(3) Sovereignty over a bay implied sovereignty for neutrality and defence purposes, as well as for customs and fishing.

(4) Definite rules concerning closing lines for bays were gradually being developed.[82]

As nation-States proliferated and as the process of industrialisation and technology expanded in conjunction with the growth of populations, tensions increased between nations. Commercial competition spawned new conflicts. Rules were

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[79] Kent, J., Commentaries on American Law, New York, (1826), 13th ed., by Barnes, C.M., (ed.)., Little Brown and Co., Boston (1884), Vol.1, pp.30-1.

[80] Swarztrauber, op. cit., pp.34-36.

[81] Great Britain and Tripoli, Treaty of Peace and Commerce, March 5th, 1675, Vol.1, BFSP, Part 1, p.715. See infra note 125. See also chapter 1, section 5, 5.2.2. note 110; and chapter 3, section 2, 2.2.1. and 2.2.2. note 28.

[82] Strohl, op. cit., p.133.

clearly required to establish certainty and stability. When, for example, larger fishing vessels sailed into what some coastal States regarded as their own waters, it was plain to see why these States were eager to widen the coastal areas under their jurisdiction through the establishment of new rules for bays.

Agreements between States on fishing rights played a role in influencing the law as to sovereignty over bays. It was generally understood that a bay was for legal purposes that area of water inside lines joining two headlands, and thus constituted territorial waters, even though according to Azuni, the centre may be, in some places, at a greater distance than three miles from the other shore.[83] Azuni concluded that it was possible to define a bay in both juridical and geographical terms. A juridical bay possessed an outer boundary, but the coastal State enjoyed complete sovereignty over the waters up to that boundary. However, agreement could not be secured with regard to the distance between headlands and the degree of concavity a geographical bay required in order to qualify as a juridical bay.[84]

In the Grange Case, Attorney-General Randolph, quoting Grotius and Pufendorf, emphasised that bays tended to become the property of States bordering them. He advised the US Government that the ship in question had been captured in its territory because "the United States are appropriators of the lands on both sides of the Delaware, from its head to its

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[83] Azuni, D.A., Sistema Universali dei Principi del Diritto Marittima dell' Europa, (1795), in The Maritime Law of Europe, trans. Johnston, W., New York (1806), Vol.1, p.296.

[84] Ibid., p.234.

entrance into the sea".[85]

In 1796, the then US Secretary of State, Mr. Pickering relied on the same principle when he stated that jurisdiction was fixed at three miles except in the case "of waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the USA be their extension what they may".[86]

Similarly, according to the British Manual of Naval Prize Law 1888, the "territorial waters of a State are those which are three miles from the low-water mark of any part of the territory of that State, or forming bays within such territory; at any rate, in the case of bays, the entrance to which is not more than 6 miles wide".[87]

It came to be recognised by the latter half of the 19th century, that gulfs lying next to a State's continental territory could be enclosed, even if they were not completely within cannon-shot, provided these gulfs were recognised by other countries,[88] and such gulfs could include "historic bays".

Factors were taken into account in enclosing bays and gulfs included: first, whether entry into a bay could be forbidden; secondly, the effect of the land on current at sea and winds; and finally, security conditions of both the bay and the land itself. Nearly all lawyers conceptualised bays and gulfs within the category of harbours, ports and

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[85] Moore, Digest of International Law, Washington, D.C., (1906), Vol.1, pp.735-9.

[86] Ibid., p.704 (emphasis added).

[87] US Naval War College, International Law Topics and Discussions, 1913, Washington, D.C., 1914, p.20.

[88] O'Connell (1982), op. cit., Vol.1, p.352.

roadsteads, thereby in effect recognising the validity to claims of jurisdiction and sovereignty over these areas of the seas.

2.2. The Islamic State Practice Regarding International Law of the Sea

It is almost universally agreed[89] that Grotius "was the first to proclaim the freedom of the sea by elaborate argument".[90] However, the notion of the freedom of the seas was a familiar one for Eastern peoples,[91] despite the belief in some Western circles that international law of the sea is a product of Western thought and civilisation.[92] The lack of regard granted to the role of Eastern and African peoples in the development of international law of the sea is "based on an ignorance of their history and a lack of understanding of their cultures".[93]

In order to illustrate the contribution made by the Muslims to the development of the law of the sea, this discussion will focus on their maritime activities, practice, and their relations with other nations. In this context, Alexandrowicz maintains that when the Europeans came to the East, 'they found themselves in the middle of a network of

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[89] Anand, R.P., Origin and Development of the Law of the Sea, Martinus Nijhoff, The Hague, Boston, London (1983), p.3.

[90] Nussbaum, A., A Concise History of the Law of the Nations, The MacMillan Company, New York, 1962, p.111.

[91] Anand, R.P., International Law and the Developing Countries, Martinus Nijhoff, Dorderecht, 1987, pp.53-68.

[92] Verzjil, op. cit., Vol.1, pp.435-36.

[93] Anand (1983), op. cit., p.5.

States and inter-State relations based on traditions which were more ancient than their own and in no way inferior to notions of European civilization'. He added that the confrontation of the Asian and European States 'took place on a footing of equality, and the ensuing commercial and political transactions, far from being in a legal vacuum, were governed by the law of Nations as adjusted to local inter-state custom'.[94]

The Holy Koran refers to the sea in the following terms:

> "It is He (God) who has subjected to you the sea so that you can eat of its fish and bring up from it ornaments with which to adorn your person."[95]

From ancient times, the Arabs were considered a seafaring people;[96] bays, gulfs and waters adjacent to Arab lands were subjected to their sovereignty. Grotius aptly noted that the Arabs and the neighbouring nations of Africa and Asia, "could not have remained in ignorance of that part of the sea adjacent to their coasts".[97]

Trade relations for example existed between the Sumerians and the Kingdoms of Southern Arabia from the very beginning of Mesopotamian civilization.[98] The Minaeans dominated the

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[94] Alexandrowicz, C.H., An Introduction to the History of Law of Nations in the East Indies, Clarendon Press, Oxford (1967), p.224.

[95] The Holy Koran, 7:13.

[96] See Hourani, G.F., Arab Seafaring in the Indian Ocean in Ancient and Early Medieval Times, Princeton Univ. Press, New Jersey (1951).

[97] Grotius, Mare Liberum, op. cit., p.41.

[98] Vida, Levi Della, Pre-Islamic Arabia, in The Arab Heritage, Nabih Amin Faris, (ed.)., Princeton Univ. Press, New Jersey (1941), p.29.

trade of the Indian Ocean and Arab coasts, and were able to "protect the adjacent waters which washed their land in order to protect commerce and protect themselves from attacks of rival States".[99] The traders of Southern Arabia had also founded settlements in Ceylon by the beginning of the Christian era; and the Roman Emperor Augustus (63 BC-19 AD) established a Roman-Arab "partnership" or "understanding" concerning trade with India.

An account of the maritime activities of the Arabs and other Asian peoples is found in the Periplus of the Erytherean Sea, written by an unknown Greek merchant from Egypt in 50-60 AD.[100] This account spoke of the robust development of Indian and Arabian shipping, and explained that there existed many ports in the areas of the Indian Ocean, Red Sea and East Africa where merchants of many nationalities, 'sold and bought...peacefully protected under the local laws'.[101]

Immediately after the rise of Islam in the 7th century AD, the Arab-Islamic Empire realised the economic and strategic value of dominion over the seas. For instance, the second Caliph, Omar Ibn Al-Kathab took possession of the Persian Gulf after the conquest of Iraq in 638, because of its vital importance to the trade of the area. The Caliph later established a commercial city in the Gulf.[102] Mu'awiyah Ibn Sufian is considered the founder of the Islamic navy, who

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[99] Ministry of Cultural Affairs, op. cit., p.32. See also, Clark, E.L., The Arabs and the Turks, their Origin and their History, Congregational Publishing Society, Boston (1875), p.28. See also Vida, op. cit, p.38.

[100] Hourani, op. cit., p.32.

[101] Anand (1983), op. cit., p.15.

[102] Ministry of Cultural Affairs, op. cit., p.42.

possessed the foresight to realise the importance of adequately protecting Islamic-controlled ports and gulfs, and to counter-attack the Byzantines.

For this purpose, the Byzantine fleet was defeated in the Mediterranean in 698, and "from this time onwards the Arabs were supreme at sea",[103] holding the southern and eastern, and parts of the northern shores of the Mediterranean.[104] In the western part of the Mediterranean, "Arab fleets achieved a dominating position",[105] and controlled some of its islands.[106]

Cyprus was captured in 648;[107] Crete in 823;[108] and the Sicilian Saracens[109] concluded a treaty with the Italian States in 875,[110] in an effort to end the Arab raids on the latter's fleets. By the 7th century, Arab traders had extended their sphere of influence as far as Canton and other Chinese

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[103] The Cambridge Medieval History, The Rise of Saracens and the Foundation of the Western Empire, Cambridge Univ. Press, Cambridge, (1913), Vol.2, p.352.

[104] Ibid., p.188.

[105] Hourani, op. cit., p.57.

[106] The Cambridge Medieval Society, op. cit., p.185.

[107] Shalabi, A., The Islamic History and Civilization, Maktabat al-Nahdah al-Misriyah, Cairo (1966), p.109.

[108] Rashid, Z.I., Crete and Egyptian Rule, Al-Jam'iya al'Misryah li-l-Dirasat al-Tarikhiyah, Cairo (1960), p.19.

[109] The term "Saracen" was in Greek literature. This word first appeared in the ancient inscription and seems to be the name of a single tribe in the Sinai area, then it was used to mean the Arabs: Lewis, B., The Arabs in History, 2nd ed., Hutchinson's Univ. Library, London, (1954), p.12.

[110] The Cambridge Medieval Society, op. cit., p.387.

ports, and even established their own colonies.[111] Arab traders had also successfully secured concessions in India,[112] and established fruitful relations with both Indian coastal rulers and Indian traders. In 935, the Byzantines concluded a treaty of peace with the Fatimide Caliph; and in 982, the Arabs reached the Gulf of Taranto.[113]

The growth of commerce also brought Islam to the Far East, where a number of Muslim States were established, including Java, Malacca, Sumatra and the Kingdom of Majopohit. The Muslim Sultan of Malacca promulgated various maritime regulations[114] which were based on customary principles, as well as provisions of Islamic law.[115] The Malacca Code, dating from the end of the 13th century, regulated law and order on ships on the high seas; the role of a captain in settling disputes; and the provisions concerning the punishment of offenders. The Maritime Code of Macassar, similar in contents to the Malacca Code, even contained provisions relating to charter parties; on the high seas, a ship was considered beyond a sovereign's control.

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[111] Chan Ju-Kua, Chu-fan-Chi, His Work on the Chinese and Arab Trade in the 12th and 13th Centuries, trans. by Harith. F., and Rockhill, W.W., New York, (1966), pp.8-18.

[112] Sastri. K.A.N., Inter-State Relations in Asia, Vol.2 Indian Yearbook of International Affairs (IYIA), (1953), pp.133-153 at p.143.

[113] The Rise of the Saracens and the Foundation of the Western Empire, op. cit., p.388; after the historic bay claim made by Libya in 1973, Italy has also claimed in 1977 that the Gulf of Taranto is an historic bay based on the theory of vital bay as will be discussed later in the thesis, chapter 6, section 2, 2.2.5.

[114] Anand (1983), op. cit., p.30.

[115] See Mansur Abdul-A-Fid, The Maritime Law in the Maliki's Doctrine [Islamic Law], in The Ministry of Cultural Affairs, op. cit., pp.89-105.

The specific character of these maritime rules relating to vessels outside territorial waters, clearly shows that the high seas were accepted as free.[116] Freedom of the seas is further "corroborated by the law relating to piracy which authorised common action of all maritime powers in the vast expanse of the oceanic waters for the purpose of maintaining maritime safety".[117] A direct correlation exists between the development of entrepots and trade centres in the East, and the generally accepted notion of the freedom of the seas.

With specific regard to the Gulf of Sirte, the Arab traveller Ibn Hawakal wrote, in the 10th century, that ships sailed into the Gulf bringing goods, and that the area supported a healthy commercial trade.[118]

The Portuguese concluded several maritime treaties with the Muslims, from 1529 onwards, to obtain safe passage for their ships through the Gulf of Aden, the Gulf of Aqaba, and their adjacent waters.[119]

The Muslim State practice in maritime affairs implies the existence of a legal attitude towards the use of the sea, and the importance of maintaining jurisdiction over parts of it.[120] This attitude was similar to the practice of ancient time and was 'grounded in the substantial body of State

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[116] Anand (1983), op. cit., p.30.

[117] Alexandrowicz (1967), op. cit., p.64.

[118] Najim, M.Y. and Abbas, I., Libya in the Books of Geography and Travellers, Dar-al-Nahar, Benghazi (1968), pp.22, 80 and 182.

[119] Shi-hab, H., Yemen History of Navigation, Dar al-Farabi, Beirut, (1977), pp.146-150 and 155-157.

[120] Ibid., p.13.

practice'.[121] The waters immediately adjacent to the land, including ports and gulfs, were considered as being under the control of the community enjoying sovereignty over the land, whilst the high seas were regarded as free to all.[122]

The Caliph Omar Ibn Abdulaziz regarded the freedom of the seas an inalienable right, granted by God,[123] and to this effect prevented the imposition of those regulations which might hinder the freedom of navigation. The exercise of sovereignty over adjacent waters, harbours and bays, for economic and security purposes, was, however, considered entirely legitimate.[124] Ibn Majid, writing in the 15th century, established the "range of vision" rule to determine the extent of territorial waters; this rule was subsequently adopted in the Treaty of Peace and Commerce (1675) between Britain and Tripoli.[125] Ibn Majid also implied[126] that the concept of territorial waters had become a known customary rule between the nations of the East.

Evidence also exists to show that the Muslims extended

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[121] Selden demonstrates throughout his book the view that there was a legal dominion based on State practice (op. cit., pp.4-5 and 127-135).

[122] Shihab, op. cit., p.17.

[123] Mansur, A.A., Muqaranah bain Al-Shari 'at Al'Islamiyah Wa' l-Qawanin Al-Wadiyah (Comparison between Islamic and Positive Law), Dar Al-Fatah, Beirut, 1970, p.66.

[124] Al-Gunaim, A.Y., Diving for Pearls According to Ancient Arab Sources, That-al-Sala'sil, Kuwait, (1973), p.22. See also Ibn Batutah, The Travels of Ibn Batutah (in the 14th Century), Al-Maktabah a-Tijariyah, (ed.)., Cairo (1938), Vol.1, p.174.

[125] Great Britain and Tripoli, Treaty of Peace and Commerce, March 1675, Vol.1, BFSP, Part 1, pp.713 and 715. See supra note 81. See also chapter 3, section 2, section 2, 2.2.1. and 2.2.2. note 28; and chapter 5, 5.2.2. note 110.

[126] Ibn Majid, Kitab Al-Fawaid, Aleem, A.A., (ed.)., Cairo, (1968), pp.114 and 220.

coastal maritime jurisdiction to such a distance from the shore as would be required to deal with private and contraband vessels. This points to a distinction made between internal waters in which the territorial sovereign possessed certain rights, and the high seas, beyond the dominion of any sovereign.

Hence, a considerable State practice existed amongst Eastern nations of enjoying the benefits of the freedom of the seas to enhance a combination of religious, political and economic goals. This general freedom of navigation continued until the appearance of the Portuguese in the 16th century, prompting Grotius to argue for the principle of **mare liberum.**

2.3. Origins of the Theory of Historic Bays

What is known as the theory of historic bays has gone through a long and complicated historical development. This theory has also been widely associated with the doctrine of historic waters. It has given rise to varying judicial decisions after having been subjected to different interpretations and codification.

The development of this theory has been based mainly on two factors:

-The controversy over the rules of the delimitation of maritime territories of States; and

-the attempts to establish a set of rules relating to the delimitation of territorial waters including bays and historic

bays.[127]

As regards the first factor, States claimed and even exercised authority over adjacent maritime areas to their coasts because they considered them vital to their security and economy. Later, with the lapse of time, if other States contested such control the claimant State would maintain that it had a different opinion about the content of the applicable rule of general international law and that by force of long usage it now had an historic title to the claimed area.[128]

Concerning the second factor, most of the then proposed rules were not accepted because they conflicted with existing situations. For this reason, as the UN Study put it:

> "The proposed rules would stand a better chance of being accepted if they included a clause excepting from its regulations waters to which a State had a historic title".[129]

Similarly, the same study quoted Gidel as saying that:

> "The theory of «historic waters», whatever name it is given, is a necessary theory; in the delimitation of maritime areas, it acts as a sort of safety valve; its rejection would mean the end of all possibilities of devising general rules concerning this branch of public international law...".[130]

It appears then from the above, that the origins of the theory of historic bays are related to the attempts made by

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[127] UN., Juridical Regime of Historic Waters, Including Historic Bays, UN Doc. A/CN.4/143 of Sept. 1962, Vol.1, Yearbook of the International Law Commission (YILC) 1962, pp.1-26 at pp.6-7.

[128] Ibid., p.6.

[129] Ibid., p.7.

[130] Id. See also Gidel, G., Le droit international public de la mer, 'Le temps de paix', Etablissements Mellottée, Paris, Vol.3, p.651.

the various writers, Governments and international bodies to lay down rules for the delimitation of territorial waters in general, and of bays including historic bays in particular. These attempts have been made in order to preserve the freedom of the high seas and to avoid the excessive appropriation of the adjacent high seas by coastal States through the abusive use of baselines or historic waters or bays claims.

In this context, it was suggested, for example, that the territorial sea in bays should be measured from a line drawn further to seaward rather than from the shore of bays.[131] Such a proposal was generally accepted by the majority of States, however, it was interpreted differently. Thus, it was maintained that 'a straight line has to be drawn across the bay at a point at which its two coasts were at a specified distance apart'.[132] Nevertheless, this proposal was still not accurate enough and this led to disagreements between States and writers about the length of closing line of the bay. Hence, different distances were proposed and applied: six, ten and twelve miles. Consequently, the theory of historic waters in general and the doctrine of historic bays in particular appeared only once "the mathematical criteria for delimiting the internal waters of a bay came into some general usage".[133]

After years of efforts, the TSC finally established rules for a closing line of twenty-four miles, hydrographical test

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[131] UN., UN Secretariat Memorandum on "Historic Bays", 1957, Preparatory Doc. No.1, UN Doc. A/CONF. 13/1, UNCLOS II (1960), OR, Preparatory Doc, Vol.1, pp.1-38 at p.2.

[132] Id.

[133] Strohl, op. cit., p.252.

and semi-circular criteria for bays.[134] These rules lay down restrictions upon States to delimit their territorial waters in bays and which in some instances conflicted with existing situations.[135] Hence, there existed several bays and gulfs which were appropriated by States before these rules were laid down in the sense that the territorial sea was measured not from the shore as stipulated in the above rules but from a closing line drawn across the entrance of the bay or gulf whatever its length.

Many States, particularly the maritime powers in order to protect their "acquired rights" over considerable bays and gulfs on the grounds of historic title, opposed any change to the **status quo** and thus, to the legal status of these waters. As a result, and in order not to conflict with the existing situations, an exception to the general rule was provided for under the heading of "historic bays" because these claims were based upon historic grounds. A sort of "safety valve" as Gidel put it[136] was introduced in the general international law in order to allow States to keep bays falling outside the scope of the customary international law relating to bays and later the TSC (Article 7), within their jurisdiction. Bouchez summarises such an exception as follows:

> "In the theory of historic bays, coastal States are entitled to exercise sovereignty over bays which normally fall under the régime of the high seas. According to the above theory, there will under special conditions, arise an exception to the general rules

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[134] See Article 7 of the TSC. Article 10 of the LOSC provides for a similar provision. See also Westerman, G., The Juridical Bay, OUP, Oxford, 1987, p.93.

[135] UN Doc. A/CONF. 13/1, op. cit., p.2.

[136] Gidel, op. cit., p.651.

> governing claims to bays...[T]he function of the theory of historic bays is to create a possibility of escaping the shackles of general rules which govern the sovereignty of coastal States over adjacent waters to their coasts".[137]

It can, therefore, be inferred from his opinion that the theory of historic waters and bays came out at the beginning of efforts to lay down rules for delimiting maritime spaces or zones.

The emergence of this doctrine was confused by its appellation. While some writers referred to it as the theory of historic bays, others put it in a more general context i.e., the doctrine of historic waters. Such a confusion has for a long time been maintained for long because of the common characteristics of the two doctrines. However, they were later on clearly distinguished.

2.4. Definitions of Bays, Historic Waters and Historic Bays

Before defining what are historic waters and historic bays, it is important to define first of all what is a bay in general.

2.4.1. Definitions of Bay

It is useful to consider a number of definitions of the terms "bay" and "gulf". Hence, according to the glossary of the British Admiralty Hydrographic Department, a bay is a comparatively gradual physical indentation of a coastline, the

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[137] Bouchez, L.J., The Regime of Bays in International Law, Sijthoff, Leyden, The Netherlands, (1964), p.199.

width of the seaward opening being usually greater in length than the penetration into the land territory. Gulfs, lochs and firths are considered an entirely different category of maritime geography.[138]

The Royal Geographical and Mining Society of the Netherlands defines a bay as a "recess or inlet in the shore between two headlands or capes". The "Kings Chambers" theory in the UK was utilized to claim possession over the small and large indentations around the coasts of England and Wales from headland to headland.[139]

The New Encyclopedia Britannica classifies a bay as:

> "...[A] concavity of a coastline or re-entrant of the sea or a lake. The difference between a bay and a gulf is not clearly defined, but the term bay will usually refer to a body of water somewhat smaller than a gulf. Numerous exceptions, however, are found throughout the world, such as the Bay of Bengal, larger than the Gulf of Mexico and about the same size as the Arabian Sea."[140]

Clearly, no precise definition of "bay" exists; indeed, the width of some bays may be a few hundred metres only, whilst others may be several hundred kilometres wide, such as the Hudson Bay in Canada.[141]

Under the general definition contained in Collier's Encyclopedia, a bay is:

> "...[A] small part of a larger body of water that indents a land area. Bays may occur in oceans, lakes and gulfs...The mouth of the Hudson River, New York bay, is

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[138] As quoted by Truver, S., The Strait of Gibraltar and the Mediterranean, Martinus Nijhoff, Dordrecht (1980), p.14.

[139] As seen above in section 2, 2.1.

[140] The New Encyclopedia Britannica, 15th ed. (1986), pp.974-5.

[141] Id.

an example of a river mouth bay. A bay is similar to, but usually considered to be smaller than a gulf. The Gulf of Mexico, for example, contains numerous bays - Mobile Bay and Tampa Bay, among others. Although bays are generally smaller than gulfs, Hudson Bay and the Bay of Biscay are both larger than some gulfs. Sometimes it is assumed that a bay must have an entrance of greater width than its interior, but there are many pouch or bottle-shaped bays with narrow entrances."[142]

The Encyclopedia Americana defines a bay as:

"...[A]n inlet of a body of water such as a sea or lake, that extends into the land. A bay is usually smaller than a gulf, and its widest part is usually at its mouth, but the rules for applying the name are not rigid...The Bay of Bengal, east of India, is widest at the mouth but is larger than some gulfs."[143]

In the Oxford Dictionary, a bay is defined as an "indentation of the sea into the land with a wide opening", whilst a gulf is categorised as a "portion of the sea partially enclosed by a sweep of the coast not always clearly distinguished from a bay."[144]

The Longman Dictionary of the English Language defines a gulf as "a part of the sea that is partially or almost completely enclosed by land and is usually larger than a bay."[145]

According to the Sailor's Word Book of 1867, a bay is "an inlet of the sea formed by the curvature of the land between two capes or headlands, often used synonymously with gulf...A

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[142] Collier's Encyclopedia, Collier Inc., London and New York (1985), Vol.3, p.723.

[143] The Encyclopedia Americana, International edition, Library of Congress, Americana Corporation, Washington, D.C., (1978), Vol.3, p.378.

[144] The Shorter Oxford Dictionary, Vol.1, (1933).

[145] The Longman Dictionary of English Language, Longman (1984).

bay has proportionately a wider entrance than a gulf."[146]

The Chambers Encyclopedia defines a bay as "a fairly small entrant of the sea into the land, constructing with one or larger dimensions known as a gulf. The terms are often loosely applied... Bays in contrast to gulfs are usually as wide at their mouths as they are deep."[147] The French Dictionary contains its own general description of bays.[148]

These definitions all point to the fact that indentations of the sea into a coast are generally accepted as either bays or gulfs, although the latter term can more aptly be applied to waters of a relatively larger size, such as the Gulf of Sirte. The term "bay" is usually descriptive of indentations of the sea into the shore which have relatively wide entrances. But clarification of the phrase "wide" is necessary: it refers to the relationship between the width of the entrance and the size of the total areas of the waters of the indentation. The distinction between bays and gulfs is not consistently or rigidly applied on maps; rather, both terms are used interchangeably in geography.[149]

Difficulties arise when definitions of bays/gulfs in geographical terms are inconsistent with more technical, legal principles. It is comparatively easier to clothe geographical definitions with scientific exactitude. But the essential problem remains that of constructing a legal definition within

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[146] Smith, Adm. W.H., Royal Navy, The Sailor's Word Book, rev. by Belcher, E., R.N., London, Blackie & Son (1867), p.87.

[147] Chambers Encyclopedia, Oxford, Pergamon Press (1967), Vol.2, p.169.

[148] Le Petit Robert de la Langue Française, Paris (1972).

[149] Bouchez (1964), op. cit., p.17.

the principles of international law.[150] In this context, Article 7 (2) of the TSC reads as follows:

> "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".[151]

This definition is nowadays accepted by most writers and States after having been debated for a long time. Blum, for example, maintains that the distinction between a bay and a gulf does not exist legally-speaking.[152]

2.4.2. Definitions of Historic Waters and Historic Bays

The concepts of historic waters and historic bays are only mentioned in Articles 10 (7 of the TSC), 15 and 298 of the LOSC but no definition is given or a regime is envisaged for them. Hence, it is necessary to turn to writers. And, in this context, Blum writes that:

> "The term 'historic bays' is designed to define all those areas of water the legal status of which differs, with the consent of other States for what it ought to have been according to the generally recognized rules of law".[153]

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[150] Reeves, J.S., The Codification of the Law of Territorial Waters, Vol.24 AJIL (1930), p.496.

[151] Article 10 (2) of the LOSC provides for a similar provision.

[152] Blum, Y.Z., Historic Titles in International Law, Martinus Nijhoff, The Hague, 1965, p.264.

[153] Ibid., p.264. He translated Gidel who wrote:

"L'expression 'baies historiques'...désigne les espaces

Moreover, the problem of historic waters arises solely with regard to bays the entrance of which exceeds twice the breadth of the territorial sea (twenty-four miles according Articles 7 (4) of the TSC and 10 (4) of the LOSC) and failed to fulfil the requirements of the semi-circular criteria of Articles 7 (2) of the TSC and 10 (2) of the LOSC, but which is situated in the national territory of the coastal State. Therefore, an historic bay is a bay whose closing line may exceed twenty-four miles and does not necessarily comply with the semi-circle test, which is claimed as such by the coastal State and satisfies the requirements of customary international law.

It is important to put emphasis on the fact that it is permissible to draw straight baselines of a longer width than those applied in bays in general. This is applicable to historic bays, the coasts of which belong to single State as well as those bays the coasts of which belong to two or more States. Thus, it can be deduced that historic bays are different from historic waters in the sense that they are first of all, "bays", however not necessarily falling within the definition of Articles 7 of the TSC or 10 of the LOSC.

Furthermore, Cavaré tries to distinguish between two types of waters in asserting that historic waters and bays are maritime areas which are claimed by States as their own

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maritimes dont le statut juridique n'est pas, du consentement des autres Etats, celui qu'il devrait être aux termes des règles généralement admises".

Gidel, op. cit., p.623.

maritime territory.[154]

Due to the fact that the theory of historic bays came out of the doctrine of historic waters, there was as a consequence a confusion between the two theories. As a result, a certain weakness was attached to the term historic bays owing to the fact that chronologically, it was used before historic waters. Cavaré expresses this opinion clearly as follows:

> "L'expression baie ne donne pas satisfaction, car les espaces maritimes en question comprennent des détroits. D'autre part, ce ne sont pas les baies dites «historiques», à proprement parler, qui sont revendiquées mais des droits historiques sur les baies. Ainsi certain auteurs préfèrent-ils substituer l'expression d'eaux «historiques» à celles plus traditionelle de baie historique, cependant la convention de 1958 [the TSC] consacre l'existence de ces espaces sans les définir, emploie le terme de baie [in Article 7 (6) of the TSC]".[155]

Moreover, Bouchez qualifies historic bays as **species** of the **gender** historic waters which means that the former are part of the latter.[156] Furthermore, the expression historic waters like historic bays is in fact a new concept in the international law vocabulary of the 19th century and reflects different geographical situations and locations. In this context, Blum not only distinguishes between the two but goes further in differentiating between on the one hand historic waters and historic rights of delimitation, waters areas lying within and around island formations, historic rights of fishing, sedentary fisheries as historic rights on the other

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[154] Cavaré, L., Droit international public positif, tome 3, Librairie de la Cour d'Appel et de l'Ordre des Avocats, Paris, 1969, p.779.

[155] Id.

[156] Bouchez (1964), op. cit., p.199.

hand.[157] As a result, it is inferred that historic bays are only a part of a more general regime which is the doctrine of historic waters.

Similarly, it has been asserted that both terms are not synonymous, because as the UN Study has pointed out the term historic waters "has a wider scope, as is also apparent from the expression used in the Resolution of the First UNCLOS in 1958 and the UN General Assembly, namely «Historic Waters, including Historic Bays»".[158]

As regards the definition of historic bays as such, Bouchez has formulated it in a very clear manner. Firstly, he lays down the conditions to be fulfilled for the existence of historic waters. He writes:

> "1. The claimed waters area ought to be adjacent to the coast of the claimant State.
> 2. The waters must be claimed by the coastal State à titre de souverain.
> 3. The pretended sovereignty has to be exercised effectively and for a sufficiently long period.
> 4. The so-created situation ought to be a matter of common knowledge, at least for the directly interested States.
> 5. The international community of States, and certainly the directly interested nations must have acquiesced in the pretended territorial rights...".[159]

Then, he gave his definition as follows:

> "Historic waters are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States".[160]

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[157] Blum (1965), op. cit., pp.262, 281, 290, 295, 315 and 331.

[158] UN Doc. A/CN.4/143, op. cit., p.6.

[159] Bouchez (1964), op. cit., p.281.

[160] Id.

The fact that certain waters are characterized as historic implies that the legal régime of these waters is one of the internal waters, in which the State exercises full sovereignty, and where there is not even the right of innocent passage.

Historic waters consist of three categories of seaward areas according to O'Connell who writes that:

> "1. Bays claimed by States which are greater in extent, or less in configuration, than standard bays;
> 2. areas of claimed waters linked to a coast by offshore features but which are not enclosed under the standard rules; and
> 3. areas of claimed seas which would, but for the claim, be high seas because not covered by any rules specially concerned with bays or delimitation of coastal waters".[161]

Again, it is noteworthy to underline that the concept of historic waters is wider in scope than historic bays because it not only includes bays but also other expanses of water which are not necessarily bays like straits, estuaries, mouths of rivers or other waters.

According to O'Connell, although the TSC (Article 7) did not clarify the status of historic waters, it did at least recognize their existence. He writes:

> "...[E]ven if there are no clear instances of historic bays in customary international law, the concept of historic bays has been established in the law by article 7 (6) of the 1958 Geneva Convention [the TSC]...".[162]

Such a consecration has been first recognized by the ICJ in the **Fisheries** Case where historic waters were said to usually mean:

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[161] O'Connell (1982), op. cit., Vol.1, p.417.

[162] Ibid., p.418.

"...[W]aters which are treated as internal waters but which would not have that character were it not for the existence of an historic title".[163]

However, the International Court was quick to stress the fact that there was in reality no conventional international law definition or regime for historic bays or historic waters. It held that:

"...There is neither a definition of the concept nor an elaboration of the juridical regime of 'historic waters' or 'historic bays'. There are, however, references to 'historic bays' or 'historic titles' or historic reasons in a way amounting to a reservation to the rules set forth therein. It seems clear that the matter continues to be governed by general international law which does not provide for a single 'regime' for 'historic waters' or 'historic bays', but only for a particular regime for each of the concrete recognised cases of 'historic waters' or 'historic bays'."[164]

Such a definition appears to have been the logical result of a very complicated process which was characterised by numerous views on the question of historic waters and bays and by the various attempts to codify the rules relating to these waters.[165]

III. The Development of the Law of Bays Including Historic Bays During the 20th Century

Efforts to codify rules and definitions on bay and historic bays were known to have existed since the end of the last century. As pointed out by the UN study most of the codification proposals of the rules relating to bays generally

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[163] ICJ Report 1951, p.130.

[164] Ibid., para.100, pp.74-5.

[165] As will be shown below in section 3.

made reference to historic bays as an exception to the general rules for bays. However, they did not provide for particular clauses for them. In addition, such proposals referred only to bays, the coasts of which belong to a single State.[166] Efforts at codification came from four main sources: (i) international judicial decisions, (ii) international bodies, (iii) international law conferences, (iv) the International Law Commission, and (v) UNCLOS II and III.

3.1. International Judicial Decisions

Two international cases have considerably helped the concept of bays in general and the historic bays doctrine in particular to emerge in State practice and in customary international law: the 1910 North Atlantic Coast Fisheries Arbitration and the 1951 Fisheries Case. Moreover, the development of the rules on historic bays went simultaneously with the codification of the law relating to bays. This explains in part why, for methodological reasons, it is appropriate to deal together with the development of these two concepts.

3.1.1. The 1910 North Atlantic Coast Fisheries Arbitration

In the Convention of October 20th, 1818 concluded between the US and Great Britain, the former renounced to the right to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks or harbours, of his

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[166] UN Doc. A/CONF. 13/1, op. cit., p.14.

Britannic Majesty's dominions in America'.[167] Because of the lack of definition of the term 'bays' in this Convention, this led to several US fishing boats being seized by the British.[168] To solve this dispute, the US and Great Britain decided to refer the matter to the Permanent Court of International Justice (PCIJ) for arbitration. The question asked was 'how the three-mile fishery limit agreed to by the parties in Article 1 of the 1818 Convention was to be measured at bays'. Great Britain argued that US fishing boats should be excluded from all bays whatever the size and that 'bays' has been used in the 1818 Convention in its geographical meaning and that all sea-areas marked as bays on maps are included within the term bays. Hence, the three-mile limit should be measured from a line drawn from headland to headland across every Canadian bay.[169]

The US argued that the term 'bays' as used in the 1818 Convention refers only to small indentations, and that bays more than six miles wide are not territorial, hence they do not fall within the meaning of bays as used in Article 1.[170]

The Arbitral Tribunal rejected the US contention and instead accepted the British view which favoured the geographical definition of the term 'bays' and it held that

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[167] Emphasis added, Article 1 of the 1818 Convention, Vol.11 United Nations of International Arbitral Awards (UNRIAA), p.167 at p.198.

[168] Strohl, op. cit., p.165.

[169] Emphasis added, Proceedings, Vol.1 North Atlantic Coast Fisheries Arbitration, 94 Senate Doc. No.870 61st Cong., 3d Sess., (1909), p.94.

[170] Vol.11 UNRIAA, p.167 at p.198. See also the use of the term 'bays' in the treaties concluded by Libya, in infra chapter 3, section 2, 2.2.1., notes 21-2.

all geographical descriptions of the coast in the Convention are expressed in geographical concepts. It held that:

> "The tribunal is unable to understand the term 'bays'...in other than its geographical sense, by which a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally..."[171]

It said:

> "...[T]he geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of bays penetrating the national coast line. This interest varies, speaking generally in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three-mile rule."[172]

In this context, and insofar as historic bays are concerned, it is noteworthy to recall that Drago has, as in the above opinion, made similar observations in the **North Atlantic Coast Fisheries** Arbitration, when he stated, inter alia, that:

> "Certain class of bays, which might be properly called historical bays...form a class distinct and apart and undoubtedly belong to the littoral country, whatever their depth of penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage, and above all, the requirements of self-defence, justify such a

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[171] Id.

[172] Ibid., p.196.

pretention'.[173]

Such 'particular circumstances' have become known as vital interests which in turn gave rise to the vital bays concept which will be discussed later.[174]

The debate on whether a bay should be defined by geographical test or by the width of its entrance such as six or ten-mile rules continued until 1958 when the TSC has adopted Article 7 on bays and thus settled the matter by clearly favouring the geographical test.

3.1.2. The 1951 Fisheries Case

Just like the Arbitral Tribunal in the 1910 North Atlantic Coast Fisheries Arbitration, the ICJ has in the 1951 Fisheries Case had to deal with the issue of defining a bay by precise limitation or by geographical tests. The parties to this case were influenced by the concepts which related to bays laid down by the Hague Conference of 1930.[175] The UK accepted as a general rule of international law the ten-mile rule for bays and other enclosed waters.[176] However, Norway rejected this and instead based part of its argument on historic grounds which was eventually accepted as being valid

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[173] Ibid., p.206.

[174] See chapter 6, section 2.

[175] As will be shown below in section 3, 3.3.2. See also the Fisheries Case, ICJ, Pleadings, (1951), Vol.1, pp.41-43, 56-60, 66-69, 93 and 315-16; and Vol.2, pp.571-2 and 628-640.

[176] Ibid., Vol.2, p.494.

by the ICJ.[177]

The ICJ rejected the ten-mile rule. It held that:

> "Although the ten-mile rule has been adopted by certain states both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between states, other states have adopted a different limit. Consequently the ten-mile rule has not acquired the authority of a general rule of international law".[178]

The Court went on to add that 'geographical realities' must determine whether a sea-area is sufficiently linked to the mainland or not in order to be subjected to the regime of internal waters.[179]

Moreover, as regards historic bays and waters, the ICJ has recognized the relevance of the local economic interests in the delimitation of coastal jurisdiction in the **Fisheries** Case.[180] Furthermore, such a pronouncement has, according to O'Connell, made it quite clear that 'the whole maritime domain is suffused with the notion of vital interests'.[181] There was a need to define what category of bays constitute historic bays as this was emphasised by Judge McNair in his **Dissenting Opinion** in the **Fisheries** Case. He states:

> "The other category of bays whose headlands may be joined for the purpose of fencing off the waters on the landward side as internal waters is the historic bays, and to constitute an historic bay it does not suffice merely to claim a bay as such, though such claims are not uncommon. Evidence is

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[177] Ibid., Vol.3, pp.438-92. See also the **Judgment** at pp.133 and 138-9.

[178] Ibid., pp.116, 131.

[179] Ibid., p.128.

[180] ICJ Report 1951, p.116 at p.133.

[181] O'Connell (1982), op. cit., Vol.1, p.437.

> required of a long and consistent assertion of dominion over the bay and of the right to exclude foreign vessels except on permission."[182]

However, despite these difficulties of elaborating a definition on historic bays, the ILC went on to try to draft a suitable definition and a regime for bays and historic bays as will be shown below.[183]

3.2. International Bodies

This includes international, regional, and national law associations which submitted draft codifications.

3.2.1. Institute of International Law

The Institute of International Law (1874-1928) made two main proposals on historic waters: one in 1874 and the other in 1928. The former referred to historic bays only incidentally and as an exception to the general rule for bays in its resolutions of 1894 (Article 3).[184] It stipulated:

> "In the case of bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight baseline drawn across the bay at the place nearest the opening toward the sea, where the distance between the two shores of the bay is twelve nautical miles, unless a continued usage of long standing has sanctioned a greater width".[185]

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[182] ICJ Reports (1951), p.164.

[183] See section 3, 3.4.

[184] Vol.3 Annuaire de l'Institut de Droit International (AIDI) (1892-96), p.517.

[185] UN Doc. A/CONF. 13/1, op. cit., p.14.

In the latter, the same proposal was made except that the wording of the last sentence was modified. Article 3 read as follows:

> "...[U]nless international usage has sanctioned a greater width".[186]

The Institute accepted a historic claim as an exception to the general rules for bays but in Article 2 it also recognised the possibility of justifying a claim to a large maritime area by reference to historic usage.[187]

3.2.2. International Law Association

In 1875, the International Law Association (ILA) submitted a similar proposal to the above except that the breadth of the territorial sea was limited to ten miles.[188] The same Association had made reference to the concept of historic waters in its earlier draft of 1895 in the same terms brought into use by the Institute of International Law in the previous year and with reference only to bays. In 1926, the said Association applied the concept of historic waters to the rules of the delimitation of maritime domain. Article 2 of its Resolution gives the rights to each State to exercise sovereignty over maritime areas by reason of an "occupation or established usage generally recognised by nations".[189] Here, it required an express or implied consent of other

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[186] Id.

[187] Id.

[188] UN Doc. A/CONF. 13/1, op. cit., p.14.

[189] Vol.23 AJIL (1929), Special Suppl., pp.373-374.

nations. In 1928, the last sentence of the proposal was modified. It read as follows:

> "...[U]nless an occupation or an established usage generally recognized by the Nations has sanctioned a greater limit".[190]

3.2.3. The American Institute of International Law

It proposed a provision called Article 6 which read as follows:

> "For bays extending into the territory of a single American Republic the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the point nearest the opening into the sea where the two coasts of the bay are separated by a distance of___marine miles, unless a greater width shall have been sanctioned by continued and well-established usage".[191]

In 1933, another proposal which was made clearly expressed the theory of historic bays. It read as follows:

> "There are exceptions for the provisions of the two foregoing articles. In regard to limits and measure, those bays or estuaries called historic, viz, those over which the coastal State or States, or their constituents, have traditionally exercised and maintained their sovereign ownership, either by provisions of internal legislation and jurisdiction, or by deeds or writs of the authorities".[192]

3.2.4. The Japanese International Law Society

This Society adopted a proposal (Article 2) which was stipulated as follows:

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[190] UN Doc. A/CONF. 13/1, op. cit., p.14.

[191] Id.

[192] Id.

"In the case of bays and gulfs, the coasts of which belong to the same State, the littoral waters extend seawards at right angle from a straight line drawn across the bay or gulf at the first point nearest the open sea where the width does not exceed ten marine miles, unless a greater width has been established by immemorial usage".[193]

Again, bays which were subjected to immemorial usage were excepted from the general rule (ten-mile).

3.2.5. Harvard Research

Article 12 of the Harvard Research Draft of 1929 provides that:

"The provisions of this convention relating to the extent of territorial waters do not preclude the delimitation of territorial waters in particular areas in accordance with established usage".[194]

The authors of the Research Draft commented on this Article in the following fashion:

"The Article seems necessary because of historic claims made by certain States and acquiesced in by other States with reference to certain bodies or with reference to particular areas of water. The simplest case is that of an historic bay such as Chesapeake Bay or Conception Bay. It seems desirable that the convention should not interfere with historic claims of this kind based upon usage which has been established before this convention comes into force...Similarly it seems desirable that it should be recognised that usage with respect to other areas may become established in the future and that well-found claims may be based upon such established usage."[195]

Here, the comment confirms that according to the work of

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[193] Ibid., p.15.

[194] Id.

[195] Id.

learned societies, as well as to State practice, the theory of historic bays is regarded as relating to international usage and to the consent of other States in an exceptional claim. A draft submitted by this learned society of international law used as well the expression of "established usage" in its Article 22.[196]

3.3. International Law Conferences

These included the conferences organized by both the League of Nations and the UN. By the beginning of the 20th century, the principles governing the law of the sea gradually acquired greater certainty and stability, thereby permitting the codification of particular rules relating to particular aspects of maritime law.

3.3.1. Draft Submitted by the Committee of Experts for the Progressive Development of International Law (League of Nations)

On September 22nd, 1924, the Assembly of the League of Nations adopted a resolution requiring the Council of the League to appoint a Committee of Experts to codify international law.[197] A proposal was submitted by Mr. SchÜcking which was embodied in Article 4 establishing ten miles for closing lines "...unless a greater distance has been established by continuous and immemorial usage". Such a

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[196] Id.

[197] League of Nations (L.O.N.) Doc., C. 196. M.70, 1927, V. p.5.

proposal was however rejected.[198]

3.3.2. The 1930 Conference on the Codification of International Law

One of the subjects selected for codification was that of "territorial waters".[199] A Preparatory Committee for the International Codification Conference was appointed by the Council of the League on September 28th, 1927. During its meeting of February 6-15th, 1928, a number of issues, amongst them bays, were sent to Governments for their clarification.[200]

The Hague Codification Conference of 1930 threw light on the problem of historic waters, hence, historic bays. In the Government replies with regard to bays, ten of these replies referred directly to historic bays of which seven used phrases relating to the recognition of historic bays by other States.[201] The US did not mention the recognition of other States; it merely mentioned precedents.[202] Norway contemplated the establishment of historic titles by national usage unaccompanied by international recognition.[203] Portugal stated that:

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[198] Ibid., Doc. C. 74.M.39., 1929, V., p.193.

[199] Ibid., p.7.

[200] L.O.N. Doc. C.44.M.21, 1928, V., p.23.

[201] L.O.N. Doc., C.74.M.39.1929.V, Basis of Discussion, op. cit., pp.39-45.

[202] Ibid., p.40.

[203] Ibid., p.42.

> "This exception [of historic bays] is found in the domestic legislation of the various States, their higher interests and necessities, and long-established usages and customs. Moreover, the special position of these bays has been recognised both in judgments of the courts and in certain treaties."[204]

Germany replied that under German Prize Law Regulation, a bay is part of the inland waters of the coastal State provided the width of the entrance did not exceed six miles. The line drawn at the entrance of the bay from one shore to the other constituted the outer limit of national waters, and also provided the baseline from which territorial waters should be measured. If the width of the entrance to the bay exceeded six miles, the boundary between internal and territorial waters was that formed by a line drawn within the bay at the point where the width of the bay ceases to exceed six miles.[205] As regards "historic bays", a State had to show it had acquired legal sovereignty over the bay by virtue of "long usage".[206]

Australia agreed that the six-mile rule was valid in determining the limit of internal waters when measured within bays, but also indicated her acceptance of any possible future ten-mile rule. As to historic bays, it recognised the existence of those "which are regarded by general acquiescence as territorial waters".[207]

As regards the US, when it discussed its claim over Chesapeake Bay, it stated that:

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[204] Ibid., p.43.

[205] Ibid., p.39.

[206] Id.

[207] Id.

"There are arms or inlets of the ocean which are within territorial jurisdiction and are not high seas...Considering therefore the importance of the question, the configuration of the Chesapeake Bay, the fact that its headlands are well marked, and but 12 miles apart, that it and its tributaries are wholly within our own territory; that from the earliest history of the country it has been claimed to be territorial waters and that the claim has never been questioned."[208]

The UK also supplied its own definition of bays:

"In front of bays the baseline from which the territorial waters are measured passes across the mouth of the bay from land on one side to the land on the other. A bay for this purpose is something more pronounced than a mere curvature of the coast. There must be a distinct and well defined inlet, moderate in size, and long in proportion to its width."[209]

The UK submitted a proposal to the Hague Codification Conference of 1930 that six miles should be the accepted width of bays, except that of "historic bays" where the territorial waters should be measured from a baseline drawn across the bay at the point recognised as forming the limits of internal waters.[210]

Egypt has, despite the fact that it was unable to supply

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[208] Ibid., pp.40-41. See also, Stetson v. United States (The Alleganean) Case, Court of Commissioners of Alabama Claims; Moore, J.B., History and Digest of International Arbitrations to which the United States has been a Party, 7 Vols., Washington, D.C., (1898), Vol.4, p.4332. See also Beckett, W.E., The Fagerness Case, Vol.9 BYIL (1928), pp.120-1; and Bellot, H.H.L., Territorial Limits in the Bristol Channel, Vol.9 BYIL (1928), pp.121-26. And with regard to the same problem, i.e., the Bristol Channel, two cases gave rise to the same issue: Regina v. Cunningham, Bell's Reports of Crown Cases (1859), p.72, and The Fagerness Case, Vol.9 BYIL (1928), p.174. See also The Direct U.S. Cable Co. v. Anglo-American Telegraph Co., (The Conception Bay Case), 2 App. Cas. (1877), 394, or in Moore's Digest of International Law, 1906, op. cit., Vol.1, p.740.

[209] L.O.N. Doc. C.74.M.39.V., op. cit., p.163.

[210] Id.

the desired information with regard to point IV (b) relating to bays,[211] however, asserted in its reply to point III, in respect of the question of the breadth of the territorial waters, that:

> "According to the Egyptian public law, the breadth of territorial waters is three miles, except as regards the Bay of El Arab, the whole of which is, owing to its geographical configuration regarded as territorial waters."[212]

Egypt claimed this bay as an historic bay[213] because it was a large bay.

The Netherlands suggested that so far as regards bays, the width of territorial waters should follow a line drawn across the bay as close as possible to the entrance, at the point where the width of the bay did not exceed ten miles. The Netherlands accepted the existence of historic bays, and recognised that these required "precise definition in the proposed convention".[214]

France relied upon Article IX of the Fisheries Convention 1839, and Article II of the Fisheries Regulations 1843, concluded with Great Britain, both of which prescribed that in the case of bays, the opening of which did not exceed ten miles, the baseline consisted of a straight line drawn from

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[211] Ibid., p.40. see also Vol.14 Revue Egyptienne de Droit International (REDI), (1958), pp.173-177.

[212] Ibid., p.125. See also Vol.6 REDI (1950), pp.175-177.

[213] L.O.N. Doc., C. 74. M.39. V. op. cit., p.125. See also Vol.6 REDI (1950), pp.175-176; and Shukayri, A., Territorial and Historic Waters in International Law, Research Centre, Beirut, (1967), p.173.

[214] L.O.N. Doc. C.74.M.39.V, p.177.

one cape to another.[215]

Norway asserted that all fjords, bays and coastal inlets had always been claimed as part of Norwegian maritime territory, whatever the width of their "**skjærgaard**" (coastal archipelago).[216] It also claimed that from "time immemorial, all waters on the landward side of the farthest rocks have been regarded as Norwegian inland waters".[217]

To summarise, the straight closing line system with regard to bays was generally accepted, together with the rule that the length of the closing line should be twice that of the territorial sea limit. Exceptions were, however, allowed for "historic bays". The Preparatory Committee acknowledged that differing opinions were expressed as to the maximum size of the entrance to bays, accepting that no more than a ten-mile limit could be agreed upon.[218] The Committee concluded, with regard to the breadth of territorial waters in the case of bays, that:

> "...[B]ays, the coasts of which belong to a single State, the belt of territorial waters shall be measured from a straight line drawn across the opening of the bay. If the opening of a bay is more than 10 miles wide, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed 10 miles".[219]

Moreover, it was suggested that:

"...[T]he belt of territorial waters shall be measured

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[215] Ibid., p.160.

[216] Ibid., p.174.

[217] Id.

[218] Ibid., p.45.

[219] Id.

> from a straight line across the entrance of a bay, whatever its breadth may be, if by usage the bay is subject to the exclusive authority of the coastal State."[220]

The Second Sub-Committee observed that a single baseline rule could not be applied in all circumstances, given the varying sinuosities of a coast:

> "In the case of an indentation which is not very broad at its opening, such a bay should be regarded as forming part of the inland waters".[221]

However, opinions differed as to the proposed breadth of this opening. Several delegations were of the view that bays, the openings of which did not exceed ten miles, should be regarded as internal waters. Others were only prepared to regard bays as inland waters if their openings did not exceed twice the breadth of the territorial sea. Most of the delegations agreed to a width of ten miles, on condition that a system was simultaneously adopted by which slight or minor indentations in the coast would not be categorised as bays.

The Rapporteur of the Second Sub-Committee of the Committee of Experts observed that if a six-mile limit would be agreed upon as far as the territorial sea was concerned, that this could later be doubled to a twelve-mile closing line for bays, with the waters of the bays designated "inland waters" of the coastal State. Article IV of the Rapporteur's Draft Convention read as follows:

> "In the case of bays which are bordered by the territory of a single State, the territorial sea shall follow the sinuosities of the coast, except

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[220] Id.

[221] L.O.N. Doc. C. 351 (b). M.145 (b), 1930, V. p.219.

> that it shall be measured from a straight line drawn across the bay at the part nearest to the opening towards the sea, where the distance between the two shores of the bay is 12 marine miles, unless a greater distance has been established by conventions and immemorial usage."[222]

Another member of the Sub-Committee, Senhor Magalhaes, was of the view that any definition of "historic bays" should be so phrased as to embody the essential needs of the State concerned:[223]

> "...[I]f certain States have essential needs, I consider that these needs are as worthy of respect as usage itself, or even more so".[224]

What Magalhaes was trying to establish was to give States the right to claim large bays on vital needs.[225]

At the Hague Codification Conference of 1930, the US submitted its proposal for the determination of the status of the waters of a bay.[226]

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[222] As quoted in Vol.20 AJIL (1926), Special Supp., p.85.

[223] L.O.N. Doc, 1930, V.16, p.107.

[224] Ibid., p.106.

[225] The concept of vital interests will be dealt with later in chapter 6, section 2.

[226] Part of which read as follows:

> "...[T]he determination of the status of the waters of the bay or estuary as interior waters or high seas, shall be made in the following manner:
>
> > (1) On a chart or a map a straight line not to exceed ten nautical miles in length shall be drawn across the bay or estuary as follows: The line shall be drawn between two headlands or pronounced convexities of the coast which embrace the pronounced indentation or concavity comprising the bay or estuary if the distance between the two headlands does not exceed ten nautical miles; otherwise the line shall be drawn through the point nearest to the entrance at which the width does not exceed ten nautical miles;

This US proposal envisaged that the delimitation of the territorial waters could be undertaken on the basis that a straight line across the waters of a bay would constitute the boundary between interior and territorial waters. The three-mile belt of territorial waters could then be measured outward from the straight line drawn.[227]

In order to encompass effectively the shape of both small and relatively large bays, the radius was proposed, this being a fractional part of the breadth of the bay between headlands or where it first narrows to ten miles.[228]

The US proposal made it possible to categorise the waters within an indentation of the coast as "internal waters", provided the indentation was sufficiently large.

The French delegation provided that where an indentation of the coast existed:

> "...[T]he breadth of the territorial sea may be measured from a straight line drawn across the

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> (2) The envelope of all arcs of circles having a radius equal to one-fourth the length of the straight line across the bay or estuary shall then be drawn from all points on the coast of the mainland...but such arcs of circles shall not be drawn around islands in connection with the process which is next described;
>
> (3) If the area enclosed within the straight line and the envelope of the arcs of circles exceeds the area of semi-circle whose diameter is equal to one-half the length of the straight line across the bay or estuary, the waters of the bay or estuary inside of the straight line shall be regarded,...as interior waters; otherwise they shall not be so regarded."

As quoted by Boggs, S.W., Delimitation of the Territorial Sea, Vol.24 AJIL (1930), pp.541-555 at p.551.

[227] Id.

[228] Boggs, op. cit., p.551.

> opening of the indentation, provided that the length of this line does not exceed ten miles and that the indentation may be properly termed a bay. In order that an indentation may be properly termed a bay, the area comprised between curve of the coast and its chord must be equal to or greater than the area of the segment of the circle the centre of which is situated on the perpendicular to the chord in its middle, at a distance from the chord equal to one half of the length of this chord, and of which the radius is equal to the distance which separates this point from one end of the curve."[229]

With regard to historic bays, the British proposal suggested that the determination of such bays could be effected on the basis of the configuration of the bay, and the extent to which it penetrated into the land.[230]

At the Conference, the basis of discussion No.8 was studied and read as follows:

> "The belt of territorial waters shall be measured from a straight line drawn across the entrance of a bay, whatever its breadth may be, if by usage the bay is subject to the exclusive authority of the coastal State: the onus of proving such usage is upon the coastal State".[231]

However, no agreement was concluded and in this context, Bouchez writes:

> "...[T]here was no agreement regarding the admissibility of the theory of historic bays as an exception to the general rules for bays. Besides there was also a disagreement with reference to the interpretation of the term «historic bays» on the part of the States which were inclined to recognize this concept".[232]

However, the 1930 Conference did not bring about a

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[229] L.O.N. Doc., C.351 (b) M.145 (b) 1930 V, p.219.

[230] Ibid., p.188.

[231] L.O.N. Doc, C. 74. M. 39, V. p.45.

[232] Op. cit., p.205.

definition of the theory of historic bays.

Despite the fact that no convention was adopted, there was nevertheless a number of draft Articles relating to territorial waters which were approved by the Hague Conference, and "later accepted by Governments as a statement of existing international law".[233]

3.3.3. The Evolution of the Situation After the 1930 Codification Conference

It has been recognised that the Hague Conference "paved the way for a more fruitful effort to be made at some future time".[234] State practice showed that certain rules concerning bays were accepted as customary international law. Some of these rules were already included in the national legislation of some States. Article 2 of the 1914 Maritime Rules of Uruguay provides that:

> "...[W]ith regard to bays, the distance of 5 miles will be measured along a straight line run across the bay at the point nearest its entrance".[235]

Article 1 of Morocco's Neutrality Regulations of 1917 provides that:

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[233] As will be seen below in section 3, 3.3.3. See also Stavropoulos, C.A., The Third Conference on the Law of the Sea in a Historical Perspective, in Rozakis, C.L. and Stephanou, C.A., (eds.), The New Law of the Sea, Elsevrier Science Publ., Amsterdam (1983), North-Holland, New York, p.11.

[234] Hudson, M.O., The First Conference for the Codification of International Law, Vol.24 AJIL (1930), pp.447-466 at p.458; see also his article: The Progressive Codification of International Law, Vol.20 AJIL (1926), pp.655-669 at p.658; and Reeves, op. cit., p.488.

[235] US Naval War College, International Law Topics and Discussions, (1916), Washington, D.C., 1917, p.107.

"...[R]oadsteads, bays, or gulfs, the opening of which measured between the most prominent points of land are less than 12 miles in width...".[236]

In the Fisheries Case, the parties were influenced by the concepts which related to bays laid down by the Hague Conference of 1930.[237]

The twelve-mile rule was also adopted by the Yugoslavian Act of December 1948.[238] Italian law concerning the territorial sea made it clear that:

"Any gulf or bay the coast of which forms part of the territory of the kingdom, shall be subject to the sovereignty of the State, if the distance between the outermost points of the opening of the gulf, inlet, or bay in question does not exceed 20 nautical miles. If such distance exceeds 20 nautical miles, then the portion of the gulf, inlet or bay enclosed within a straight line drawn between the two points laying furtherest to seaward which are separated by a distance of 20 nautical miles shall be subject to the sovereignty of the State."[239]

In the Fisheries Case, the UK accepted as a general rule of international law the ten-mile rule for bays and other enclosed waters.[240] Part of the Norwegian argument was based on historic grounds, accepted as being valid by the ICJ.[241]

The rules of definition differed according to the nature of the bay in question: those whose entrances did not exceed

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[236] Ibid., p.116.

[237] ICJ, **Pleadings**, (1951), Vol.1, pp.41-43, 56-60, 66-69, 93 and 315-16; and Vol.2, pp.571-2 and 628-640.

[238] UN., National Legislations and Regulations and the Territorial Sea, ST/LEG/SER.B/6, New York, 1957, p.314.

[239] Ibid., p.162.

[240] ICJ **Pleadings**, (1951), Vol.2, p.494.

[241] Ibid., Vol.3, pp.438-92. See also the **Judgment**, ICJ Reports, pp.133 and 138-9.

twenty-four miles,[242] and those larger bays where the process of definition rested upon immemorial usage and vital interests.[243] The latter includes both Hudson Bay in Canada, which extends for five hundred and twenty miles; and the Gulf of Sirte, which extends to three hundred miles in width,[244] which will be discussed later in the thesis.[245]

3.4. The Contribution of the International Law Commission to the Development of the Law Regarding Bays and Historic Bays

From the above, it could be maintained that customary international law did not provide 'precise standards for the enclosure of bays within internal waters'[246], this has led François, the Special Rapporteur of the ILC to propose the ten-mile rule[247] and linked it with the semi-circle test.[248] However, after lengthy discussions and criticisms from Governments,[249] a twenty-four mile rule was suggested instead by the ILC to the First UNCLOS by the ILC to the First UNCLOS.[250] Again, this was replaced by a fifteen-mile rule.[251]

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[242] See chapter 6, section 2.2. for State practice.

[243] Id.

[244] Id.

[245] Id.

[246] O'Connell (1982), op. cit., Vol.1, p.489.

[247] Vol.2 YILC, 1952, p.34, see also Vol.2 YILC 1953, p.4.

[248] Vol.2 YILC 1954, p.4.

[249] Vol.2 YILC 1955, pp.45 and 61.

[250] Vol.2 YILC 1956, p.26.

[251] Ibid., p.197.

The ILC's Draft Article 7 defined a bay as follows:

> "(1)...[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 drawn on the mouth of that indentation.
>
> (2) The waters within a bay, the coasts of which belong to a single State, shall be considered internal waters if the line drawn across the mouth does not exceed 15 miles measured from the low water line...
>
> (4) The foregoing provisions shall not apply to so-called 'historic' bays,...".[252]

Of the ILC's definition, Chile observed that the fifteen-mile measurement of the width of a bay was "exceedingly short, especially if it is borne in mind that not a moderately precise definition has been given of 'historic' bays, a definition which is absolutely necessary."[253] Norway took the view that paragraph (1) did not reflect existing principles of international law.[254] Japan proposed the following definition of historic bays:

> "The term historic bays means those bays over which the coastal State or States have effectively exercised sovereign rights continuously for a period of long standing, with explicit or implicit recognition of such practice by foreign States".[255]

The UK objected to the fact that the ILC had failed, in

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[252] UN General Assembly Resolution, 1105 (XI), Feb. 1957, OR, 11th Session, Supp., No.9 (A/3159), p.15.

[253] Vol.1, OR UNCLOS I (1958), Preparatory Documents, UN Doc., A/CONF. 13/5, p.78.

[254] Ibid., p.93.

[255] Ibid., Vol.3, UN Doc. A/CONF. 13/C.1/L/104, p.241.

paragraph (1), to define adequately the criteria by which an indentation would satisfy the definition of a bay, rather than a mere curvature of the coast.[256] Britain also favoured the ten-mile limit as regards the acceptable width of a bay.[257]

Finally, UNCLOS I adopted the twenty-four mile rule[258] in the TSC which undoubtedly represented twice the breadth of the territorial sea of many States. The Final Act of the Conference was signed on April 29, 1958 and the TSC entered into force on September 10th, 1965. Its Article 7 on bays reads as follows:

> "1. This article relates only to bays the coast of which belong to a single State.
>
> 2. For the purpose 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.
>
> 3. For the purpose of measurement, the area of an indentation is that lying between the low water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.
>
> 4. 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 marks, and the waters enclosed thereby shall be considered as internal waters.

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[256] Ibid., Vol.1, p.103.

[257] Id.

[258] Ibid., Vol.3, p.145.

> 5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.
>
> 6. The foregoing provisions shall not apply to so-called 'historic' bays, or in any case where the straight baseline system provided for in Article 4 is applied."[259]

Moreover, as already underlined the existence of historic bays was only confirmed by Article 7 (6) of the TSC without any further definition. The issue of historic bays was raised during the drafting within the Committees, and François, the Special Reporter of the Second Committee, maintained that it was not necessary to mention historic bays as such because the problem of delimitation was wider and required the establishment of general rules with regard to the belt of the territorial sea.[260] He also proposed the concept of historic bays in his Second Report to the ILC.[261] Following debates on this issue, the ILC adopted the proposal as it stands in Article 7 (6) of the TSC.[262]

Moreover, the UN Secretariat elaborated a memorandum on historic bays.[263] Again, after further discussions at UNCLOS I, Panama and India proposed a draft to the effect of requesting the UN Secretary-General to arrange 'for the study of the Juridical Regime of Historic Waters Including Historic

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[259] Ibid., Vol.2, UN Doc. A/CONF. 13/L. 32/32; reprinted in Vol.52 AJIL (1958), pp.835-6.

[260] Ibid., p.16.

[261] Vol.2 YILC 1953, p.76.

[262] See the provision above in supra note 259.

[263] Vol.1, OR, UNCLOS I, p.1.

Bays'[264] which was adopted and the work referred to the ILC.[265] Consequently, this matter was referred to further and more general investigation i.e., within the context of historic waters. Indeed, as will be shown later,[266] the UN Secretariat Memorandum on Historic Bays and the ILC's Study on Historic Waters Including Historic Bays represented, without doubt, an authoritative source of customary international law on historic bays.[267]

3.5. UNCLOS II and III

UNCLOS II met in Geneva from March 17th to April 26th, 1960 but it failed to reach any substantive agreement on the width of the territorial sea.[268] A study on the subject of historic waters including historic bays was produced. However, no decision was adopted following that study, and therefore the problem remained unresolved.

The 1960 Conference did not only fail to reach a substantive agreement on the width of the territorial sea, but also failed to agree on a general definition of historic bays. The Libyan delegation presented a proposal to the Conference. Article 5 of this proposal reads as follows:

"The foregoing provisions shall not affect in any manner

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[264] Vol.3, OR, UNCLOS I, pp.252 and 197.

[265] UN General Assembly Resolution 1453 (XIV), see also Vol.1 YILC 1958 p.111.

[266] As will shown below (section 4).

[267] As will be discussed throughout this thesis.

[268] UNCLOS II, OR, Geneva, March 17th-April 26th, 1960, UN Doc., A/CONF. 19/18.

the juridical status of historic bays".[269]

At the end of the Third UNCLOS, the LOSC which was adopted earlier was finally signed on December 10th, 1982 at Montego Bay, Jamaica.[270] It provided, in Article 10 similar provisions with regard to those contained in Article 7 of the TSC,[271] thus containing no particular or detailed rules for historic bays. However, some proposals have been forthcoming with the LOSC. The concept of historic bays came up for review before this Conference. The problem of historic bays was raised in the Second Committee during the second and third sessions.[272] Many proposals and draft Articles were submitted to the Second Committee, such as the one submitted by Colombia when it stated, inter alia, that:

> (1) A bay shall be regarded as historic only if it satisfies all of the following requirements:
>
> (a) that the State or States which claim it to be such shall have clearly stated that claim and shall be able to demonstrate that they have had sole possession of the waters of that bay continuously, peacefully and for a long time, by means of acts of sovereignty or jurisdiction in the form of repeated and continuous official regulations on the passage of ships, fishing and any other activities of the nationals or ships of other States;
>
> (b) that such practice is expressly or tacitly accepted

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[269] Ibid., UN Doc. A/CONF. 19/C.1. L.6, 1960, p.168.

[270] UN Doc. A/CONF. 62/122; see also supra note 5.

[271] Except that the words "these Articles" in para. 2 of Article 7 of the TSC were replaced by "this convention", in the same paragraph of Article 10 of the LOSC. See also supra note 5.

[272] See statement of Mr. Tupou (Tonga), Vol.2, OR, UNCLOS III, 1974, p.107; see also the statement of Mr. Abad Santos (Philippines), ibid., p.102; and the statement of Mr. Herrera (Honduras), ibid., p.108.

by third States, particularly neighbouring States".[273]

Similarly, other working papers were produced such as the Blue Paper No. 3 which stipulated the following:

Article 1

"1. For an area of the sea to be considered as historic waters, the following requirements must be made:

(a) that the coastal State whose sovereignty has been extended over the area as such has effectively exercised thereover acts of sovereignty during a **considerable period of time.** Such acts may include the enactment of regulations relating to the transit of vessels, fishing and other activities of nationals or vessels of other States, and must be **reasonably justified by the vital interests of the coastal State and in particular defense or economic interests peculiar to the area;**

(b) that this practice is generally tolerated.

2. The dispositions of this article do not apply to States whose **exercise of sovereignty has been interrupted for a long period of time by foreign occupation.**

Article 2

The coastal State may claim **historic waters as internal waters or territorial sea,** depending on the scope of authority it has exercised over the area".[274]

However, it can be said that this paper did not resolve the problem but only established guidelines which were acceptable by the majority view. Nevertheless the issue of historic waters and bays still needs further investigation as

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[273] Draft Articles Concerning the Territorial Sea: Bays, the Coasts of which Belong to a Single State, Historic Bays or other Historic Waters, UN Doc. A/CONF. 62/C.2/L.91 (1976), Vol.5, OR, UNCLOS III, p.203.

[274] UN Doc., G 2/**Blue Paper No.3**, April 9th, 1975, 2nd Committee, ibid., Vol.5, p.225 (emphasis added). See also chapter

no definition of historic bays was adopted in the LOSC.[275]

The outcome of UNCLOS III was, however, that the historic bay issue was the subject of only three indirect references in the LOSC. Article 10 (6) stipulates that the juridical bay provisions including the twenty-four mile closing line of bays do not apply to historic bays. Historic titles were also referred to in Article 15 which excludes historic waters from the operation of the equidistance rule in the absence of agreement.[276] Lastly, historic waters were again mentioned in Article 298 (1) which gave the States which are parties to the Convention the right to invoke "optional exceptions to the applicability of Section 2" (which set up compulsory dispute settlement procedures entailing binding decisions), including disputes "involving historic bays or titles". A party to the Convention may invoke this "optional exception by making a written declaration".[277]

In addition, alternative dispute settlement procedures

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[275] See also chapter 5, note 109, and the Recommendations on Historic Bays adopted by the African States 'Seminar on the Law of the Sea in chapter 6, notes 65 and 100.

[276] Article 15. Delimitation of the territorial sea between States with opposite or adjacent coasts

> "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. **The above provision does not apply, however, where it is necessary by reason of historic title** or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

Emphasis added. Article 12 (1) of the TSC provides for a similar provision.

[277] Article 298 (1) of the LOSC, UN Doc. A/CONF. 62/122. For the exact quotation, see infra chapter 5, note 39.

became incumbent upon the parties where "no agreement within a reasonable period of time is reached in negotiations between the parties".[278]

IV. Assessment: Customary International Law Requirements for Historic Bays

Neither the TSC nor the LOSC offered solutions as regards the issue of historic bays. What, for example, constitutes an "historic bay" for the purpose of defining national waters? What proof of such a character is required. The definition of an historic bay still relies upon State practice and the internal policies of national jurisdictions, together with the writings of jurists. In this context, and before examining the Libyan historic bay claim, it is vital to answer the question whether the Gulf of Sirte must comply with the geographical requirements of a juridical bay as envisaged by Articles 7 of the TSC or 10 of the LOSC.

It is also important to state that writers' opinions differ as to whether valid claims to historic bays require compliance with the geographical criteria of a juridical bay. Both Conventions are silent as regards the category of historic bays: indeed, Articles 7 (6) of the TSC and 10 (6) of the LOSC state clearly that historic bays do not fall within the regime envisaged by these two Conventions. The answers to the issues are indeterminate, but an appraisal of the views of writers on the subject may assist in shedding

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[278] See also Goldie, L.F.E., Historic Bays in International Law, Vol.11 Syracuse Journal of International Law and Commerce (SJILC), (1984), p.217.

some light on the ambiguities prevalent in this sphere of the law of the sea.

Hyde, in a number of important contributions to the subject, has repeatedly stressed the importance of geographical considerations to a State's claim over areas of maritime territory. He writes that:

> "Thus the situation that made a bay geographically part of its territory, was a decisive factor. It is believed that the term 'historic bays' is illustrative of the full effect of a habit of maritime states, rather than a token of an exception to an excepted rule...It reveals the fact that maritime states have not acted on the theory that international law as such yielded ...indentations of defined, limited or calculated width to the sovereign of the adjacent land, and withheld others of greater extent from its grasp."[279]

Moreover, he emphasises that the geographical particularities pertaining to a given area, rather than any abstract prescriptive rights, are the proper basis for a State's claim over maritime territory. Furthermore, he concedes that it is possible for a state to begin to construct and lay the foundations of an historic title to a bay at the present time "provided that nature has made it part and parcel of the country into which it has been thrust".[280]

Adopting the logic of this reasoning, it is plausible to suggest that Libya could commence to establish, at the present moment in time, an historic claim to the Gulf of Sirte, strengthening its claim with the use of other, cogent evidence comprising, inter alia, a showing of vital interests[281] and

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[279] Hyde, C., International Law Chiefly as Interpreted and Applied by the United States, 2nd ed., Little/Brown and Co., Boston (1947), pp.469-470.

[280] Ibid., p.482.

[281] As will be shown in chapter 6, section 3.

long usage.[282]

Spinnato has asserted that the Gulf of Sirte does not fall within the definition of an historic bay because the Gulf itself possesses an extremely broad opening. Hence, the waters of the Gulf cannot be easily distinguished from the high seas of the Mediterranean.[283] But, it is submitted, no legal limit exists on the permissible length of the opening of an historic bay. Indeed, in the North Atlantic Coast Fisheries Arbitration, Drago placed a special emphasis on the fact that bays could qualify as historic "whatever...their depth of penetration and the width of their mouths".[284]

Ronzitti maintains that it is the satisfaction of the semi-circularity test of a juridical bay that properly qualifies a valid claim to an historic bay. He writes that:

> "...[I]t also includes in the concept of 'bay proper' indentations that meet the semi-circle test even though they feature an entrance wider than twenty-four miles".[285]

This view has been criticised by writers such as Westerman and others,[286] to the effect that the definition of historic bays need not comply with the requirements of a

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[282] See chapter 3, section 2.

[283] Spinnato, J.M., Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra, Vol.13 Ocean Development International Law Journal (ODILJ) (1983) pp.65-85, at p.78.

[284] As quoted by Nixon, D.W., A Comparative Analysis of Historic Bays Claims, ICJ **Pleadings**, (1982), Vol.4, **Libyan Reply (LR)**, Annex II-3, pp.320-41, at p.330.

[285] Ronzitti, N., New Criticism on the Gulf of Taranto Closing Line: A Restatement of a Different View, Vol.12 SJILC (1986), p.469.

[286] Westerman, G.S., The Juridical Status of the Gulf of Taranto: A Brief Reply, Vol.11 SJILC (1984), p.297. See infra notes 287-9.

juridical bay in respect of the twenty-four mile closing line and the test of semi-circularity. Strohl argues that:

> "...[I]f taken literally, the first clause of paragraph 6 [of Article 7 of the TSC] means that all provisions regarding bays would be disregarded in any consideration of historic bays, including the first sentence of paragraph 2, embodying a geographical concept...".[287]

It further appears from the discussions of the ILC prior to UNCLOS I (1958), that historic bays were never envisaged as falling within the definition of juridical bays. Thus, historic bays were not required to comply with the criteria established for the category of judicial bays. In 1953, Article 6 (Bays) of the Draft Convention on the Law of the Sea excluded historic bays from the definition of juridical bays, as is illustrated by François' proposal which read as follows:

> "Historic bays are excepted; they shall be indicated as such on the maps".[288]

Later, in 1954, he reiterated his recommendation in the following terms:

> "3)...[I]l est entendu que les baies historiques seront

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[287] Strohl, op. cit., p.317.

[288] It was recommended by the Special Reporter of the ILC François that Article 6 concerning bays should be modified in the following terms:

> "L'article 6 doit être modifié comme suit:
> 1. Une baie est une baie (i) juridique lorsque sa superficie est égale ou supéreure à la superficie de demi-circle ayant comme diamètre la ligne tirée entre les points limitant l'entrée de la baie historique, ainsi libellées sur les cartes...".

Amendements et Additions au Deuxième Rapport du Rapporteur Spécial: François, J.P.A. (Addendum), Vol.2, YILC (1953), p.76.

exceptées de cette définition...".[289]

A combination of State practice and of the two Conventions fails to lend credence to Ronzitti's view that historic bays must satisfy the test of semi-circularity. In this context, in the United States v. Louisiana Case, the US Supreme Court supported the view that an historic bay need not comply with the geographical test (Article 7 of the TSC). It held that:

> "It is clear that a historic bay need not conform to the geographic tests for a juridical bay set forth in Article 7 of the Convention [the TSC]...we need not decide how unlike a juridical bay a body of water can be and still qualify as a historic bay...".[290]

The test of semi-circularity has not always been met by post-UNCLOS I historic bay claims, for instance in the case of the Soviet claim to Peter the Great Bay.[291] In these claims, greater emphasis was placed upon features of historic title, rather than upon geographical requirements. It can, therefore, be maintained that the Gulf of Sirte does not need to conform to the tests of geographical criteria as established by Articles 7 of the TSC and 10 of the LOSC, because it has been claimed as an historic bay. However, it is nevertheless submitted that certain minimum requirements must be met to the extent that any historic bay must constitute a deep indentation and not a mere curvature of the

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[289] UN Doc. A/CN.4/77, Regime of the Territorial Sea, 3rd Report by François, J.P.A., Special Reporter, Vol.2, YILC (1954), p.4.

[290] United States v. Louisiana et al. (Alabama and Mississippi Boundary Case), US 470, (1985) in (Annotated Lawyer ex.) 84 L.Ed. 2d 73, at p.80, 2 [2b].

[291] Nixon, op. cit., p.336.

coast.

In this chapter, we have to give a further outline of the development of rules relating to historic bays because the claim of Libya to the Gulf of Sirte is based on historic grounds together with the vital needs of Libya. In addition to what has been said above about historic bays, some other points will, therefore, be mentioned below.

The three series of UNCLOS as already seen, also failed to agree upon a definition of historic bays in international law. In the TSC, the concept of historic bays was not codified. It was only made an exception to the regime of bays. The question of historic bays was of great importance, as has been recognised by eminent writers, including Gidel, who regarded historic bays as a safety valve in the law of the sea, and considered that the refusal of States to accept the "theory" would make it impossible to arrive at an agreement on general rules concerning maritime areas.[292]

State practice in respect of historic bays is equally important; a number of bays had been declared "historic" by international treaties or pronouncements of State authorities and several had been recognised as such by arbitral awards.[293]

It is axiomatic that every State enjoys sovereign rights in those parts of the sea that wash their coasts, including bays and gulfs. These particular maritime features have been conceptually regarded as being distinct from the open

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[292] Gidel, op. cit., p.656.

[293] See UN Doc. A/CN. 4/143, op. cit., pp.1-26.

seas.[294] In this context, Phillimore asserted that the absolute property and jurisdiction of the coastal State may now be considered as firmly established, but, he added that:

> "...[I]t does not extend, unless by the specific provisions of a Treaty or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon shot, from the shore at low tide".[295]

However, once the open seas were reached, "universal use is presumed", stated Phillimore, quoting Lord Stowell.[296]

It would be deceptive to claim that universal agreement existed as regards the rights of a State in maritime areas of bays and gulfs. Although the principle of the freedom of the seas has gained a seemingly unassailable position within the general law of the sea, coastal States have, nevertheless, sought to ensure that their rights over waters adjacent to their coasts are preserved and accepted as valid by other States in the international community.

Phillimore writes:

> "...[T]he real question...is, whether it be within the physical competence of the nation, possessing the circumjacent lands, to exclude other nations from the whole portion of the sea so surrounded...".[297]

A definite, all-embracing and universal set of rules with regard to bays and gulfs still eludes international law. It rests upon State practice to crystallise new principles of greater relevance to present-day circumstances. Linked with

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[294] Fulton, op. cit., p.547.

[295] Phillimore, R. (Sir)., Commentaries upon International Law, Butterworths, Vol.1, 3rd ed., London, (1879), p.274.

[296] Ibid., p.275.

[297] Ibid., p.284.

this difficulty is the growth in the number of newly independent States which resent the imposition of standards perceived as being utterly alien.

State practice from earliest times tends to support, it is submitted, the Libyan claim of sovereignty over the Gulf of Sirte. Throughout history, coastal States have found it necessary to exercise sovereignty over their respective bays and gulfs by virtue of economic and strategic necessity. Such exercise of State sovereignty has been both recognised by other States and acknowledged by prominent international lawyers. Historical evidence illustrates that by virtue of Libya's prominent maritime position in the Mediterranean, it succeeded in exercising control over large areas of the sea, and not merely those parts immediately adjacent to its coast. At the First UNCLOS, Libya stated, with regard to the breadth of territorial waters in general,[298] that:

> "...[I]t was not necessary that the breadth of the territorial sea should be the same for all States, for the geographical characteristics and the needs of the various States were not uniform."[299]

Thus, it is both the doctrine of historic bays combined with the vital interests theory that Libya tries to justify its claim over the Gulf of Sirte as appears from the 1973 Declaration and as will be seen later.[300]

From the above and in the absence of conventional international law on historic bays which could be binding on

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[298] These proposals were annexed in Vol.3, UNCLOS I, OR, pp.209-216.

[299] Ibid., p.53.

[300] See in particular chapters 3 to 6.

Libya and the US,[301] it could be said that customary international law and State practice[302] require at least three criteria for a bay to be regarded as historic bay. First, for a claimant State to assert its sovereignty over a claimed bay, it must show that it has evidence of an immemorial and continuous usage of this bay, secondly, that it openly and effectively exercises its exclusive authority over the claimed area, and finally, that foreign States have acquiesced in this control.[303] There is a view which adds another criterion to these traditional criteria: the vital interests of the State,[304] other writers, however, argue that such interests operate independently of the historic bays criteria, thus, the vital bays theory.[305]

The following chapters will seek to establish whether the Libyan claim over the Gulf is consistent or not with State practice, and whether it is or is not contrary to the precepts of international law of the sea; hence, recourse to customary international law and the new trends in the fields of historic and vital bays will be made throughout this thesis.

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[301] The TSC and the LOSC are not binding on Libya since it has not acceded to the former and has only signed the latter. As regards the US, they ratified the former and voted against the adoption of the latter as will be shown in chapter 5, notes 40-2 and 182.

[302] As will be shown later throughout this thesis.

[303] See UN Doc. A/CONF.13/1, op. cit., at pp.28-37; see also UN Doc. A/CN.4/143, op. cit., pp.13-21; O'Connell (1982), op. cit., Vol.1, pp.427-435, and the United States v. Louisiana Case, 394 US (1969), p.11.

[304] For example, in the United States v. Louisiana Case, the US Supreme Court added a fourth element for a bay to be recognised as an historic bay, i.e. "vital interest" of the claimed State, 470 US (1985), p.93.

[305] This will be discussed later in chapter 6, section 2.

CHAPTER THREE :

THE LIBYAN IMMEMORIAL USAGE AND EFFECTIVE EXERCISE OF SOVEREIGNTY OVER THE GULF OF SIRTE

I. Introduction

The 1973 Declaration explicitly refers to a long-standing historic element by stating that:

> "Through history and without any dispute, the Libyan Arab Republic has exercised its sovereignty over the Gulf..." (Emphasis added).[1]

But, apart from this reference, there is no other reference in this Declaration which invokes some other historical evidence to that effect. But, it remains crystal clear that this Declaration carries a Libyan historic bay claim over the Gulf of Sirte.

However, this claim is not accepted by several States, among them the US, who protested at it and whose protest underlined particularly the lack of historicity to the Libyan claim. It stated:

> "...Nor does the Gulf of Sirte meet the international law standards of past open, notorious and effective exercise of authority, continuous exercise of authority,...necessary to be regarded historically as Libyan internal or territorial waters...".[2] (Emphasis added).

The purpose of this chapter is to deal with the question

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[1] The Libyan Official Gazette, Special Supp. No.5, Oct. 19th, 1973.

[2] Vol.68 AJIL 1974, pp.510-11.

whether this Libyan claim constitutes a valid historic bay claim or not. For this purpose, it is necessary to refer to the relevant international law in this field, i.e., international law relating to historic bays. But, because as already seen, there is no conventional international law on this category of bays, it is then important to turn to customary international law applicable in this field which requires the existence of three criteria for a bay to be recognized as a historic bay.[3] The object of this chapter is to deal only with the criteria of immemorial usage and effective exercise of authority and the other criterion (acquiescence) will be examined later.[4] At this stage, it is important to assess whether there was a Libyan immemorial usage and effective exercise of authority over the Gulf.

This chapter is divided into four sections. Section one exposes the object of this chapter. Section two assesses the historical aspect of the Libyan usage in the Gulf of Sirte by referring to the maritime history of Libya, to the treaties concluded by Libya with foreign States and to their impact on the Libyan claim. Moreover, an analysis of whether fishing and maritime delimitation of Libyan maritime zones are enough to constitute an usage which has to be immemorial and continuous will be undertaken.

As history shows, there have been foreign occupations of Libya which might have interrupted the immemorial and

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[3] As seen in chapter 2, section 4.

[4] See chapters 4 and 5.

continuous Libyan usage over this Gulf, it is, thus, necessary to answer the question whether such interruption invalidates the continuous aspect of this usage. Further, as the area of this Libyan-claimed Gulf does not constitute an international navigation route,[5] it is relevant to find out whether Libya had to exercise a full and comprehensive authority over the claimed area or whether a limited control was enough. It follows that the issue of prescription should also be dealt with in order to state from what moment exactly should such a prescription run.

In section three, the question whether Libya effectively exercised and still exercises its authority over the Gulf of Sirte will be debated. Hence, it is important to refer to the effectiveness criterion. In this context, the US **Note** of protest towards the 1973 Libyan Declaration has mainly relied on customary international law requirements such as the effectiveness criterion.[6] It stated that:

> "...[N]or does the Gulf of Sirte meet the international standards of...**open, notorious and effective exercise of authority**" (Emphasis added).[7]

Moreover, to be effective in the exercise of sovereignty, the coastal State must demonstrate its intention to act as a sovereign over the area claimed; this sovereignty must also be peaceful, open and effective. The leading authorities in

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[5] See chapter 6, section 3.3.

[6] As already underlined in chapter 2, section 4.

[7] Rovine, op. cit., 1974, p.293. Repetition is for the convenience of the Reader.

international law recognized the effectiveness criterion.[8] In the light of the above, the question arises whether Libya has exercised effectively, peacefully and openly its authority over the Gulf it claims ?

Finally, an assessment of the Libyan immemorial usage and the effective exercise of authority over the Gulf of Sirte is made in section four.

II. The Libyan Immemorial Usage in the Gulf of Sirte

Immemorial usage refers, without doubt, to an activity which is carried out repeatedly and continuously by the same person or entity and ultimately gives rise to historic rights.[9] As the 1973 Declaration provides for a long-standing historical element, it is then necessary to find out whether this historic evidence exists or not.

By analogy, Drago has referred to the historic element in his Dissenting Opinion in the North Atlantic Coast Fisheries Arbitration as 'immemorial usage' as being one of the factors which rendered two bays, i.e., Chesapeake Bay and Delaware Bay historic ones.[10] This 'immemorial usage' was also relied on in the Stetson v. United States (the Alleganean) Case, by the Court of Commissioners which held that:

> "It is a part of the common history of the country that the States of Virginia and Maryland have from their earliest territorial existence claimed jurisdiction over these waters, and it is of general knowledge that they

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[8] As acknowledged by the UN Doc., A/CN.4/143, op. cit., p.15.

[9] O'Connell (1982), op. cit., Vol.1, p.434.

[10] North Atlantic Coast Fisheries Arbitration, Vol.11 UNRIAA, pp.167-226, at p.206.

still continue to do so".[11] (Emphasis added).

Applying such opinion to the Libyan-claimed Gulf would require an examination of both the historical and the past legal backgrounds of Libya in general and of the Gulf of Sirte in particular.

2.1. Maritime History of Libya and the Gulf of Sirte

There has been a debate about whether Libyan naval activities in the Mediterranean sea were lawful or not, that is to say if such activities were piracy or corsairing.[12] When the Ottoman Empire offered its protection to North African States in the face of European threats, the Tripolitanian Navy grew considerably not only to protect the Tripolitanian coasts but also to police the Mediterranean Sea with other North African and Ottoman Navies. Ships of unfriendly States were not allowed to navigate freely in this sea. Ships of friendly States or of States linked by treaties with the North African States were allowed to navigate therein and were also offered protection, assistance and refuge when in North African territorial waters.

Such policing was often carried out by the North African Navies particularly insofar as the territorial waters were concerned. However, on the high seas, policing was often the duty of the Corsairs because they were not only good fighters

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[11] Moore, J.B., A History and Digest of the International Arbitrations to Which the United States had been a Party, op. cit., Vol.4, pp.4332-4341 at p.4339.

[12] See chapter 1, section 5, 5.2.1.

but also intrepid sailors and they were hired to carry out this activity. In this context, Dearden acknowledges the skills of Corsairs in the Mediterranean Sea and in particular in the Gulf of Sirte.[13] These skills were seldom found in Corsairs not hired by Libya insofar as the Gulf was concerned. In this regard, it is important to be reminded of the fact that this Gulf was under the control of Libyan Corsairs led by Dargut, a Libyan Navy Captain who was known as "the Master of Syrte".[14]

The control exercised by Corsairs hired by North African States did raise some considerable problems as to whether their activities were piracy. In fact, corsairing was not only peculiar to North African, it was carried out by Europeans as well. Generally, in western and central Mediterranean, Muslim corsairing was mainly identified with North Africa whereas Christian corsairing was linked mainly with the Order of Malta. Andrews, in his account of English privateering during the reign of Elizabeth I, gave the following definition:

> "The proper distinction between privateering and piracy is a legal one: the privateer had a commission from a recognised authority to take action against a designated

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[13] He writes:

> "Merchant vessels were shy of sailing in the dangerous Gulf of the Greater Syrtes with its heavy tides and spreading sandbanks, and even the war-galleys of Venice and Spain were at a disadvantage when manoeuvring in its treacherous eddies against the Corsairs who knew every inch of the coast".

Dearden, S., The Nest of Corsairs - The Fighting Karamanlis of Tripoli, John Murray, London, (1976), p.16.

[14] Bruno, E., Problèmes juridiques des minorités européennes au Maghreb, Conseil National de la Recherche Scientifique (CNRS), Paris, 1968, p.173.

enemy: the pirate had no commission and attacked anyone."[15]

So, in contrast to pirates, Corsairs were licensed by the State to carry out their activities as is underlined by a Maltese writer who writes that:

> "...[T]he Corso among all civilized nations, until it was eventually...abolished, represented a delegation of the right of war to individuals licensed for this purpose by the State".[16]

Moreover, the distinction between Corsairs and pirates is obvious.'Corsair' is defined as:

> "...[A] private individual [who was] granted a licence by his sovereign to fit out a ship to attack his sovereign's enemies. The prizes which he takes, if judged lawful by the courts of his country, are his to dispose of as he sees fit, subject normally to a share being paid to his sovereign".[17]

Furthermore, it was maintained in the **Libyan Counter-Memorial (LCM)** in the <u>Continental Shelf (Tunisia/Libyan Arab Jamahiriya)</u> Case, that this definition of 'corsair' applies to corsairs be they Maltese or North African. It was stated

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[15] Andrews, K.R., <u>Elizabethan Privateering, English Privateering During the Spanish War, 1585-1603</u>, Cambridge Univ. Press, 1964, p.5; see also, White, G.E., The Marshall Court and the International Law: The Piracy Cases, Vol.83 AJIL (1989), pp.727-735.

[16] Caruana Curran, P., <u>The Last Years of the Maltese Corso 1787-1798</u>, (Ph.D. Thesis), Old Univ. Msida, Malta, 1973, p.3. For more developments on 'corsairing' with reference to North African States, see ICJ **Pleadings** 1982, Vol.3 **LCM** Annex 6, particularly section 2 (Maritime Traditions in North Africa), pp.90-8. See also

[17] Earle, P., <u>Corsairs of Malta and Barbary</u>, Sidgwick and Jackson, London, 1970, p.6. See also the definition given by Malouf, H., L'impact des activités corsaires sur la politique nord africaine, Revue Tunisienne des Sciences Sociales, 23/94/95, 1988, pp.211-53, at p.243.

that:

> "This definition [of 'corsair'] applies equally to both the Barbary States and rival Christian corsairs - generally...under the title of the "Maltese Corso", because of the dominance of the Order of Malta. It also covers activities by national navies and private individuals, for there was little difference between the two"[18].

'The Tripoli corsairs', according to Pennell, were certainly 'acting on the commission of a recognised authority'.[19] In the same line of thought, it is submitted that the 'Qaramanlis derived their Government income from the State participation in all corsair ventures'.[20] This fact is a striking evidence that corsairing was associated with the Libyan State, and thus could not be assimilated with piracy.

From the above, it could be maintained that at that time, corsairing was in no way an illegal activity. This is particularly true if one looks at the considerable number of treaties concluded by North African States with European Powers. This fact alone gives a status of Statehood to North African States and removes altogether any possible aspect of piracy from their naval activities as could be seen below.

2.2. The Impact of the Treaties Concluded by Libya on the Gulf

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[18] ICJ **Pleadings**, 1982, Vol.3, para.61, at p.90. See also chapter 1, section 5, 5.2.1.

[19] Pennell, C.R., Piracy and Diplomacy in Seventeenth Century North Africa, Associated Univ. Presses, London and Toronto, 1989, p.45. In the same line of thought, it was submitted that 'the Qaranmanlis derived their Governmental income from State participation in all Corsair ventures' (Dyer, F., The Foreign Trade of Western Libya 1750-1830, Ph.D., Boston Univ., 1987, p.63).

[20] Dyer, op. cit., p.63.

of Sirte

Looking back into Libyan history insofar as the Gulf of Sirte is concerned and to the period prior to Libyan independence, there are several treaties which were concluded between Libya and European States and these constituted evidence of some form of Libyan control over its coast including the Gulf of Sirte. These treaties referred to some aspects of the law of the sea concepts such as ports, bays, and territorial waters.

2.2.1. The Concept of Bay in these Treaties

In this context, it is important to recall treaties which were concluded between the State of Tripoli and the Kingdoms of The Two Sicilies, Venice, Great Britain and even with the US. With the exception of the treaty with Great Britain, these treaties provided that the above nations would pay to Libya an agreed amount of money and in return the latter would allow their vessels to sail off its coasts and to protect these vessels in Libyan waters, to call or to take refuge in Libyan ports and bays, to trade with Libyan ports and allow them to navigate in the Mediterranean.[21] Such a situation continued

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[21] See for example Article 1 (Additional Articles) of the Treaty of Peace Between the Kingdom of the Two Sicilies and the Regency of Tripoli (signed at Tripoli on April 29th, 1816) which provides that:

> "Lord Exmouth hereby engages, on the part of the King of the Two Sicilies, to pay To His Highness the Bey of Tripoli the sum of 50,000 Spanish Dollars on the 1st January 1817, in full and adequate compensation for all the Neapolitan and Sicilian Slaves who are to be

until the occupation of Libya in 1911 by Italy.

However, as from the end of the 18th century, one could see that there is evidence that from 1796 the US and Western European States were taxed by the Libyan authorities who offered in return protection against pirates of the south Mediterranean Sea, which was under the control of North African States including Tripolitania. Libya concluded several treaties with these States. For example, the 1812 Treaty of Peace and Commerce concluded between Great Britain and Tripoli when the latter was neutral had as its object to protect Tripoli's neutral rights; and in this context, Articles 1, 2 and 3 of this treaty provide for the following:

> "That the Privateers of Belligerent Powers which, on account of bad weather, want of Provisions, or chased by an Enemy shall take refuge in Tripoli, or in any other of the Ports, Roads, or Bays of that Kingdom, having received a Supply of Provisions, and the danger of the Enemy ceased, shall be obliged to depart without unnecessary delay, or increasing the Number of Men, Arms, or Ammunitions, with which they entered; and, being out of Port, the said Privateers shall not lurk in the Bays, Creeks, and behind the points of promontories, or islands, belonging to the Territory of His Highness The Bashaw, to carry there, and give chase to the Ships of their Enemies which shall be entering or going out, nor shall they in any manner whatever disturb the free ingress or egress of the Ships of Any Nation to the Ports, Bays, or Roads of the Kingdom".
>
> "The Privateers Belligerent Powers shall not be per-

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delivered up to Lord Exmouth, in the name of the King of the Two Sicilies.

Moreover, Article 2 reads as follows:

"Lord Exmouth also engages on the part of His Sicilian Majesty, that the sum of 4,000 Spanish Dollars shall be paid to His Highness the Bey of Tripoli, upon the installation of a Consul; and that a similar Consular present of present of 4,000 Spanish Dollars shall be paid to Him upon every Installation of a new Consul."

Vol.3, BFSP, 1851-6, pp.546-8. See also chapter 2, section 3, 3.1.1., note 170.

> mitted to sail from any Port, Bay, or Roadstead, belonging to the Kingdom, until Twenty four hours after the departure of any Vessel belonging to another Power with which they may be at War, nor shall they even at any period be allowed to depart, while such vessel remains in sight of such Port, Bay, or Roadstead, whether detained by calms, fool winds, or other unavoidable circumstances".[22] (Emphasis added).

There is some indication here that the insertion of the word 'Bay' in the treaty implies that as a point of fact, Libya had exercised sovereignty over all gulfs and bays along its coasts. The Gulf of Sirte is also the largest and most important gulf along this coast. There is also evidence from State practice that the term 'bay', whenever found in a treaty, must be interpreted in its geographical sense. Thus, the term 'bay', which was not defined properly by the 1818 Treaty concluded between Great Britain and the US was the main source of dispute between those States for more than 100 years along the adjacent waters of Canada and the US.[23] The matter was referred to a tribunal selected by the Permanent Court of Arbitration (PCA) which was asked inter alia to determine how the three-mile fishery limit agreed to by both parties in Article 1 of the above Convention was to be measured in bays.

Hence, in the North Atlantic Coast Fisheries Arbitration, Great Britain argued that the term 'bay' should only be used in its geographical context, i.e., that it applies to all bays regardless of their size, to all sea areas marked on maps as bays. As a result, the three-mile limitation was to be

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[22] Vol.1, BFSP 1812-1814, Part 1, pp.731-733.

[23] Hertselt, L., A Complete Collection of Treaties and Conventions between Great Britain and the Foreign Powers, Vol.2, Butterworth and Bigg, London, 1940, p.393. See chapter 2, section 3, 3.1.1.

measured from a line drawn across every bay from one headland to another headland of a bay whether claimed or not.[24]

However, the US maintained that the term 'bay' referred only to small indentations such as creeks or harbours and applied only to indentations whose mouths did not exceed six miles, i.e., twice the breath of the then territorial sea (three miles). Therefore, any bay whose entrance was more than 6 miles was not territorial and thus not within the renunciation provision of the 1818 Convention.[25]

The Tribunal adopted instead the UK position that the description of the coast was to be made in geographical terms. It held that:

> "The Tribunal is unable to understand the term 'bays'...in other than its geographical sense by which a bay is to be consolidated as an indentation of the coast, bearing a configuration of a particular character".[26]

Similarly, the term 'bay' in the above treaties can be said to apply also to the Gulf of Sirte since this term is first of all a geographical concept and is to be considered as such before any other extra-geographical can be taken into account.

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[24] Vol.1, Proceedings, North Atlantic Coast Fisheries Arbitration, 94 Senate Doc. No.870 61st Cong., 3d Sess. (1909), see also **Special Agreement Between United States and Great Britain Relating to North Atlantic Coast Fisheries**, Jan. 27, 1909, Vol.102 BFSP 1908-1909, pp.145-151.

[25] Scott, The Hague Reports, 1st Series, p.145.

[26] Ibid., p.187.

2.2.2. The Concept of Territorial Waters in these Treaties

Despite the fact that the concept of territorial waters in the period between the 16th and the 19th centuries was not well-established as it is nowadays, it still existed, albeit in a vague formulation.[27] It was referred to in some treaties between Tripoli and European States. For example, The State of Tripoli is reported to have accepted the cannon-shot rule as a method of delimiting the territorial waters in a treaty concluded with Great Britain in 1675.[28] Similarly, the same rule was also accepted by this State, and in this context, it is relevant to underline the fact that Article 3 of the Treaty between Tripoli and Austria-Hungary in 1749, provided for a similar rule. It reads as follows:

> "Tripolitine Privateer Ships are absolutely forbid (sic) to hover and cruise, and do damage within sight of the Ports and Country subject to their Imperial Majestys, that the security of commerce may not be disturbed..."
>
> "...And then they shall be in safety within cannon-shot, but when they have been received therein, they shall not be suffered to pursue any ship of their Enemys, till 24 hours after the going out of the same".[29]

Moreover, this concept of territorial waters was also referred to in the 1816 Treaties which Lord Exmouth (on behalf

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[27] Lahouasnia, op. cit., p.97.

[28] Id. See also the 'Treaty of Peace of March 5th, 1675 between Halil Bashaw, Ibrahim Dey Aga Divan and Governor of the Noble City and Kingdom of Tripoli and Admiral Sir John Narborough', Vol.1, PRO, Foreign Office, (FO), 95/519, p.128. See also Vol.1, BSFP, Part 1, (1812-1814), p.715. As referred to from chapter 1, section 5, 5.2.2., note 110; and chapter 2, section 2, 2.1.2., note 81, and 2.2., note 125.

[29] Vol.2 BFSP, FO 1815-1816, pp.189-190 and pp.546-548.

of the Italian States) negotiated with Tripoli, and these were the Treaty between Tripoli and the Kingdom of the Two Sicilies and the Treaty between Tripoli and Sardinia. One common Article of the these treaties provides that:

> "No ship of War or Privateer of either party shall take a station in sight for any particular Port in each other Dominions with the view to intercept any Enemy, nor shall they capture or take any Enemy's vessel within gunshot of the coast of a Friendly Power, or attack any ship or vessel lying at anchor in any **Bays** within **Gunshot**, although there may not be any Battery or Guns to defend her".[30] (Emphasis added).

From the above, it could be maintained that waters which were within the eyesight of a port or coast were regarded as territorial waters. And the limit of these waters should not go beyond the gunshot distance. However, these treaties did not provide any explicit reference to the Gulf of Sirte as such.

2.3. Substance of the Libyan Usage in the Gulf of Sirte

It is vital to try to find out of what the Libyan-claimed usage consisted of. For this purpose, it is also worth considering some other examples of the past effective exercise of authority over the Gulf by Libyan or foreign authorities, such as Italy in fields such as fishing and delimitation of maritime zones and related matters.

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[30] Vol.3, BFSP, 1851-6, pp.546-8.

2.3.1. Libyan Regulations on Fishing Activities

The Gulf was a particularly rich fishing ground in the Mediterranean and contained, among other fishing resources existing along the Libyan coast, sponge-fishing, which was probably the most active fishing activity for foreigners. In this context, sponge-fishing activities were said to have existed well before the Italian occupation in Libyan waters and particularly in the 'Greater Syrtis'.[31]

Similarly, Libyan Experts have, in the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, shown the existence of an old usage[32] such as the Ottoman regulations and the exercise of authority up to 1911 in fishing matters, and in particular sponge-fishing and coral-fishing. These activities were carried out by locals and foreigners alike such as the French, Greeks, Italians, and Maltese fishermen along the Libyan coast, in banks some of which extended up to 25 miles offshore and whose depth varied between 30 and 250 feet thus, necessarily including the Libyan-claimed Gulf.[33] In this context, the French Consulate in Benghazi stated that sponge-fishing was not only carried out along the Libyan coastline

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[31] MAE., France, NS94, avril 1901 and décembre 1902. Turquie-Libye, Tripolitaine, Cyrénaique. See also ICJ **Pleadings**, 1982, Vol.3, **LCM**, Annex 6, para.215, at p.128; and MAE, France, NS94, 19 avril 1902 No.20.

[32] ICJ **Pleadings** 1982, Vol.3, pp.44-60 at p.44.

[33] L.F.O., The Gulf of Sirte Study, 1986, op. cit.; see Serbetis, C.D., Reports to the Government of Libya on the Fisheries of Libya, Food and Agriculture Office (F.A.O.) Report No.18, Rome, 1952; and Bourgeois, F., The Present Situation of Libyan Fisheries, F.A.O. Report No.817, Rome, 1958.

but also in the Gulf of Sirte and in the Gulf of Bomba.[34] It is thought that before World War II the number of fishing boats amounted to 200 at any one time.[35]

When Libya became an Italian colony, Italy was thus provided with a supplementary fishing ground for its many fishermen already present along the Libyan coast.[36] Reference to fishing activities along the Libyan coast has been made in the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case.[37] In this context, Judge Arechaga states that:

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[34] He states:

> "Pêche des éponges: Cette pêche a lieu sur toute l'étendue des côtes de la colonie de la colonie [Libya], principalement dans le golfe de Bomba et celui de la Syrte".

Rapport Situation économique de la Cyrénaique, Archives du **MAE**, No.15 du 16 mars 1931, Quai d'Orsay, Paris, 1929-1930. See also Map No.4.

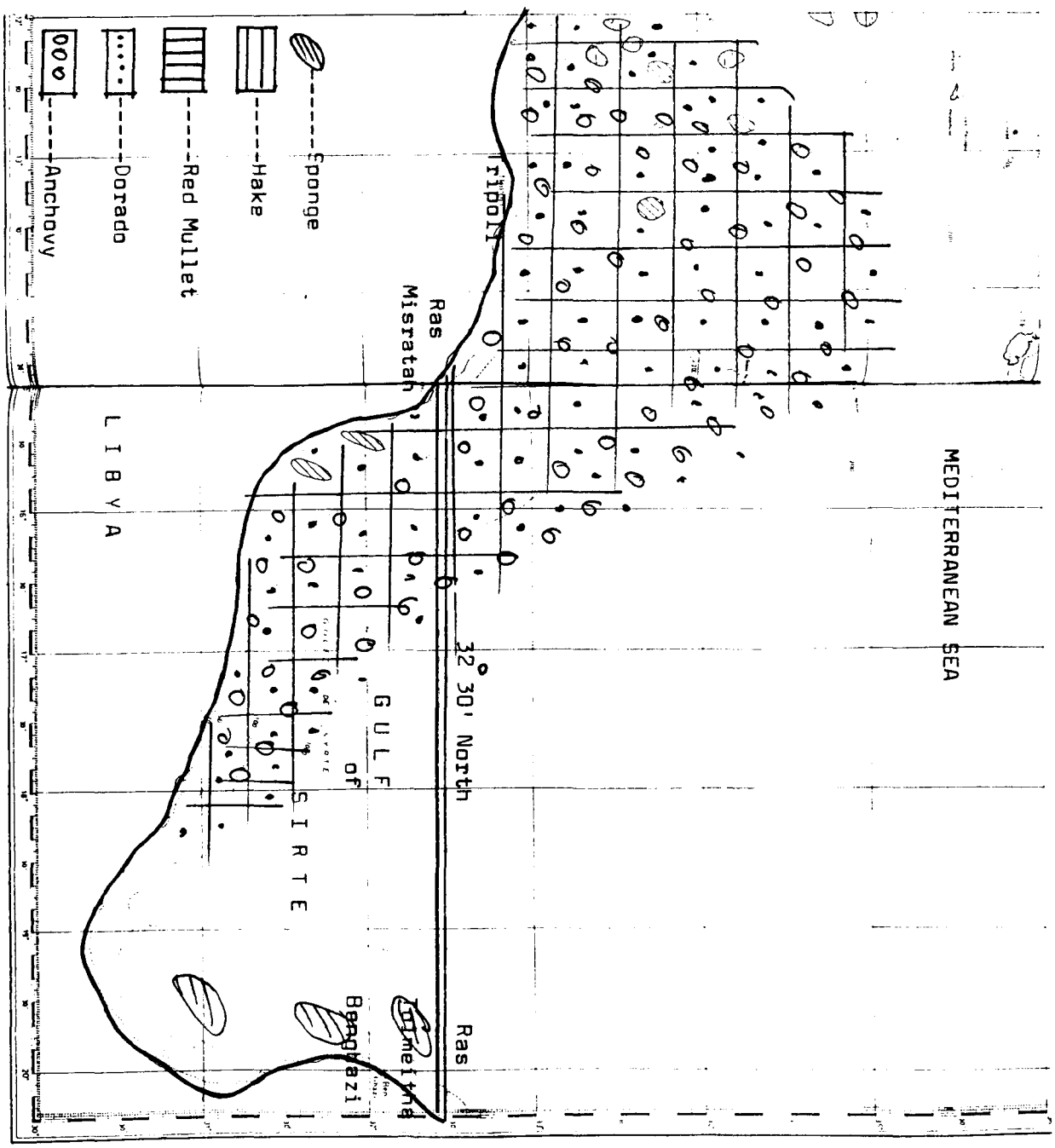
[35] Anderson, E.W. and Blake, G.H., The Libyan Fishing Industry, in Libya Since Independence:Economic Development and Political Development, Allan, D.J. (ed.)., Croom Helm, London, 1982, pp.73-91 at p.84.

[36] ICJ **Pleadings**, 1982, **LCM**, Vol.3, Annex 3. Moreover, Judge Arechega stated that:

> "When becoming the authority in Tripolitania, the Italian Government regulated sponge fisheries off that coast in a manner analogous to that adopted by the French Protectorate in Tunisia. And these rights over sponge fisheries were recognized by the French Protectorate, whose authorities stated that the two nations concerned had the strict right of exercising surveillance over the sponge-banks situate well **outside the boundaries of their territorial waters**". (Emphasis added).

ICJ Report (1982), **Dissenting Opinion**, p.122.

[37] ICJ Reports (1982), p.86.



Map No.4. Sponge and Fish Banks

"...[R]ights of surveillance over sponge fisheries were invoked and exercised off the Tripolitanian coast after the Italian annexation in 1911".[38]

Such control, he maintains, was not only recognized by foreign powers like France but also extended to areas outside the traditional territorial sea.[39] As could be seen from the above, Italian authorities then carried out comprehensive fishing activities and in particular sponge-fishing, and updated the Ottoman regulations in the different matters of fishing, neutrality, sanitation, etc...They aimed at regulating the exploitation of marine resources in general and sponge-fishing in particular, and at exercising the control of these fishing activities through legislation and regulations and by enforcing them through the courts.[40] Italy has indeed issued acts relating to the control of fishing, as underlined by Judge Arechaga in the Continental Shelf (Tunisia/Libyaa Arab Jamahiriya) Case.[41] Among these acts, it is important to underline the following: the 1913 Decree on Fishing of Sponges in Tripolitania and Cyrenaica, which established a system of licences (Articles 17 and 20) and

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[38] **Dissenting Opinion**, ICJ Reports 1982, at p.122.

[39] Ibid., at pp.131-132.

[40] Zouara Judgment, Sept. 2nd, 1913, Zouara Court Docs., Vol.2, ICJ **Pleadings**, 1982, **LCM**, Annex No.44, pp.441-2. See also infra notes 47 and 138.

[41] He stated:

> "...Libya has also demonstrated that it has **possessed and exercised rights identical with those of Tunisia with respect to sponge fishery off the coasts of Tripolitania**. The Tripolitanian fishermen have exploited sponge banks off their coasts at least since 1893...".
>
> ICJ Reports, 1982, **Dissenting Opinion**, para.78, p.108.

provided for a reserved fishing zone,[42] the 1925 Italian Instructions for the Surveillance of Maritime Fishing in the Waters of Tripolitania and Cyrenaica,[43] the 1925 Italian Royal Decree on Sponge-Fishing in Tripolitania and Cyrenaica,[44] and the 1931 Italian Instructions for the Supervision of Maritime Fishing in the Waters of Tripolitania extending the territorial waters from 3 to 6 miles, a provision of which reads as follows:

"(1) The validity of the fishing legislation extends to

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[42] See the Royal Decree on the Fishing of the Sponges in Tripolitania and Cyrenaica (1913), ICJ **Pleadings**, (1982), **LCM**, Annex 41, pp.418-32 and 200.

[43] Part of which read as follows:

> "1. The practice of fishing fish, molluscs, crustaceans, sponges and coral **along the coasts of Tripolitania and Cyrenaica, and within the limits of the territorial waters, is subject to the concession** of particular permits for each type of fishing by the **Port Authorities** of the two Colonies.
> 2. The limits of the territorial waters are to be intended as established at three marine miles from the coast. It is however an accepted principle that **all sponge and coral fishing** on such sponge colonies fronting the coast and **extending without interruption even beyond the 3 miles** constitute territorial waters and therefore sponge and coral fishing on such sponge colonies, **regardless of how far they extend from the coast, must be subjected to the concession** of the proper permit".

ICJ **Pleadings**, 1982, Vol.2, **LCM**, Annex No.43, pp.438-40 at p.438. See also the Royal Decree on Sponge-Fishing in Tripolitania and Cyrenaica of 22 Nov. 1925, No.2273, ibid., Annex No.42, pp.433-37 at p.433.

[44] Article 19 of which reads as follows:

> "Sponge fishing operations over the entire alga expanse of Tripolitania and Cyrenaica may be conducted only after having obtained a permit issued by the maritime authorities of Tripoli, Bengasi...".

See also the Decree of 22 Nov. 1925, in Annex No.42, ibid., p.433.

> the very limit of the territorial waters, that is to say up to 6 miles from the coast, but it is understood that all sponge algas that face the coast and that extend without solution of continuity even past the limits of the territorial waters, at whatever distance they might be from the coast, are considered as being included in the territorial waters"[45].

Italian authorities carried out a number of scientific surveys in Libyan waters.[46] Also, under a Royal Decree of March 27th, 1913, licences were required for fishing in sponge banks beyond Libyan territorial waters. These regulations were also strictly enforced as is illustrated by the case below. In this context, in 1913, a Greek fishing boat was captured fishing illegally by the Italian Navy and taken to Zouara, a town on the Libyan coast where it was sentenced by the Court of Zouara.[47]

These Italian regulations even covered banks up to 50 kilometres from the coast, i.e., in the Libyan-claimed Gulf.[48] Italian delimitation of both the Libyan territorial waters and the fishing zones combined with the Italian exercise of a regulatory power have been witnessed by foreign

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[45] Ibid., Annex No. 45, pp.443-7, at p.444.

[46] Mazarelli, G., La pesca sui banchi di spugne esplorati., con la R.N, Tritone, Socita Italiana per II Progresso delle scienze, Nov. 1936, pp.14-5.

[47] **MAE**, Correspondance commerciale et politique, No.280 (1911-1916), pp.36-38. See Zouara Judgment, op. cit., pp.441-442. See also supra note 40, and infra note 138.

[48] L.F.O., The Gulf of Sirte Study, op. cit., p.13; see also **Separate Opinion** of Judge Jimenez Arechega in Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, ICJ Report 1982, pp.122 and 29.

Consuls.[49] Moreover, it has been maintained that sponge-fishing activities existed in the Gulf itself and in the Gulf of Bomba near the Egyptian frontier.[50]

In 1943, when Italian occupation was ended, Libya was administered by British authorities who went on to apply Italian fishing regulations and even issued other regulations such as the Fishing Regulations of May 17th, 1948,[51] which undoubtedly constituted important evidence of long-standing legal and administrative activities all around the Gulf of Sirte. It is worth emphasising the importance of the commercial sponge banks in the Gulf of Sirte since the sponge areas amount to some 48% of the total area of the Gulf enclosed by the line 32° 30' North.[52] Consequently, Italy issued more or less detailed legislation and regulations relating to fishing, coral, pearls and sponge-fishing both within the Libyan territorial waters and fishing zones (outside 3 miles).

Independent Libya has also encouraged fishing in general and sponge-fishing in particular. To achieve this effect, it has updated previous pre-independence fishery legislation and regulations on these matters not only in its territorial

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[49] See for example the report by the French Consulate, Rapport du Consul. Mr. George Trever, Consul à Tripoli, Afrique 1918-40, Libye, Affaires diverses (1930-36), 42 **Archives, MAE**, No.4, 13 janvier 1931. Rapport quotidien du 17 mars 1931.

[50] Rapport No.4 du 5 mars 1935, Situation économique de la Cyrénaique à la fin de 1934, **MAE**, Quai d'Orsay, Paris. See also Map No.4.

[51] See British Declaration No.179 of May 17th, 1948 Concerning Sponge-Fishing, Vol.3, ICJ **Pleadings**, 1982, **LCM**, Annex No.3, p.56.

[52] See L.F.O., The Gulf of Sirte Study, op. cit., p.13.

waters but also in maritime areas where sponge banks were located, i.e., even outside the 12 mile-limit.[53]

Moreover, Libya's position was that fishing and particularly sponge-fishing was not restricted to the Libyan territorial waters but extended beyond them.[54] In this context, the 1959 Libyan Law No. 12, Concerning Fishing for Sponge provided that sponge-fishing was only permitted in some specified sea-areas.[55] Furthermore, the Decision No.1 of 1960 and Decision No.1 of 1961 applied the former Law by specifying the sea-areas suitable for sponge-fishing.[56] Besides, these legislative and regulatory steps, the Libyan Government has invested in the fishing industry.[57] It could be inferred from

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[53] The Libyan Law No.12 of 1959 and the Decree of 8 August 1962 on Sponge Fishing may be cited as examples. See also Lahouasnia, op. cit., p.98.

[54] It stated:

> "These provisions [Italian sponge-fishing regulations] applied outside the customary limit of territorial waters".

ICJ **Pleadings**, 1982, **LCM**, Vol.2, para.132 at p.200, This seems to have also been accepted by the British Government at that time (see also L.F.O. Doc., 360/830-5241-1913).

[55] Its Article 1 reads as follows:

> "Fishing for sponge is permitted only in those areas specified by the Chief of Transportation in the district".

Law No.12, Libyan Official Gazette, No.15 of 14 Sept. 1959. See also Annex No.47, ICJ **Pleadings**, 1982, **LCM**, Vol.2, p.449.

[56] Libyan Official Gazette No.9 dated May 1st, 1960.

[57] See Ministry of National Economy., Statistical Abstract 1963, Tripoli, 1964; Sogreah, Study for a General Master Plan for the Development of the Fishing in the Libyan Arab Republic, Part 2, Grenoble, 1973, pp.42-53; Secretariat of Light Industry, Programme for Development of Marine Resources, 1981-85, Tripoli, Feb. 1980, p.77.

the above laws and regulations that such sea-areas were indeed both inside the Libyan territorial waters and the Libyan-claimed Gulf.[58]

2.3.2. Delimitation of Libyan Maritime Zones and Related Matters

2.3.2. (A) Before Libyan Independence

In order to occupy Libya, Italy waged the 1911 War against the Ottoman Empire, and for this purpose, it issued the 1911 Blockade Declaration by which it delimited the "blockaded area, i.e. the whole Libyan coast including harbours, ports, creeks, roadsteads...within the meridians of 11° 32' and 27° 54' longitude East of Greenwich".[59] This Declaration was not concerned with the entire Gulf as such. The geographical area concerned by the Declaration did not extend to the whole area enclosed by the 1973 Declaration (32° 30' line) but only to a limited part of the Gulf of Sirte). Moreover, had Italy considered the entire Gulf as part of Libya, it would have certainly included it in the above geographical co-ordinates by providing for the line of 32° 30' for example. Nevertheless, the Ottoman Empire and Germany made use of this Gulf for their naval activities before World War

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[58] See also Map No.4.

[59] Askew, W.C., Europe and Italy's Acquisition of Libya, 1911-1912, Duke Univ. Press, Durham, North Carolina, 1942; see also, Wright, J., Libya: A Modern History, Croom Helm, London, 1981, pp.27-28. See also Childs, T.W., Italo-Turkish Diplomacy and the War over Libya 1911-1912, Brill, E.J. Pub., Leyden, New York, 1990, pp.49-70.

I.[60] Similarly, during the same period, Italian submarines used the Gulf as a refuge from which they could control the coastal area and attack shipping to the north.[61]

For customs purposes, Italy enacted a Royal Decree for the Customs Surveillance of the Libyan coasts which provided for a 12-mile breadth of the maritime customs zone to be measured from the shore of the coasts of Tripolitania and Cyrenaica (i.e., Libya).[62] Again, the Italian Instructions for the Surveillance of Maritime Fishing in the Waters of Tripolitania and Cyrenaica provided for the low-water mark from where the breadth of the territorial waters in Libya was to be measured.[63] During World War II, and most probably for neutrality purposes, Italy delimited the dangerous zones for navigation where both neutral and Italian ships were allowed

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[60] L.F.O., Maritime Boundaries File, No.16, 1986, op. cit.

[61] PRO, First World War - 1914-1918, File - Admiralty (ADM) 137:2186. It was stated that:

> "Since the occupation of Port Bardia etc., the centre of interest has shifted to the Tripoli coast and although activity undoubtedly goes on in the Gulf of Sidra and possibly also in Benghazi area, there can be no doubt that the centre of enemy submarine activity is at Misrurata. A certain amount of coastal communications by submarine appears to take place between Misurata and these places in the Gulf of Sidra, and submarines from Turkey undoubtedly visit the coasts of Cyrenaica occasionally, but the salient feature of the whole affair is a regular submarine service between the Adriatic and Misurata; which has now gone for more than 18 months".

the same Report goes to add that there have been around 65 incidents of which 37 happened in the Gulf (id.).

[62] Article 2 of the Royal Decree No.85 of February 4th, 1913 Providing Orders for Customs Surveillance along the Coast of Libya, Official Gazette, Feb. 14th, 1913.

[63] ICJ **Pleadings**, 1982, **LCM**, Annex No.43, April 16th, 1919, pp.438-440 at p.438.

only by prior authorization. The breadth of these zones reached a limit of up to 12 miles to be measured from the Libyan coastline.[64]

The Gulf was put to a military use during World War II when the Italian Navy used it as a naval assembly base, venturing forth from there to attack shipping passing east-west through the Mediterranean north of the Libyan coast. Such use has even caused around 150 incidents within the vicinity of the Gulf between July 1940 and December 1942.[65] Italian military use of this Gulf constitutes a significant part of the Gulf's history and shows that its waters have been in practice treated as internal waters of Libya.

Moreover, it is maintained that the Sirte Basin served as an important area for Libya during the Qaramanli era. Its ports were used to export and import goods coming from Africa and Europe.[66]

2.3.2. (B) Since Libyan Independence

As already seen, the 1973 Declaration refers to a pre-

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[64] Article 2 of the Royal Decree of 6 June 1940, No.595, Berthing and Stay during Wartime, of National Merchant Ships, Warships and Neutral Ships in the Territorial Waters of the Kingdom of Italy and Albania, The Empire, the Colonies and Possessions, Annex No.40, ibid., pp.416-7.

[65] L.F.O., The Gulf of Sirte Study, op. cit., p.11; see also PRO, Second World War 1939-1945, file - ADM 199:7628. It is also interesting to note that in March 1942, a large convoy of British warships was sailing from Alexandria to Malta and was sighted by the Italian navy which attacked it outside the line of closure of the Gulf (33° 56' North); it is known as the Battle of Syrte (id.).

[66] Dyer, op. cit., p.63.

1973 claim, and this in turn leads us to examine the previous Libyan legislation insofar as the delimitation of the various maritime zones are concerned since Libya gained its independence in 1951. Hence, it is relevant to enquire which baseline was used in the process of delimiting the Libyan territorial sea. The first legislative act in this field was the Libyan Law of 1955 which delimited the Libyan territorial sea to 6 nautical miles from the coast,[67] implying the use of the normal baseline i.e., the low-water mark along the Libyan coast including the Gulf of Sirte.[68] Further, the six-mile limit became a 12 mile-limit following the 1959 Territorial Waters Law, Article 1 of which reads as follows:

> "The Libyan Territorial Waters shall be fixed at twelve nautical miles".[69]

This Law, contrary to the 1955 Law, did not specify explicitly the baseline from which the territorial sea was to be measured.[70]

It is also important to explain why Libya did not make use of the baselines provisions of the TSC. Was it because of the discovery of oil in Libya in the 1950s? Was it because of the adoption of the 1955 Petroleum Law which provided for a map dividing Libya and its maritime coasts into 4 zones

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[67] Libyan Note of Nov. 19, 1955, UN Doc., ST/LEG/SER.B/6, op. cit., p.32.

[68] Lahouasnia, op. cit., p.96.

[69] Law No.2 of 18 February 1959 Concerning the Delimitation of Libyan Territorial Waters, Official Gazette of Libya, No.7, 31 March 1959. See also UN Doc., ST/LEG/SER.B/16, op. cit., p.14.

[70] Id.

including the Gulf of Sirte ?[71] Has Libya sought not to jeopardize its position insofar as the baselines were concerned ?

It is worth attempting to answer these above questions. In this context, one could maintain that Libya tried progressively to gain additional maritime areas by the adoption of the four zones map initially, and then. later, by extending formally its sovereign control over the Gulf of Sirte in particular which contains a considerable volume of oil reserves. Hence, after a lapse of time, Libya could fix baselines along its coast or a closing line in this Gulf such as the 1973 Declaration.

2.4. Continuity of the Libyan Claim and the Question of Prescription

2.4.1. Is There Any Interruption in the Continuous Libyan Usage?

A continuous exercise of authority over the claimed area is necessary for the formation of an historic title. A State which claims historic title over a particular area must, according to international law, depend **inter alia** upon possession or the exercise of sovereignty, both peaceful and continuous. Consequently, the activity from which usage emerges must be a repeated and continuous activity of the claimant State. Since the passage of time in this case is therefore essential, the claimant State must have kept its

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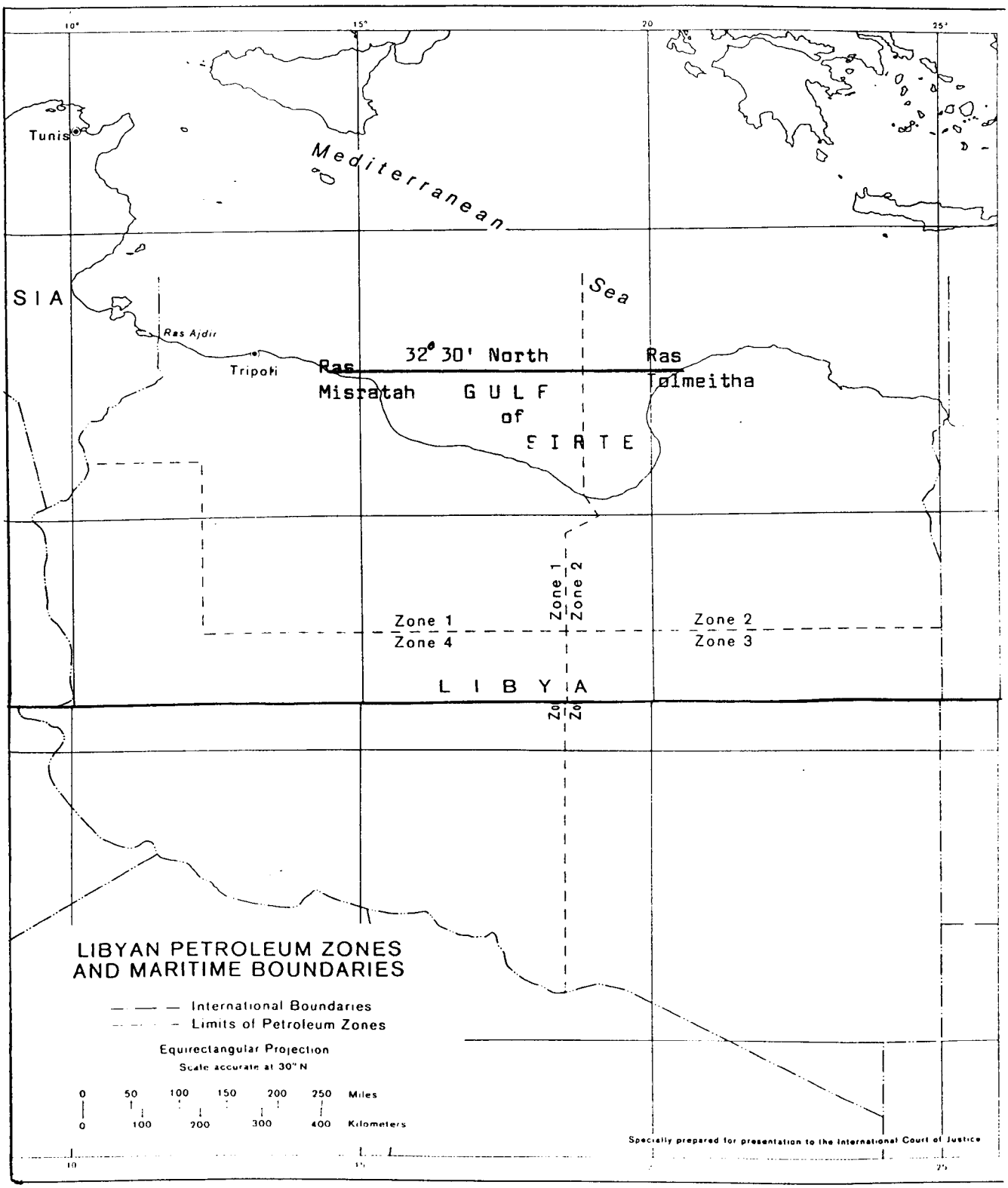
[71] Id. See infra note 195 and Map No. 5.



Map No.5. The 1955 Petroleum Zones.

exercise of authority over the area for a considerable time. There is, however, a more recent view which pays less attention to the passage of time and lays more emphasis on the vital interests of the claimant State.[72]

In the Fisheries Case, Norway argued with regard to the issue of usage that:

> "La base de discussion No.8, formulée par le Comité Préparatoire, se contentait d'appuyer le titre historique sur 'l'usage'. Sans doute cette expression devait-elle être comprise comme impliquant un exercise paisible et continu de la souveraineté".[73]

However, it seems that there are different views with regard to the validity of usage. According to one view, usage per se is a good root for historic title, whereas according to the second view, usage needs to be recognized by other States in order to be considered as a basis of discussion for historic title.[74]

In its Counter-Memorial, Norway has in the Fisheries Case, stated that:

> "Que faut-il essentiellement pour qu'un Etat puisse revendiquer une baie comme lui appartenant historiquement? Il faut qu'il ait affirmé sur elle sa souveraineté. L'affirmation de souveraineté par l'Etat riverain est la condition primordiale de son titre. Elle ne suffit pas par elle-même mais elle est indispensable. Les autres éléments ne sont que des 'circonstances particulières' qui viennent étayer et justifier sa prétention".[75]

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[72] Yates, G.T., International law and the Delimitation of bays, Vol.49 North Carolina Law Review (NCLR), 1971, pp.943-963 at p.956. See also chapter 6, section 2, 2.1.1.

[73] ICJ **Pleadings**, 1951, Vol.3, p.454.

[74] UN Doc. A/CONF.13/1, op. cit., pp.28-29.

[75] ICJ **Pleadings**, 1951, Vol.1, pp.555-556.

Whereas the UK in its Reply maintained that:

> "The national usage must have received international recognition".[76]

In the Delagoa Arbitration between Portugal and Great Britain, the Arbitrator in his Award of July 24th, 1875, found that Portugal not only discovered the area, but **inter alia** had made 'continual' claims to sovereignty over the bay and had established exclusive right to trade there and upheld these claims by force of arms against foreigners.[77] By analogy, Libya has, as has been shown,[78] made a continuous and exclusive claim over this Gulf and even confronted US military forces.[79] In the Libyan case, there is as well a Libyan dominion over the Gulf of Sirte which has indeed evolved from a fishing regime to a sovereign regime as laid down by the 1973 Declaration.

In the Boundary between Brazil and British Guyana Arbitration, the Arbitrator found that:

> "That...acts of authority and jurisdiction over traders and natives tribes were afterwards 'continued' in the name of British sovereignty...That such 'effective' assertion of right of sovereign jurisdiction was gradually developed".[80]

In the Legal Status of Eastern Greenland Case, Denmark argued that its sovereignty over the disputed area was founded

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[76] Ibid., Vol.2, p.624.

[77] Cmd., 1361 (1875) pp.247-249.

[78] As seen in chapter 1, section 4.

[79] See chapter 1, section 4.

[80] Vol.11 UNRIAA (1904), p.22.

upon 'peaceful and prolonged' display of sovereignty for a 'long time' and 'without interruption'.[81]

However, one can accept the contention that there is a lack of continuous sovereignty during the Italian occupation. Such interruption of sovereignty should not be overstated in relation to historic claims. And, in this context, it is not only the Libyan case to which such interruption applies but also to other claims.

In the case of the Gulf of Sirte before the 1960s, special circumstances existed which might be seen to affect the continuity of the display of authority; the circumstance being the nature of the area, which is quite large. This does not mean that Libyan sovereignty discontinued entirely in the area. In addition, the fact that the existence of foreign military bases namely, the British and the US forces, who had the right to use Libyan waters[82] must be seen as a special circumstance which made it improbable that a dispute could arise in the Gulf. However, when these forces left Libya the Gulf became vital to Libya in terms of its economic and strategical importance beginning from the 1970s.

The notion of continuity of exercise of sovereignty is a relative one varying from case to case and depending on particular situations. It also follows that greater continuity

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[81] PCIJ, Series C, No.62, p.101.

[82] The British and US forces had the right to use the Libyan territories including the Libyan waters. This right sprang from the treaties concluded between Libya and these two countries, op. cit., in supra chapter 1, section 4, notes 29-30; and infra chapter 5, section 3, 3.3.1. (A) and (B), note 149, and section 4, note 237. See also UKTS, HMSO, London, 1954, p.16.

will be necessary in cases involving populated areas than unpopulated ones. The peaceful and continuous exercise of sovereignty is evidence of the other State's knowledge of the claim and is often interpreted as recognition of the claim. This recognition is normally tacit or through late acquiescence of it.

In this regard, the view held in Libya is that the historic claim over the Gulf of Sirte existed well before Italian annexation,[83] and certainly before 1973 and that this claim was not stimulated by the Italian occupation. However, it remains to be seen whether this view is compatible with the principle that there should be no interruption in an historic claim and in the time required for the prescription to run as maintained by Blum.[84] But, if one examines State practice in this area, one could arrive at the conclusion that such a practice could in some circumstances depart from the rather rigid theoretical approach of Blum, and this is particularly true insofar as Third World States are concerned. The exercise of sovereignty by different authorities over an historic bay at different times is not peculiar to Libya.

In this context, the Central American Court of Justice has, in the Gulf of Fonseca Case, referred to the continuous

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[83] See Sharef, A.A., The Concept of an Historic Bay and Vital Bay in the Law of Nations with an Analysis of the Libyan Claim to the Gulf of Sirte, L.LM. Dissertation, Univ. of Hull, Sept. 1984, pp.55. See also Lahouasnia, op. cit.; Bakhnoug, R.B., The Legal Status of the Bay of Sirte in International Law, M.A. Dissertation, Univ. of Salford, Dec. 1984, p.66.

[84] Blum, Y.Z., Historic Rights, in Encyclopedia of Public International Law, Bernhardt, R., (ed.), Elsevier Science Pub., Amsterdam, New York, and London, Vol.7, (1984) p.120, at pp.122-3.

sovereignty over this Gulf by different authorities when it considered the historic element. The Court found that Spain and subsequently the Federal Republic of Central America and later the three States of El Salvador, Honduras and Nicaragua 'notoriously affirmed their peaceful ownership and possession in the Gulf'.[85]

The Gulf of Sirte is a similar case to the Gulf of Fonseca because Libya, which was independent under Qaramanli (1711-1818), an Italian colony (1911-1943), under British Administration (1943-1951) and finally became independent in 1951, has controlled the Gulf when able to do so. Also, its control was interrupted only during Italian colonisation, and it resumed such a control when it became independent in 1951 and particularly in 1969. Of course, one might maintain that neither the Ottoman Empire nor Italy has shown that it made a formal claim over the Gulf of Sirte, but by analogy, it could be maintained as the instance of archipelagic States shows that there is no need for the historicity element to exist previously to making a new historic claim.

In this context, it is important to recall that both Indonesia[86] and the Philippines[87] have failed to show that

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[85] Vol.11 AJIL 1917, pp.700-701. The Gulf of Manaar was also subject to various sovereignties from ancient Kings of Ceylon to the Portuguese and the Dutch to the British and today Sri-Lanka as held by the Annakumara Pillai v. Muthupayal, Indian Law Reports, Madras Series, Vol.27, 1903, pp.551-576.

[86] Limits in the Seas, No.35 Indonesia, US Dept. of State, Office of the Geographer, Washington, D.C. (Limits in the Seas).

[87] Ibid., No.33, The Philippines.

they have made historical claims in the past[88] over the archipelagic waters they claim today. Besides, in the case of Philippines, the latter has failed to show that both Spain and the US (its previous colonial powers) had made any such claim. However, the 1898 Treaty concluded between Spain and the US did provide that the former agreed to cede to the latter all Philippine land and waters, but it remained unclear whether these waters included the archipelagic waters surrounding the Philippines.[89] Despite this lack of historicity, the Philippines have made archipelagic claims based partly on historical grounds and partly on geographical, economic and security considerations.[90]

Moreover, the Libyan view seems to be in concordance with some form of emerging regional custom in matters of historic bays.[91] In this context, it is relevant to recall that at the Regional Seminar on the Law of the Sea organised by the Organisation of African Unity (OAU), such an issue was raised and the Conclusion adopted in the seminar included the following recommendations:-

> Recommendation No.5 on "'Historic' Rights and 'Historic' bays":
>
> "1. That the 'historic rights' acquired by certain neighbouring African States in a part of the sea which may fall within the exclusive jurisdiction of another State should be recognized and safeguarded:
> 2. The impossibility for an African State to provide

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[88] O'Connell (1982), op. cit., Vol.1, p.249.

[89] Vol.1 Philippine International Law Journal (PILJ) 1962, p.148.

[90] O'Connell (1982), op. cit., Vol.1, pp.247-9.

[91] See chapters 5 (section 4) and 6 (section 2, 2.1.5.).

> evidence of an 'uninterrupted' claim over a historic bay should not constitute an obstacle to the recognition of the rights of that State over such a bay".[92]

These recommendations are by no means binding on other States, but they do indicate some form of African **opinio juris**, and also imply a tacit recognition by the OAU States of the historic title claims by its members. This explains why African States (with the exception of Tunisia) did not protest at the Libyan claim.

By a way of analogy, Italy who claims the Gulf of Taranto as an historic bay, has also failed to show that it claimed this Gulf in the past.[93]

What is the degree of authority which must be shown when considering the continuity of a usage over a claimed area? In certain circumstances, the coastal State is not obliged to have very comprehensive laws and regulations. Such a view is best illustrated by O'Connell.[94] In the same line of thought, continuous sovereignty in principle, as Judge Huber observed in the **Island of Palmas** Arbitration, "cannot be exercised in

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[92] See in UN Doc., ST/LEG./SER. B/16 (1974) p.661, or in Vol.12, International Legal Materials (ILM), 1973, p.211. See also further discussions in chapter 6, section 2, 2.1.4., note 65, and section 2, 2.1.5., note 100.

[93] See Presidential Decree on Straight Baselines No.816 of April 26th, 1977, in GAZETTA UFFICIALE DELLA REPUBLICA ITALIANA (GAZETTA) No.305 of Nov. 11th, 1977.

[94] He writes that:

> "Just as in the case of islands which are remote and uninhabited, so in the case of remote and little used seas, very little in the way of the effective exercise of sovereignty need be required".

O'Connell (1982), op. cit., Vol.1, p.428. See also infra notes 162-3.

fact at every moment on every point of a territory".[95] In accordance with this principle, the display of sovereignty at irregular and comparatively long intervals was held sufficient for effective occupation. Judge Huber concluded that:

> "The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But,...manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period".[96]

Similarly, Libya might maintain that because the Gulf of Sirte is a remote area far distant from the main international navigation routes,[97] and a little used sea area, there was no need for her to enact detailed and very comprehensive legislation and regulations (for example in matters of navigation and security) and other enforcement measures in the absence of foreign challenge and occupation in the Gulf of Sirte.[98]

It is indeed the absence of foreign objections or activities in the Libyan-claimed Gulf which explains why Libya and the occupying powers did not make a formal claim before 1973. However, one might argue that Libyan fishing regulations, combined with the past Libyan maritime practice, can still constitute some sovereign and exclusive measures and

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[95] Scott, 2nd Series, op. cit., p.94.

[96] Ibid., pp.126-127.

[97] See chapter 6, section 3.3.

[98] See Lahouasnia, op. cit., p.138.

thus evidence of the Libyan claim, which imply clearly the Libyan intent to appropriate the Gulf of Sirte.

2.4.2. The Issue of Prescription and the Libyan Usage

As immemorial usage requires the passage of a considerable amount of time, it necessarily raises the issue of prescription. In matters of historic claims, such as the Libyan claim, the application of the acquisitive prescription is implied so that the claimant State may assert the acquisition of a title but only after a long time has gone by and following an immemorial usage and continuous possession of the claimed area by the claimant State.

Acquisitive prescription[99] is a means by which a claim upon an area, be it land territory which is not owned by any State (**res nullius**) or sea area (**res communis**) which does not belong to individual States but to the international community of States can be validated after a considerable period of time

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[99] It is defined by Johnson as:

> "...[T]he means by which, under international law, **legal recognition** is given to **the right of a state to exercise sovereignty** over land or **sea territory** in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted, and peaceful manner over the area concerned for a **sufficient period of time**, provided that all other interested and affected states (in the case of land territory the previous possessor, in the case of sea territory neighbouring states and other states whose maritime interests are affected) have acquiesced in this exercise of authority". (Emphasis added).

Johnson, D.H.N., Acquisitive Prescription in International Law, Vol.27, BYIL (1950) pp.332 at pp.353-4; see also Verykios, P.A., La prescription en droit international public, Paris, 1934.

and a continuous and immemorial possession of the area involved. Hence, the possession of the claimed area by the claimant State which was based either upon an uncertain title or no title at all becomes in one way or another legitimate as a result of the long, immemorial and continuous possession of this area.[100] Consequently, a valid title is then acquired.

Although writers, when dealing with prescription, use terms such as 'sufficient period of time', etc.., no length of time for this prescription is set for the claimant State to assert its right.

In contrast to municipal law, international law does not set any length of time for the prescription. No particular period of time seems to have been agreed upon before a valid claim to historic title can be made, although it is generally accepted that time is relevant.[101] The length of the period of time required to establish historic title does not seem to matter very much although the longer a situation endured the greater legal stability it acquired.

The Libyan Declaration of 1973 implies that the previous exercise of Libyan sovereignty over the Gulf was exercised prior to 1973. However, it is difficult to state in the past the exact date of the starting of the Libyan claim of sovereign control over the Gulf of Sirte.

In addition, usage does not need to be very long; the

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[100] UN Doc. A/CN. 4/143, op. cit., p.11.

[101] Jessup, P.C., The Law of Territorial Waters and Maritime Jurisdiction, Jennings G.A. Co., New York, 1927, p.382. See also Bouchez (1964), op. cit., p.203, and Gidel, op. cit., p.628.

emphasis should be on the existence of usage only so that the history element "required of an historic claim might be short and incidental".[102] In its Report on Historic bays and Waters, the ILC stated that:

> "... [N]o precise length of time can be indicated as necessary to build the usage on which the historic title must be based. It must remain a matter of judgment when sufficient time has elapsed for the usage to emerge. The addition of the adjective 'immemorial' is of little assistance in this respect. Taken literally 'immemorial' would be a wholly impractical notion; the term 'immemorial' could, therefore, at the utmost be understood as emphasizing, in a vague manner, the time element contained in the concept of 'usage'. It will anyhow be a question of evolution whether, considering the circumstances of the particular case, time has given rise to a usage".[103]

What is important is not necessarily the length of time but whether the claim is rapidly being consolidated or not. In this respect, De Visscher writes:

> "...[A]vant tout l'ancienneté de l'usage: il y a des usages récents qui, sous l'action des nécessités impérieuses, se consolident rapidement et se substituent en peu de temps à une coutume".[104]

Applying such criterion to the Libyan claim may lead to the view that it is not necessary or vital to trace the Libyan claim to, for example, the Middle Ages. Besides, It might be maintained that the concept of prescription is a proportional one depending on the case. As a result, each case must be judged in the light of its circumstances as Norway pleaded in

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[102] O'Connell (1982), op. cit., Vol.1, p.432.

[103] Vol.2 YILC (1961-62), op. cit., p.15 (emphasis added).

[104] De Visscher, Ch., La codification du droit international, Vol.1, Recueil des Cours de l'Académie de Droit International (Recueil), 1925, p.325 at pp.351-352.

the Fisheries Case,[105] besides, as it was maintained by Strohl 'each bay is a different problem'.[106]

The length of time need not be the same for all cases, and in this context, Norway in its **Counter-Memorial** in the Fisheries Case maintained that with regard to immemorial usage 'l'ancienneté de la pratique est une notion relative, qui varie selon les circonstances et la nature des problèmes'.[107] In the same line of thought, O'Connell writes:

> "While 'immemorial possession' has often been referred to, it is misleading in the context of at least some maritime claims, where the real question is the relationship between interested States and their conduct in respect of the claims. To require immemoriality in the literal sense would be to exclude almost all the so-called historic bays, except Palk's Bay, where the history was traced to the thirteenth century at least, so that it cannot mean in any event what it purports to mean".[108]

Prima facie, there is no reason to expect Libyan usage for as long as, for instance, in the case of Palk Bay.[109] Furthermore, the importance of a time factor in the formation of an historic title was pointed out by Judge Ammoun in his **Separate Opinion** in the Barcelona Traction Case when he stated that time sometimes effaces illegality so that only

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[105] **ICJ Pleadings**, 1951, Vol.3, p.462.

[106] Strohl, op. cit., p.249.

[107] Ibid., **ICJ Pleadings**, 1951, Vol.1, p.384; see also Sørensen, M., Les sources du droit international, Munksgaard, Copenhagen, 1946, p.102.

[108] O'Connell (1982), op. cit., Vol.1, p.432. See also Johnson, D.H.N., Consolidation as a Root of Title in International Law, Cambridge Law Journal, 1955, p.215, who maintains that "'immemorial possession' is a notion which is wholly unrealistic", at p.219.

[109] Goldie, op. cit., p.224.

effectiveness remains.[110] The factor of time is closely linked with the acquiescence factor if a claim to an historic title is to be successful. This affects the peaceful occupation of the area in question since an historic claim may only stand if it has been acquiesced in, or at least tolerated by, other States.[111]

The time factor is also important in order to give other States an opportunity to demonstrate their rejection of any historic claim. Because there was no formal historic bay claim by Libya over the Gulf of Sirte during the Qaramanli Dynasty (1711-1835) or during the Ottoman (1835-1911) and Italian (1911-1943) periods, so foreign States did not have the opportunity to pronounce upon the Libyan claim. As regards the 1973 period, Birnie maintains that the Libyan claim was too recent and consequently was not yet accepted.[112] Of course, this view could be challenged since if this claim was recognised by foreign States, a few years might have been enough for the claim to be accepted.[113] Further, in the case of a newly independent State, such as Libya, a decade might be seen as acceptable for the acquisition of a real and important economic interests and by comparative analogy an historic title.[114]

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[110] ICJ Report, 1970, p.310.

[111] See chapter 4, section 3.

[112] The Times, March 26th, 1986, p.5.

[113] Lahouasnia, op. cit., p.96.

[114] See Prescott, J.R.V., Straight Baselines: Theory and Practice, in Brown, E.D. and Churchill, R.R., (eds.)., The United Nations Convention on the Law of the Sea: Impacts and Implementation, Proceedings of the XIXth Annual Conference of

III. The Open and Effective Exercise of Libyan Authority over the Gulf of Sirte

Before examining whether Libya fulfils the effectiveness criterion, it is important to deal though briefly with it, hence, this requires its theoretical assessment. Then, the formalism and the material display of the Libyan claim will be examined.

3.1. The Theoretical Aspect of the Effectiveness Criterion

In international law, the effectiveness criterion is an essential element. The existence of any State is measured by its capacity to exercise effectively and exclusively its authority over its territory and population.[115] According to De Visscher, the effectiveness criterion may be seen as an expression of the relation between facts and law at a certain moment. He writes:

> "L'effectivité suggère à la fois l'idée d'une certaine tension et celle d'une ultime adéquation entre le fait et le droit".[116]

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the Law of the Sea Institute (Co-sponsored by the Centre for Marine Law and Policy, UWIST, Cardiff, July 1985). Honolulu, Hawaii. 1987, pp.288-318 at p.310. He writes that:

> "Indeed, it may be reasonably guessed that the majority of counries which have achieved independence in this century would regard a decade of activity as evidence of real and important economic interest".
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> (id.).

[115] Goldie, op. cit., p.221.

[116] De Visscher, Ch., Observations sur l'effectivité en droit international public, Vol.62 RGDIP 1958, p.601.

The effectiveness criterion has been defined 'as being a material possession which consists of acts taken by a State to appropriate a claimed area over which it exercises its exclusive authority'[117]. The effectiveness criterion must be 'exclusive authority', 'dominion', 'sovereignty', 'complete sovereignty', etc.,.[118] Insofar as the 1973 Declaration is concerned, 'complete sovereignty', 'complete national sovereignty and jurisdiction', and 'complete rights of sovereignty' were the phrases which were used. Further, this effectiveness criterion means a manifestation of State authority over the maritime area concerned and the exclusion of all other nations from that area.[119] The claimant State must show that it took all the necessary measures so as to assert its sovereignty. The question is thus necessarily one of fact.[120]

The relation between law and fact can be illustrated thus in one way that the facts must fit exactly with the law in force at a given time. However, there can also be a difference between law and fact. The former case presents no real problem but, if there is no accord between the law and the facts, it is a very different story and one likely to exist everywhere because all nations change and develop. As the factual

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[117] Clipperton Island Case, Vol.2 UNRIAA (1931), pp.1105-11 at p.1110.

[118] UN Doc. A/CN.4/143, p.13.

[119] See the United States v. Louisiana Case, 470 US 93 (1985), p.73 at p.88.

[120] Kittichaisaree, K., The Law of the Sea and Maritime Boundary Delimitation in South-East Asia, OUP, Oxford, 1987, p.25.

circumstances change, the relation between the interests of the members of the International Community of States is also altered. Indeed, new facts require a change in the old rules or else the creation of new ones.[121]

The effectiveness criterion is not only essential but is also vital for the constitution of historical title. Such a fact was recognized during the Island of Palmas Arbitration when this criterion was dealt with; this Arbitration threw some light on the meaning of the concept.[122] Its Award defined the effectiveness criterion as 'a peaceful display of territorial sovereignty' by the claimant State in the area it claims.[123] This case related to a dispute between the US and the Netherlands concerning the sovereignty of the Island of Palmas. The US claim was based on the fact that it had sole sovereignty over the Island because it succeeded Spain, who in her turn, was the first to discover the island whereas the Dutch claim was based on the effective display of authority over the Island.[124]

The Arbitrator, Judge Huber found that a title based on effective exercise of sovereignty is superior to a claim founded on discovery. He stated that:

> "It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking...So true is this that practice, as well as

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[121] Bouchez (1964), op. cit., pp.239-240. See also the Separate Opinion of Judge Ammoun in the Barcelona Traction Case, ICJ Reports 1970. See also chapter 6, section 2.1.5.

[122] Vol.2 UNRIAA (1928), pp.829-871.

[123] Ibid., p.839.

[124] Ibid., pp.840-846 and 870.

> doctrine, recognizes-though under different legal formulae and with certain differences as to the conditions required- that the ... peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title".[125]

He emphasized the element of effective display of sovereignty over the claimed area, which must be 'continuous and peaceful'.[126] He spoke of the principle that the ' peaceful display of the functions of the State within a given region is a constituent element of territorial sovereignty' and that 'under the reign of international law, a fact of peaceful display is still one of the most important considerations in establishing boundaries between states'.[127] Moreover, he maintained that the Netherlands's claim to sovereignty was founded 'essentially on the title of peaceful display of a State authority over the island".[128]

Judge Huber was satisfied that there was a sufficient 'open and public' display of State authority exercised by the Netherlands over the disputed island which provided clear evidence that the requirement of 'peaceful display of sovereignty' had been fulfilled.[129] He also stated that:

> "The peaceful character of the display of the Netherlands sovereignty for the entire period to which the evidence concerning acts of display relates (1700-

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[125] Ibid., p.839.

[126] Vol.2, UNRIAA, op. cit., p.839; see also Scott, 2nd Series, op. cit., p.93.

[127] Id.

[128] Scott, 2nd Series, op. cit., p.126.

[129] Id.

1906) must be admitted".[130]

It is then concluded in the Award that:

> "The Netherlands title to sovereignty, acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700, therefore holds good."[131]

By analogy, the peaceful character of the Libyan claim prevailed until 1981 when Libya was confronted by the US Sixth Fleet.[132]

From this Award, it could be maintained that the effectiveness criterion implies a peaceful and regular exercise of State authority over a claimed area.[133] Therefore, this exercise of State functions and duties results in possession which in turn becomes a valid title. Consequently, this effectiveness criterion constitutes more or less the relation between the facts and what is considered as law at a certain moment.[134]

Moreover, in the Legal Status of Eastern Greenland Case, the Court reaffirmed the principle laid down in the above-mentioned case and added that a sovereign claim which is based upon continued display of authority must involves two factors which may be proved to exist i.e., (i) 'the intention and will

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[130] Ibid., p.127.

[131] Ibid., p.129.

[132] See chapter 1, section 4 for more details on the US-Libyan Incidents.

[133] Id.

[134] Id., p.845; see also Bouchez (1964), op. cit., p.239. See also supra note 121.

to act as sovereign', and (ii) 'some actual exercise or display of such authority'.[135]

Thus, as will be seen later,[136] the Libyan sovereignty claim over the Gulf of Sirte requires two elements.

First, evidence that the Libyan claim is intentional. This could only be made through a procedure such as legislation, regulation, court decision or any act or method which is sufficient to prove that foreign States knew or should have known of the Libyan claim as it was upheld by the ICJ in the **Fisheries** Case. Here, the International Court accepted the Norwegian contention i.e., that the application of the system of straight baselines by Norway along its coasts had achieved such a degree of notoriety that the UK must have been aware of it.[137]

Second, that Libya, the claimant State must have actually displayed its authority over the Gulf of Sirte.

It is interesting to see how the Libyan claim was formally made and how it was materially manifested and displayed over the Gulf of Sirte by Libya and its predecessors.

3.2. The Formalism of the 1973 Libyan Declaration over the Gulf of Sirte

The formality of the 1973 Libyan Declaration can be said

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[135] Ibid., pp.22-147 at pp.45-46.

[136] See infra section 3, 3.2.

[137] ICJ Reports, 1951, p.139.

to have involved two steps: (i) a clear and unequivocal intention to act as a sovereign over the Gulf of Sirte by Libya and even by its predecessors, and (ii) a procedure through which the Libyan claim was expressed i.e., legislation, regulations and even judicial pronouncements.[138]

3.2.1. Libyan Intention to Act as a Sovereign

A claim to an historic bay is a claim by a State based on an historic title to a maritime area as a part of its national territory; it is a claim to sovereignty over the claimed area. The Libyan claim is based on sovereignty and thus constitutes a typical example. In other words, the possession of the State claiming such sovereignty and title must have been exercised 'à titre de souverain'.

The intention of the claimant State must be made clear and must constitute the claim itself. It must show publicly and openly to foreign States that the State claims sovereignty over a given area.[139] Also, it is useful to examine whether the Libyan claim was a formal and notorious claim which constituted a duly notified intent on the part of Libya to appropriate the Gulf of Sirte.

At present, the Libyan assertion of authority over this Gulf has only been formally made public by the relevant Libyan authorities in the 1973 Declaration, i.e., that this Gulf which 'constitutes an integral part of' Libya and 'is under

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[138] See the Zouara Judgment, op. cit., and supra notes 40 and 47.

[139] UN Doc. A/CN. 143/4, op. cit., p.15.

its complete sovereignty'. Such a Government Declaration formally proclaimed Libyan sovereignty over the Gulf of Sirte and constitutes without doubt a proper, formal and notified claim. Consequently, foreign States were duly made aware of the official intention of Libya to appropriate this Gulf through their Embassies and High Commissions in Libya and their Representatives at the UN.[140]

Libya is then set to exercise the same authority over this Gulf as it does over its land territory. Thus, this formality aspect of the claim can only be expressed by municipal acts of the claimant State such as legislative or regulatory acts.[141]

The question whether activities of individuals could, as State activities, generate usage and historic title to sea-areas deserves to be dealt with in this study. This issue was well debated in the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case. In its Reply, Libya stated that the criteria to be proved in order for a bay to be considered as an historic bay was that 'the areas adjacent to a coastal State, must be claimed **'à titre de souverain'**.[142]

The principle that a sovereign claim is a claim made **'à titre de souverain'** is a principle of international law which only refers to the State which is endowed with the rights of sovereignty and not private individuals. It follows that only acts of State should be relied upon as the manifestation of

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[140] See chapter 1, note 2.

[141] ICJ **Pleadings** 1951, **Norwegian Counter-Memorial**, Vol.1, pp.567-8.

[142] ICJ **Pleadings**, 1982, Vol.4, p.114.

State sovereignty and not the activities of private individuals who are acting on their own unless these activities are carried out by persons serving the State or are authorized by the State laws and regulations or they are acting on its behalf.[143]

In the **Fisheries** Case, both Norway and the UK discussed this matter in their **Oral Arguments**. Norway asserted that it had occupied and exercised an effective control over the disputed area since time immemorial. It stated that:

> "Sans interruption, les eaux litigeuses ont été placées sous l'autorité exclusive de la Norvège, et que l'exploitation des fonds de pêche qui s'y trouvent a été réservée aux populations côtières, soit sous la forme de propriété privée, soit sous celle de propriété collective, soit en vertu des interdictions de droit public prononcées par les pouvoirs compétents à l'égard des pêcheurs étrangers".[144]

This Norwegian argument on acts by individuals was contested by the UK in its **Reply**. The UK stated that Norway:

> "...[M]akes no distinction between individual acts of appropriation by fishermen or by parishes for their own benefit and acts of the Norwegian State asserting a claim to these areas as Norwegian national waters. Mere actions by individuals, unaccompanied by any act of the State, could not of course confer upon Norway any rights under international law".[145]

It argued that even if it was proved that Norwegian fishermen had been fishing in 'waters outside the generally

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[143] Waldock, C.H.M., Disputed Sovereignty in the Falkland Islands Dependencies, Vol.25 BYIL 1948, pp.311-352 at p.323.

[144] ICJ **Pleadings**, 1951, Vol.1, p.572.

[145] Ibid., p.318.

recognized limits of maritime territory',[146] it was not 'evidence' nor could it be seen as a 'basis for Norwegian sovereignty over the waters concerned'.[147] The UK concluded that it is the acts of State sovereignty, not the acts of individuals which provide the foundation for a title to territorial sovereignty, because international law cannot permit the acts of private individuals to create a title to sovereignty in derogation of the existing rights of States.[148]

However, Norway clarified its view in her **Rejoinder**. It stated:

> "Sans doute des activités privées, qui s'exerceraient sans aucune intervention directe ou indirecte de l'Etat, n'auraient-elles pas d'influence sur la situation juridique de ce dernier. Mais il est fréquent que l'attitude de l'Etat se manifeste extérieurement à travers l'action de personnes privées. Si, par example, une personne privée agit conformément à son droit national, ce qui apparaît dans les actes qu'elle accomplit , ce n'est pas seulement une volonté privée, c'est aussi l'ordre juridique étatique".[149]

Norway's position means that the acts of individuals cannot be seen as the basis for the legal rights of sovereignty but it may be seen as evidence of the domestic law which gave these individuals the right to fish in the disputed area, which may be regarded as the basis for the historical legal rights of sovereignty.

Although the World Court did not discuss this point,

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[146] Ibid., p.658.

[147] Id.

[148] Id.

[149] Ibid., Vol.3, p.451.

Judge McNair, in his **Dissenting Opinion**, maintained that the State claiming an historic title is required to bring some proof that it exercised its jurisdiction over the claimed area and that 'the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them'.[150]

However, Judge Hsu Mo has, in the **Fisheries** Case, made it clear that individual activities cannot confer sovereignty on the State. He stated that:

> "As far as the fishing activities of the coastal inhabitants are concerned, I need only point out that individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State, and this despite the passage of time and the absence of the molestation by the people of other countries. As for prohibition by the Norwegian Government of fishing by foreigners, it is undoubtedly a kind of State action which militates in favour of Norway's claim of prescription".[151]

While it seems to be true that the acts of private individuals cannot be considered as a basis for a claim to historic title, it seems logical that these individual acts may be construed as evidence of existing State sovereignty.[152] This argument was relied upon by the UK in

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[150] ICJ Reports, 1951, p.184.

[151] **Opinion Dissenting**, ibid., p.157.

[152] Blum (1965), op. cit., p.127.

the Minquiers and Ecrehos Case,[153] and supported by Judge Arechaga in the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case.[154]

3.2.2. Acts Expressing Material Display of Authority Over the Gulf of Sirte

A State can show its intention through various legislative or administrative means which serve to demonstrate that the State sees the area concerned as an integral part of the territory.[155] So it is important to assess by which acts and how the Libyan claim, hence, the Libyan sovereignty, is exercised.

As regards sovereignty, insofar as historic bays are concerned, Bourquin maintains that it must be effective in the case of historic bays, and this requires certain acts from the claimant State. He adds that there is a requirement that sovereignty must be exercised effectively, hence the State's intent must be expressed by deeds and that proclamations on

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[153] ICJ **Pleadings**, 1953, Vol.1, pp.110, 267 and 269; and Vol.2, pp.157-159. See also the **Individual Opinion** of Judge Carneiro in the same case, who supported the same argument (ICJ Reports, 1953, pp.104-105 and 104-105).

[154] **Dissenting Opinion**, ICJ Reports, 1982, p.124.

[155] ICJ **Pleadings**, 1951, Vol.1, pp.567-568. In the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, Tunisia claimed to have exercised sovereignty over these sedentary fisheries areas and the Gulf of Tunis and the Gulf of Gabes and cited in support of this legislative and other indicia of the exercise of the supervision and control dating back to the time 'whereof the memory of man runneth not to the contrary' (ICJ Reports, 1982, p.72).

their own are not enough.[156]

The effectiveness criterion could only materialize when a claimant State issues municipal laws and regulations and carries out the enforcement action necessary for this purpose. These acts must imply sovereignty and not acts which do not carry any sovereignty implication.[157]

Sovereignty over a maritime area can also be shown through decrees controlling fishing, navigation, pollution, security and other activities such as the allocation of taxes, the making of topographical surveys, the grant of concessions for exploitation, regular control by police and military patrols, construction work etc. All these acts are examples of the effective exercise of sovereignty.[158]

In order to assert its claim, Norway resorted to its municipal acts in the Fisheries Case, when it maintained that in the application of the theory of historic waters, municipal acts of the coastal State are of the essence as they are implicit in an historic title. It stated that:

> "It is the exercise of sovereignty that lies at the basis of the title. It is the peaceful...exercise thereof over a prolonged period of time that assumes an international significance and becomes one of the elements of the international juridical order...
> Above all, by action under municipal law (laws, regulations, administrative measures, judicial decisions,

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[156] As translated by UN Doc. A/CN. 143/4, op. cit., p.15. See also infra note 171.

[157] See infra notes 200-1.

[158] In the United States v. California Case, the US Supreme Court admitted that 'State acts which extend State sovereignty to an international area by claiming it as inland waters necessarily extends national sovereignty' [381 US 139 (1965) p.299].

etc...)".[159]

However, through which acts a claim must be asserted is a complicated matter as is illustrated by Gidel who finds it difficult to specify such acts.[160] In the same line of thought, Bourquin asks the same question, viz., which are the municipal acts which express the State's intent to act as sovereign. He adds that the matter is difficult to determine.[161]

Sometimes, a conception of these acts which is more or less flexible is chosen. This is particularly true in the Grisbadarna Arbitration, as is underlined by Gidel who says that it would be very strict to require that only acts of appropriation may constitute such evidence. He referred to the above case when Sweden had performed various navigation acts such as the placing of beacons.[162]

In contrast to the above case, the International Court took a rather restrictive view in the Minquiers and Ecrehos Case, where French action relating to navigation was rejected by the same Court as evidence of ownership and of an exercise of French authority over the islets.[163]

The above two cases led Bourquin to maintain that there are borderlines cases where the same act could be regarded

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[159] ICJ Pleadings, 1951, Vol.1, pp.567-8.

[160] Gidel, op. cit., p.633.

[161] Bourquin, M., Les Baies Historiques, in Mélanges Georges Sauser-Hall, Paris-Neuchâtel, (1952), pp.37-51 at p.43.

[162] Gidel, op. cit., p.633.

[163] ICJ Reports, 1953, p.71.

differently in various cases.[164] According to Bouchez, the scope, the exclusivity and the importance of the exercise of authority of a State over a claimed bay need not be the same in every case. According to him, this depends on the nature of the bay claimed, and the purpose for which such a bay is claimed.[165] Consequently, there is a link between the claim, the manner of the exercise of authority and the nature of the claimed bay.[166]

If one applies such opinion to the Gulf of Sirte, one could then argue that certain acts taken by Libya and its predecessors, constituted acts through which exclusive Libyan authority was exercised and that the 1973 Declaration completed this control by providing for a full and exclusive jurisdiction over this Gulf.

Since Libyan independence in 1951, and particularly from the early 1970s, Libya has stimulated sponge-fishing activities and has issued supplementary fishery legislation and regulations especially relating to sponge-fishing whether in, or outside, its territorial waters.[167] Moreover, it invested a considerable amount of capital in fishing activities.[168] It issued acts for the delimitation of maritime zones, including its internal waters in the Gulf of

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[164] Bourquin, op. cit., p.43.

[165] Bouchez (1964), op. cit., p.250.

[166] Id.

[167] As has been shown in section 2 above.

[168] See Blake et al., ICJ **Pleadings**, 1982, **LCM**, Vol.2, p.56. See also section 2 above, and chapter 6, section 3, 3.2.

Sirte and the exploitation of marine resources.[169] It regulated maritime affairs and activities in general and navigation and fishing in particular.[170] Such a display has existed in the past and indeed exists at present in conformity with the second required element of the effectiveness criterion, i.e., the material manifestation of the Libyan authority over the Gulf of Sirte.

In addition to laws and regulations which a State must take, the same State must also carry out enforcement actions in a peaceful, continuous and effective way so as effectively to exercise its authority over the area it claims. Such effectiveness must not only be exclusive, but also be open and permanent over a considerable time. In this context, it is necessary to refer to the Civil Aeronautics Board v. Island Airways Inc., Case, when the US District Court of Hawaii held that:

> "(1) The sovereignty claimed must be effectively exercised; the intent of the state must be expressed by deeds and not merely by proclamations, e.g., keeping foreign ships or foreign fishermen away from the area, or taking action against them.
> (2) The acts must have been notoriety which is normal for acts of the state".[171]

This view is similar to Bourquin's opinion.[172] Similarly, in the Fisheries Case, the Court found that Norway not only considered the waters as national waters but also had

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[169] As shown in section 2 above.

[170] As already seen in section 2 above.

[171] 235 US Fed. Supp., (1964), 990 at p.1005.

[172] Bourquin, op. cit., p.49. As has been underlined earlier in supra note 156.

effectively exercised its authority over the water areas.[173]

It also held that:

> "The Court, having thus established the existence and the constituent elements of the Norwegian system of delimitation, further finds that this system was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other States".[174]

Thus, the Court clearly considered the effective exercise of the straight baselines system over a long period of time as a very important fact for the justification of the system.

In the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, Libya argued that one of the elements required for a bay to be an historic bay is the exercise of control over the claimed bay. This required exercise of control must encompass all interests of a State in the regulation of its internal waters. Such interests would include 'law enforcement, the prohibition or regulation of foreign vessels and navigation, resource management, and security considerations'.[175]

In the Fisheries Case, Norway maintained, as already seen, that there was no serious doubt that in the implementation of the historic waters theory, acts originating from the riparian State have an essential role. The historic title implies fondamentally the realisation of these acts.[176]

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[173] ICJ Reports, 1951, pp.136-139.

[174] Ibid., pp.136-137.

[175] ICJ Pleadings, 1982, Vol.4, p.114.

[176] ICJ Pleadings, 1951, Vol.1, p.567. See also supra note 159.

Moreover, in its Rejoinder, Norway added that it is certain that a State can only invoke a historic title if it is in a position to prove the existence of 'peaceful and continuous usage'.[177]

In its Reply, the UK made reference to a Draft submitted by its delegation to Sub-Committee No.1 for discussion during the 1930 Conference for the Codification of International Law. It read as follows:

> "If, in virtue of 'uninterrupted usage', a coastal State has exercised exclusive authority over an area of water, surrounded to a large extent by land or lands belonging to the territory of that State, the area in question shall, if the authority of the State has been generally recognized and admitted by other States, be deemed to form part of the inland waters of the State".[178]

The Court, after having established the existence of the Norwegian system of baselines, held that such a system was consistently applied by Norwegian authorities.[179] The Court concluded that:

> "The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the 'long period' which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court.
> In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation 'consistently and uninterruptedly' from 1869 until the time when the

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[177] Ibid., Vol.3, p.452.

[178] Ibid., Vol.2, p.635.

[179] ICJ Reports 1951, p.133.

dispute arose".[180]

Applying this opinion to the Libyan claim led to the result that the Libyan claim was interrupted by Italian colonisation as underlined earlier.[181] Since at least 1973, however, such an interruption has disappeared and this claim is consistent.

In the United States v. California Case, California claimed that its bays were historic but it failed to prove that there was an active and continuous assertion of dominion over these bays. Thus, the US Supreme Court rejected the Californian argument, referring in generalities to the 'questionable evidence of continuous and exclusive assertion of dominion' over the disputed area.[182]

In the United States v. Louisiana Case, the same Court held that:

> "By the long-standing, 'continuous' and unopposed exercise of jurisdiction to regulate navigation on waters within the 'inland water line', the United States is said to have established them as its inland waters under traditional principles of international law".[183]

This approach is clearly reflected in the 1973 Libyan Declaration where it is asserted that Libyan authority has been exercised over the Gulf of Sirte throughout history and without dispute.[184] It was also reaffirmed several times by

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[180] Ibid., p.138.

[181] See section 2 above.

[182] 381 US 139, at p.318.

[183] 394 US 11, p.44 at p.61.

[184] For an exact quotation, see supra note 1.

the Libyan authorities.[185]

The active exercise of sovereignty over the area by the State claiming it which must be repeated or continued by the same State in order to establish an historic title to a maritime area was also recognized by the US District Court of Hawaii in the Civil Aeronautics Board v. Island Airlines Inc., Case.[186]

In the United States v. Louisiana Case, the US Supreme Court reaffirmed the principle that the 'exercise of authority over the area by the claiming nation' and the 'continuity of the exercise of this authority' inter alia are factors which must be taken into consideration in determining whether a body of water is an historic bay.[187] Later on, this Court held the same view in the United States v. Maine Case by stating that 'continuity of usage or international acquiescence are necessary to establish historic title'.[188]

However, what this principle actually means is less certain. Bouchez makes a very definite statement. He suggests that effectiveness should be measured by considerations of all kinds of legislation and administrative acts which demonstrates the exercise over the relevant sea area.[189]

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[185] See Libyan statements in the UN and other international organisations, L.F.O., The Gulf of Sirte File 1973-1980; see also US-Libyan Incidents in chapter 1, section 4.

[186] US 235 F. Supp. 990 (1964), p.1005. See also supra note 161; and for a full quote, see supra note 173.

[187] 470 US 93, (1985), p.81.

[188] 475 US 89, p.68 at pp.78-79.

[189] He states that:

"...[I]t is impossible to formulate a generally

Moreover, such effectiveness must also be enforced both vis-à-vis the nationals as well as the foreign nationals.[190] Equally true, the Libyan exercise of authority was directed against both local and foreign fishermen as underlined earlier.[191] In addition, this Libyan exercise of authority can even be characterized as of a 'radical nature', particularly in areas such as the Gulf of Sirte which give access to Libyan 'vital industrial and commercial centres'.[192] That is why Libya took all measures necessary for that purpose so that its exercise became intense and effective.

Among such measures, it is important to recall the 1973 Declaration which formally laid the Libyan sovereign claim over the Gulf of Sirte, and delimited its geographical coordinates, which clearly amounted to a type of internal waters action.[193] Moreover, the 1959 Libyan Law on Sponge-Fishing laid down a system of licences and excluded foreign fishing boats from the sponge-banks in and off Libyan territorial waters (and the Gulf).[194]

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applicable criterion for determining whether there is effective exercise of sovereign rights or not".

Bouchez (1964), op. cit., p.249.

[190] United States v Florida, Report of Albert. B. Maris, Special Master, Jan. 18th, 1974 (Oct. Term-1973) N°5241.

[191] See supra note 53.

[192] Bouchez (1964), op. cit., p.250. See also chapter 6, section 3, 3.1. and 3.2.

[193] See chapter 1, note 2.

[194] Law No. 12 of 1959, Libyan Official Gazette No.15, 14 Sept. 1959; see also Annex 47, p. 449, LCM, Vol.2, ICJ Pleadings, (1982), and Royal Decree Creating Restricted Areas in which

Furthermore, the 1955 Libyan Petroleum Laws established four petroleum zones (in effect including the Gulf of Sirte) for the purpose of exploration and exploitation of offshore oil.[195] By their effect, these measures amount also to a type of action which is very close to the regime of internal waters.

Libyan **Notices to Mariners** were issued in 1985,[196] whose purpose was to enforce the Libyan claim of sovereignty over the Gulf of Sirte, and in particular Libyan navigation rules such as the submission of the innocent passage of foreign ships in Libyan territorial waters (measured as from the closing line of the Libyan-claimed Gulf) to prior Libyan authorization, daytime sailing and other very restrictive requirements (extended to the Gulf).[197] These **Notices** established four prohibited zones along the Libyan coast which are in fact located in and outside the Libyan territorial sea. Zones A and B were located east of Tripoli, where foreign shipping is not allowed at any time. Zone C which is the largest zone is found south of Benghazi, thus inside the Gulf of Sirte. The fourth Zone (D) is situated close to Tripoli.

Sponge could be Gathered, ibid., pp.461-2.

[195] See the zones created by the Petroleum Law No.25 of 1955 which are: (i) the Province of Tripolitania, (ii) Part of Cyrenaica which lies north of 28th parallel of latitude, (iii) Part of Cyrenaica which lies south of 28th parallel of latitude, and (iv) the Province of Fezzan (Article 3), Libyan Official Gazette No.4 of June 19th, 1955. See also supra note 71. See also Map No. 5.

[196] LOS Bulletin, 1985, No.6, p.40; and as referred to by the US Dept. of State protest (id.). See also chapter 1, section 2, note 14; see also chapter 5, section 3, 3.3.1.(C), note 189; and chapter 6, section 3, 3.3., note 243.

[197] Id.

International law allows coastal States temporarily to close some sea-areas to foreign shipping only where their security is endangered or is at risk. As a result, Libya can prohibit foreign shipping in some sea-areas only on a temporary basis and in accordance with Articles 17 (3) of the TSC or 25 (3) of the LOSC.[198] As a result, these Notices have the effect of establishing an internal waters regime in the Gulf of Sirte.[199]

The above Libyan acts can indeed be characterized as 'acts of appropriation'[200] since such acts have clearly gone beyond the normal scope of regulations made in the interests of navigation[201] or simply controlling sponge-fishing. It is important also to recall that Libya has effectively succeeded in exercising its authority over the Gulf of Sirte. This is particularly true as borne out by the arrests of Italian fishing boats.[202]

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[198] Article 25 (3) of the LOSC reads as follows:

> "3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published".

[199] See Lahouasnia, op. cit., p.161.

[200] See Gidel's opinion, op. cit., p.633.

[201] Id. See also supra note 157.

[202] Vol.78 RGDIP (1974), p.1175. Also, it is important to underline the fact that the Italian Under-Secretary stated that fishing in Libyan waters is regulated by Libyan law which provides that fishing boats illegally fishing in Libyan waters will be confiscated and the crews put to prisons, Vol.4 Italian Yearbook of International Law (IYIL), (1978-9), p.239. In addition, Italy has acknowledged the effectiveness of the Libyan authority (ibid., p.240).

IV. Assessment

As already seen throughout this chapter, since the 17th century and particularly during the Qaramanli Dynasty, the Ottoman, Italian and the British periods, there was no formal historic bay claim made over the Gulf of Sirte. In the past, the Gulf was used as a base and recently it was used to launch US attacks against Libya.[203] Consequently, it can be maintained that from 1911, when Italy occupied Libya, it had several military uses demonstrating by the same token its historic and strategic importance in addition to the discovery of oil in the 1960s.

As soon as oil started to be extracted the Gulf region developed into a vital centre, and it became essential, for economic and strategic reasons, for Libya to lay a formal claim of sovereignty over it in 1973. This explains, when it became independent in 1951, why Libya did not immediately and formally claim this Gulf.

However, fishing legislation and regulations along the Libyan coast and beyond the 3 mile-limit and thus including this Gulf could constitute a strong basis for the Libyan claim and can be considered as an exclusive control which has an undoubted sovereignty significance, at least in the past. There is some evidence that Libya exercised its sovereignty over the Gulf of Sirte not only since the beginning of the 1970s, but also before.[204]

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[203] See chapter 1, section 4.

[204] As has been shown in section 2 above.

Bearing in mind the above State practice and the doctrine, one could argue that insofar as the criterion of effectiveness is concerned, Libya fulfils such criterion as Spinnato has acknowledged. He also adds that Libya has, since the 1973 Declaration and subsequent action, succeeded by materialising its control over the Gulf of Sirte.[205]

Such compliance with the effectiveness criterion, one of the most important historic bay requirements, renders the Libyan claim over the Gulf of Sirte susceptible of being accepted by the international community of States. This is particularly true as few States have actively protested and some of them, such as the US, for reasons other than concern for international law.[206] Besides, as State practice has shown, the effectiveness criterion seems to be the most important element in the doctrine of historic bays. And in this context, it is important to refer the Soviet claim over Peter the Great Bay, which has been consolidated since 1958 despite protests also from only a limited number of States.[207]

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[205] Spinnato, op. cit., p.74.

[206] This is particularly the case of the US and of neighbouring States such as Greece, Italy, Malta and Tunisia which registered some form of disapproval for delimitation purposes as will be shown in chapters 4 (section 3, 3.2. ans 3..3.) and 5 (section 3, 3.1.4., 3.1.5., 3.2.5., 3.3. and section 4).

[207] Whiteman, M.M., Digest of International Law, 4 Vols. US Dept. of State Pub. No.7403-1963, Washington, D.C., (1963-73), Vol.4, pp.250-7.

CHAPTER FOUR :

INTERNATIONAL ACQUIESCENCE AND THE LIBYAN CLAIM OVER THE GULF OF SIRTE

I. Introduction

The Libyan Law of October 9th, 1973, by which Libya asserted its sovereignty over the Gulf of Sirte, mentioned the acceptance or acquiescence of this sovereignty by other States when it stated that Libya had exercised this sovereignty 'throughout history' and 'without any dispute'. The absence of dispute by other States meant that they recognised or acquiesced in this claim.

Moreover, the Libyan claim over the Gulf of Sirte needs to be accepted by foreign States by way of acquiescence so as to be consolidated and accepted. Consequently, acquiescence is the only practical procedure to be used so as to appraise the acceptability of a claim.

The concept of international acquiescence is one of the essential criteria insofar as customary international law regarding historic bays is concerned.[1] The answer to the question whether there is any acquiescence in the Libyan claim requires a brief theoretical examination of the acquiescence (section two). Moreover, a more in depth analysis will be taken in section three in order to assess international acquiescence in the case of the Libyan claim (section four).

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[1] As already underlined in chapter 2, section 4.

II. The Concept of Acquiescence

An examination of the concept of acquiescence requires a brief review of the different definitions, purpose and how the various conceptions of acquiescence could be applied to the Gulf of Sirte claim. Moreover, it is relevant to assess the importance and relevance of acquiescence in judicial decisions, and the necessity for foreign States to be aware of the Libyan claim if it is to be accepted by the international Community of States.

2.1. The Definitions of Acquiescence

Acquiescence means tacit agreement or consent. The **Oxford Dictionary** defines it as the fact of accepting silently or without protest a situation.[2] In this study, it is used to describe the inaction of States when faced with a claim to an historic title to sea-areas.[3] In this context, acquiescence has been defined as 'the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights'.[4] Moreover, it is important to underline the fact that in the Gulf of Maine Case, acquiescence has been defined by the ICJ as 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as

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[2] Hornby, A.S., Oxford Dictionary of English, Oxford, 1983 ed.

[3] See MacGibbon, I.C., The Scope of Acquiescence in International Law, Vol.31 BYIL, (1954), pp.143-186 at p.143.

[4] Id.

consent...'[5] It would appear that this definition is mainly and simply a concept which shows that foreign States have been inactive and insofar as historic claims are concerned, it indicates that there has been an absence of opposition by these States to the claimant State's peaceful display of authority over, for example, an historic bay.[6]

2.2. The Purpose of Acquiescence

It appears that any claim over a bay is either accepted by foreign States by way of acquiescence and/or recognition or rejected. International acquiescence constitutes a vital element within the procedure of the acquisition of rights over a claimed bay because foreign States play a critical role in this procedure, as their acquiescence is indeed required for the claimant State to assert its sovereign rights over the area it claims.[7]

Acquiescence has the advantage of seeking out the factors behind the process which brings about new rules of international law; if necessary it gains jurisdiction from the consent of member States to the international legal order. According to MacGibbon, acquiescence "constitutes a procedure for enabling the seal of legality to be set upon rules which were formerly in process of development and upon rights which

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[5] ICJ Reports 1984, p.305.

[6] UN Doc. A/CN.4/143., op. cit., p.17.

[7] MacGibbon (1954), op. cit., pp.144-145.

were formerly in process of consolidation."[8]

It is also proposed that the doctrine of acquiescence should help to establish the existence of this 'general conviction' both accurately and practically; in other words, the consent of the State(s) concerned can be understood because of their failure to protest against the development of a title and if they are considered to have accepted the situation in this way, then, this is 'in conformity with international order'.[9] Such an important aspect of the international acquiescence is underlined by many writers of international law. These writers agree on the fact that acquiescence performs an important role in the acquisition of historic bays.

2.3. Various Views on Acquiescence

There are views concentrated particularly in the juridical foundations of rights gained by prescriptive or historic processes. These views have consistently found acquiescence, in its sense of a lack of protest when this was both possible and appropriate, to be important and influential. As MacGibbon has truly noted, to these writers 'belongs in great measure the credit for exposing the fundamental antimony which tribunals may be called upon to resolve in questions of disputed titles, namely the rival claims to consideration of the maxim **quieta non movere**, on the

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[8] Ibid., p.145.

[9] Oppenheim, International Law, A Treatise, Lauterpacht, (ed.,)., 8th ed., London and New York, 1955, Vol.1, p.527.

one hand, and of the concept of good faith, on the other hand.'[10] To support his opinion, MacGibbon cited Hyde who explains that the 'strength of the equities' of the principle of prescription 'lies in the implied acquiescence in the condition of affairs which its own conduct...has produced.'[11]

There are several views on acquiescence. The first opinion favours the view that the general toleration by other States towards a clear historic bay claim by a State is enough as to constitute 'a basis of an historical consolidation' which would make the claim as enforceable as against all States.[12]

This view means that acquiescence comes either through inaction or silence of foreign States regarding a claim by a State. It follows that it is sufficient to confer sovereignty on the claimant State. In this context, Bourquin holds the view that the absence of any reaction by foreign States towards a claim is sufficient to generate historic title.[13]

Jessup puts forward the idea that 'holding in abeyance the general rule which is to govern all bays it must be admitted that there are certain bodies of water to which individual States by general acquiescence or long usage have acquired the absolute right or title'. To him, 'long usage' could be seen as an alternative to 'general acquiescence'

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[10] MacGibbon (1954), op. cit., p.152.

[11] Hyde (1947), op. cit., Vol.1, p.387.

[12] **Fisheries** Case, ICJ Reports (1951), p.138.

[13] Bourquin, op. cit., p.46.

which is generally seen as its evidence.[14] As for MacGibbon, he maintains that acquiescence is a negative concept which is deduced from 'a silence or absence of protest' in cases where 'the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights' in circumstances which call for a 'positive reaction signifying an objection', and that the same State fails to respond.[15]

Fitzmaurice takes a view similar to that of the ICJ in the **Fisheries** Case, as he points to toleration rather than an actual display of acquiescence.[16] He is one of those who sees the right to 'historic waters' as an exception to general international rules. He is inclined towards the requirement of at least tacit or presumed consent by third States as well as knowledge of the situation by those States so that a lack of protest on their part may be held against them. He writes:

> "Clearly, absence of opposition is relevant only in so far as it implies consent, acquiescence, or toleration on the part of the States concerned, but absence of opposition per se will not necessarily or always imply this. It depends on whether the circumstances are such that opposition is called for because the absence of it will cause consent or acquiescence to be presumed. The circumstances are not invariably of this character,

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[14] Jessup, op. cit., pp.362-363.

[15] MacGibbon (1954), op. cit., p.143.

[16] He writes:

> "...[T]he true role of the theory [of historic rights] is to compensate for the lack of any evidence of express or active consent by States, by creating a presumption of acquiescence arising from the facts of the case and from the inaction and toleration of States".

Fitzmaurice, G., The Law and Procedure of the International Court of Justice, 1951-4: General Principles and Sources of Law, Vol.30 BYIL 1953, pp.1-70, at p.30; see also ICJ Reports 1951, p.138. See also infra notes 43, 95, and 170.

> particularly for instance, where the practice or usage concerned has not been brought to the knowledge of other States, or at all events lacks the notoriety from which such knowledge might be presumed; or again, if the practice or usage concerned takes the form such that it is not reasonably possible for other States to infer what its true character is."[17]

It is clear from his opinion that a system which requires consent or acquiescence by foreign States and their knowledge of the situation is preferred. However, the way in which this is expressed seems to suggest that implied consent and presumed knowledge and consent are more theoretical than real; all in all notoriety from which knowledge may be presumed seems to be most acceptable to the author.

Johnston stated in relation to the Hudson Bay that it is a Canadian historic bay. He based his view 'on the evidence of occupation by Canada and on the evidence of acquiescence in that occupation by other States'.[18] Johnston concluded that "on the basis of occupation, and acquiescence by other States in that occupation, Canada also has title to Hudson bay and Hudson Strait. He writes:

> '...[F]or Canada has occupied and has developed the Bay and the Strait for navigational purposes as part of the Canadian national domain; that occupation has not been disputed and therefore has been acquiesced in by other States'.[19]

A similar view was put forward by Johnson who maintains

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[17] Fitzmaurice (1953), op. cit., p.33.

[18] Johnston, V.K., Canada's Title to Hudson Bay and Hudson Strait, Vol.15 BYIL (1934), pp.1-20 at p.5. Balch maintains that the claim over Hudson Bay was not acquiesced in by other States (op. cit., p.409).

[19] Ibid., p.20.

that 'display of authority by one party, acquiescence in that display by another party - those are the **sine qua non** of acquisitive prescription'.[20] Both Johnston and Johnson required an actual exercise of sovereignty and acquiescence of other States. At the same time, it seems as if they did not insist that the exercise of sovereignty be for a 'long time' or 'immemorial usage'. Hence, as in the case of Libya, the exercise of authority over the claimed area with the acquiescence of the majority of States would make the Libyan claim valid within a short time.

O'Connell stated that the 'significance' of acquiescence varies from the requirement of virtual assent to mere proof that the sovereignty has been 'peaceful and continuous which seems to call for nothing more than an absence of actual resistance on the part of other States'.[21] In his opinion, the 'element of acquiescence is the stumbling block' which causes difficulties in the progress of acquiring an historic title to bays. He writes:

> "If actual assent is required, history logically ceases to be necessary, because recognition, or agreement, becomes the basis of title, and this is all that is required. Long usage would only need to be resorted to when seeking proof of assent by presumption, and not for its own sake. But if this is all the concept of historic waters amounts to, no special status need be accorded to it, since any specific regime can be created by agreement without the need for an intellectual structure to sustain it."[22]

He concluded that the 'emphasis must rest more on the

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[20] Johnson (1950), op. cit., p.345.

[21] O'Connell (1982), op. cit., Vol.1, p.433.

[22] Id.

first two elements (immemorial usage and effectiveness) of an historic claim[23] than on the third (acquiescence)', so that notoriety and public exercise of sovereignty rather than proof of knowledge of the claim on the part of other States which fail to protest effectively are the most significant considerations.[24]

In the Fisheries Case, Norway adopted the same view when it argued that in order to substantiate a claim to a bay on historic grounds, it is the assertion of sovereignty which is indispensable; the other factors - such as acquiescence - are but 'special circumstances', which support and justify the claim.[25]

It seems that O'Connell's opinion implies that acquiescence is a form of consent. However, there is a problem associated with this. If it is accepted that acquiescence is a form of consent, then this would mean that the sovereignty of the claimant State over the particular area was recognised by other States and it would not be necessary to rely on

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[23] As already stated in chapter 2, section 4. In this context, O'Connell states three elements as requirements for the formation of historic title: effectiveness, the effluxion of time and the attitude of foreign States (acquiescence) [ibid., pp.427-435]. In this respect, one should note that the second element according to O'Connell must be seen as an aspect or condition of the first requirement which is effective exercise of sovereignty, both peacefully and continuously, which is known usually as long or immemorial usage. In fact, as O'Connell himself stated:

> "Emphasis logically falls upon 'usage' rather than 'long', so the history required of an historic claim might be short and incidental".
>
> Ibid., p.432.

[24] O'Connell (1982), op. cit., Vol.1., p.434.

[25] ICJ **Pleadings**, 1951, Vol.1, p.555.

historic title. If acquiescence in the sense of consent by the foreign States involved were enough to prove the exercise of sovereignty over a continuous period of time, then the passing of time, i.e. the historical aspect, would no longer be required.

Some of those in favour of the concept of acquiescence have made efforts to prove their point by interpreting it as an essentially negative concept, whilst at the same time trying to avoid a confusion with recognition, yet reluctant to accept that the continued exercise of sovereignty by the coastal State over the claimed area could, in itself, constitute an historic right to the area.

Accordingly, 'the truer role of the theory (of historic rights) is to compensate for the lack of any evidence of express or active consent by States, by creating a presumption of acquiescence arising from the facts of the case and from the inaction and toleration of States'.[26]

Interestingly, if those who support the concept of acquiescence take it to mean simply lack of action or toleration, they come to a point very close to that put forward by those who oppose the idea that the regime of 'historic waters' is an exceptional regime and the consequent idea that the acquiescence of foreign States is necessary to acquire a title to historic waters. Bourquin, who is in support of the latter opinion, states the following:

> "While it is wrong to say that the acquiescence of these States is required, it is true that if their reactions interfere with the peaceful and continuous exercise of

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[26] Fitzmaurice (1953), op. cit., p.30.

> sovereignty, no historic title can be formed. In such cases the question to be asked is not whether the other States consented to the claims of the coastal State, but whether they interfered with the action of that State to the point of divesting it of the two conditions required for the formation of an historic title...The absence of any reaction by foreign States is sufficient."[27]

The second view is labelled as strict and its supporters maintain that 'acquiescence' must come in the form of more than inaction or silence. Thus, in the United States v. Alaska Case, as for acquiescence to exist, the attitude of foreign nations should be 'something more than the mere failure to object'.[28] An explicit consent by the States which is particularly affected by the claim over a particular bay must be shown.[29] The reason behind such importance given to States affected by a claim over an historic bay is that usually historic bay claims have a considerable impact on the freedom of the high seas, hence, acquiescence of all States is required for historic bay claims to be accepted.[30]

In this context, Fauchille observed that in the case of large bays and gulfs their character as such was attributed to a combination of factors involving two main elements; first, the exercise of sovereignty for a long time over the area by the claimant State; and secondly, acceptance of claims by some States as well as non-protest on the part of

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[27] Bourquin as translated in UN Doc., A/CN. 4/143, p.16.

[28] 422, US 184 (1975), at p.200.

[29] MacGibbon (1954), op. cit., p.144; see also Johnson (1950), op. cit., p.353.

[30] Bouchez (1964), op. cit., pp.266-7.

others.[31] He emphasised more the acquiescence element as follows:

> "...[I]t is the acquiescence of States which-so it has been held in judicial decisions-accounts for the territoriality of historic bays...In cases where the coastal State has claimed sovereignty over such bays, it is the acquiescence of certain States and the absence of protest on the part of other States that have made those bays historic and have given them their territorial character"[32].

This strict acquiescence conception has not always been applied. In this context, the US Supreme Court has recently in the United States v. Louisiana et al. (Alabama and Mississippi Boundary Case), not accepted the US Government argument that the Mississippi Sound is not an historic bay. It held, as regards acquiescence that:

> "There is substantial agreement that when foreign governments do know or have reason to know of the effective and continual exercise of sovereignty over a maritime area, inaction or toleration on the part of the foreign governments is sufficient to permit a historic title to arise...We conclude that under these circumstances the failure of foreign governments to protest is sufficient proof of the acquiescence or toleration necessary to historic title"[33].

This opinion is, it is submitted, compatible with international law practice. It is quite remarkable how similar the views of both those in favour and those against the concept of acquiescence are: both appear to accept that lack

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[31] Fauchille, P., Traité de Droit international public, 8th ed. Rousseau & Cie., Paris, (1925), Vol.1, p.380.

[32] Ibid., pp.380-382. See also the opinions of both Judge Hsu Mo and Judge Read in the Fisheries Case who hold the same view, ICJ Reports 1951, pp.154 and 194.

[33] 470 US 93 at p.86.

of action by foreign States is sufficient for the establishment of historic rights because it keeps the exercise of authority 'unimpeded'.[34]

2.4. The Concept of Acquiescence in Judicial Decisions

In addition to what has been said above,[35] acquiescence has been a subject of discussion in the tribunal's judgments. In almost every dispute which was referred to such tribunals the consent of States was dealt with though under different terms such as toleration, knowledge of foreign States, absence of protest, acquiescence, recognition, acceptance etc. However, acquiescence has been seen as the only reason for the juridical determination of any dispute, rather than a factor to which tribunals have ascribed some weight.

2.4.1. International Tribunals

International Tribunals' decisions are relevant in determining international law according to Article 38 of the ICJ Statute.[36] The concept of acquiescence was frequently examined by international tribunals through different disputed cases on territorial and internal waters. However, not all of these tribunals used the term, 'acquiescence' as some of them recognised the principle implicitly by using different words

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[34] Bourquin as translated in UN Doc., A/CN. 4/143, p.16.

[35] See supra, section 2, 2.3.

[36] For an exact quotation, se infra chapter 5, note 241.

or even more expressly sometimes by using the term, 'recognition'.

It is to be noted here that only some well-known judgments and pronouncements of international tribunals will be looked at and from different times to show the progressive development of international law in the field of historic rights.

In the Alaskan Boundary Dispute, the Tribunal made reference to the consideration that, for more than sixty years, 'Russia, and in succession to her the US, occupied, possessed and governed the disputed territory'. At the same time, the Tribunal took note of the absence of the exercise of rights or performance of duties of sovereignty over the disputed area by Great Britain or even 'attempted to do so, or suggested that she consider herself entitled to do so'.[37] This inaction of Great Britain implied her acquiescence. Hence, the Tribunal found in favour of the US. It based its decision, inter alia, on the fact that Great Britain did not protest or object to the claim which was interpreted by the Tribunal as acquiescence by her (Great Britain) in the rights of Russia succeeded by the US.

The US members of the Tribunal made reference to the statements made by the Canadian Prime Minister, who admitted that no protest of any kind had been made against the occupation of the disputed area by the US. Thus, they concluded that:

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[37] Alaskan Boundary Arbitration, Award of 20 October 1903, Cmnd., 1877 (1904), pp.40ff at p.79.

> "It is manifest that the attempt to dispute that possession ...is met by the practical, effective construction of the Treaty presented by the long-continued acquiescence of Great Britain in the construction which gave the territory to Russia and the United States and to which the Prime Minister testifies. Only the clearest case of mistake could warrant a change of construction after so long a period of acquiescence in the former construction, and no such case has been made out before this Tribunal."[38]

The Permanent Court of Arbitration (PCA) has, in the Grisbadarna Case, found that Norway acquiesced in certain acts of Sweden. The Court considered this a factor which upheld the validity of the Swedish claim. The dispute concerned who the fishing banks off the coast outside territorial waters belonged to; the Tribunal decided, **inter alia** that the Grisbadarna Bank belonged to Sweden.[39]

Consideration of the Court's decision clearly shows that the absence of Norway's protests against certain acts of sovereignty carried out by Sweden in the Grisbadarna was seen as acquiescence in Swedish sovereignty and evidence of the validity of the Swedish title.[40]

In the Gulf of Fonseca Case, the Central American Court of Justice established that the Gulf of Fonseca fell within the sovereignty of the three coastal States which could use it in common. The Court found that during three periods of the political history of Central America (i.e. under the Spanish dominion, under the Federal Republic of Central America, and then under sovereignty of El Salvador, Honduras and Nicaragua

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[38] Ibid., p.87.

[39] Scott, The Hague Reports, 1st series, op. cit., pp.130-2.

[40] Vol.11 UNRIAA (1911?), pp.234-235.

which succeeded the Federation) 'the representatives (of these) authorities [of the Federal Republic of Central America, El Salvador, Honduras and Nicaragua] have notoriously affirmed their peaceful ownership and possession in the Gulf...A secular possession such as that of the Gulf could only have been maintained by **the acquiescence of the family of nations.**'[41]

The Court reaffirmed the concept of acquiescence once more in a later passage and confirmed that the Gulf of Fonseca was an historic bay 'on the theory that it combines all the characteristics and conditions that the text writers on international law, the international law institutions and the precedents have prescribed as essential to territorial waters, to wit, secular or immemorial possession accompanied by **animo domini** both peaceful and continuous and by acquiescence on the part of other nations'.[42]

The ICJ has, in the **Fisheries** Case, delivered its first decision which dealt with the significance of the doctrine of acquiescence in relation to the establishment of historic title, although the Court did not use the term 'acquiescence', preferring 'toleration' as already seen.[43] It held:

> "In the light of these considerations...it is now necessary to consider whether the application of the Norwegian system [of delimitation] encountered any opposition from foreign States...**The general toleration of foreign States**, with regard to Norwegian practice is an unchallenged fact. For a period of more than sixty

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[41] Vol.11 AJIL (1917), pp.700-701, (emphasis added).

[42] Ibid., p.705.

[43] See ICJ Reports 1951, p.138; see also supra note 16 and infra notes 95 and 170.

years the United Kingdom Government...in no way contested it."[44]

In a later passage, the Court once more repeated the same principle by holding that:

> "The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations... The notoriety of facts, **the general toleration of the international community**, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom...[The Norwegian] method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law."[45]

An historic right to apply the system of delimitation was found to exist by the Court because of Norway's consistent and prolonged application of the system along with the 'general toleration' by foreign States. This decision fits in very well with the final position taken both by those in favour of the concept of 'acquiescence as explained by writers of international law', as stated above.[46]

The ICJ discussed the function of acquiescence in the establishment of new and historic rights in some other cases, such as the Sovereignty Over Certain Frontier Lands Case in 1959 between Belgium and the Netherlands;[47] the Right of

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[44] Id., (emphasis added).

[45] Ibid., p.139, (emphasis added).

[46] See supra section 2, 2.3.

[47] ICJ Reports, 1959, p.209.

Passage Over the Indian Territory Case in 1960;[48] and more recently in the Gulf of Maine Case.[49]

In the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, the Court found that the line of delimitation referred to by the Libyan legislation of 1955 (i.e., the Libyan Petroleum Law) 'is not opposable to Tunisia' and 'the facts of the case do not, in particular, allow any assumption of acquiescence by Tunisia to such a delimitation; indeed its manifested attitude excludes the possibility of speaking of such acquiescence'.[50]

In dealing with the question of historic rights, the Court held:

> "The historic rights claimed by Tunisia derive from the long-established interests and activities of its population in exploiting the fisheries of the bed and waters of the Mediterranean off its coasts...and of rights of surveillance and control...coupled with at least the toleration and recognition thereof by third States."[51]

Judge Jimenez de Arechaga has, in his Separate Opinion, found that the French Prime Minister and Minister of Foreign Affairs, advised by the French Resident-General in Tunisia 'tacitly accepted' the Italian line of delimitation between Libya and Tunisia.[52]

In delimiting the continental shelf between the US and Canada in the Gulf of Maine Case, the Chamber (of the ICJ)

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[48] Ibid., 1960, p.3.

[49] Ibid., 1984, pp.304-312.

[50] Ibid., 1982, p.69, (emphasis added).

[51] Ibid., p.72, (emphasis added).

[52] Ibid., p.127.

observed that 'acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent.'[53] This ICJ decision gave a clear definition of the concept of acquiescence as well as the notion of estoppel as will be seen later.[54]

2.4.2. Municipal Courts

In the Direct U.S. Cable Company v. Anglo-American Telegraph Company Case, the Juridical Committee of the Privy Council of Great Britain referred to the concept of acquiescence in its judgment with regard to the legal status of Conception Bay when it stated that:

> "The British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the Bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important."[55]

In deciding the legal status of Palk's Bay in the Annakumara Pillai v. Muthupayal Case, the Supreme Court of Madras found, inter alia, that:

> "Considering that the various European maritime powers who from about the 16th century were contending for supremacy in the Indian Seas, raised no question as to the right of the sovereigns...to their respective fisheries, there can be little doubt that such right was regarded by one and all of them as unassailable."[56]

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[53] Ibid., 1984, p.305.

[54] See infra section 3, 3.3.

[55] 2 Appeal Cases (1877), p.420.

[56] 27 Indian Law Reports (1903) Madras Series, p.566.

The Court, then, concluded that:

> "Considering the evidence that exists as to the occupation of Palk's Bay by the British with the acquiescence of other nations, we have no hesitation in holding that it is...an integral part of His Majesty's Dominions."[57]

In Stetson v. United States Case, the US Second Court of Commissioners, established to sort out the **'Alabama Claims'** which had resulted from the American Civil War, had to deal with a claim based on the destruction of a ship in Chesapeake Bay. As far as the claimant was concerned the deed occurred on the high seas. The US, on the contrary, contended that the waters of the bay 'are internal waters of the US and subject to the exclusive control and jurisdiction thereof'. The Court did not accept the claimant's contention because the vessel had not been captured on the high seas but within the US internal waters. The Commissioners concluded, **inter alia**, that from the earliest history of the country it (Chesapeake Bay) has been claimed to be territorial waters, and that the claim has never been questioned.[58]

The above decision represents what amounts to probably the strongest juridical authority of municipal courts in favour of the concept of acquiescence as vital to the validity of an historic title. The element of acquiescence has been emphasised as a decisive factor by the Supreme Court in several cases involving historic claims by the States of the Union. For example, in the Indiana v. Kentucky Case, the Court

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[57] Ibid., p.573.

[58] Moore., History and Digest of International Arbitration, op. cit., Vol.4, pp.4335 at p.4338.

held:

> "This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the Island is more potential than the recollections of all the witnesses produced on other side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognised, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."[59]

Since then, the US Supreme Court has repeatedly recognised the advantages of the above opinion. Hence, in the Virginia v. Tennessee Case, the Court held that:

> "[A] boundary line between States or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognised and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant.[60]

Again, in the New Mexico v. Colorado Case, when the Court was asked to decide upon the dispute over the boundary between the two States, it held that:

> "From 1868, when (the surveyor) Darling ran and marked the line of the 37th parallel, to 1919, when this suit was brought, a period of more than half a century, his line was recognised and acquiesced in, successively, as the boundary between the two territories, between the State of Colorado and the territory of New Mexico."[61]

Also, in the Vermont v. New Hampshire Case, the Court's

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[59] 136 US (1890) 510.

[60] 148 US (1893) 522.

[61] 267 US (1924-25) 40.

decision favoured Vermont; the reason for this is that New Hampshire Representatives in the US Congress must have known the terms of its resolutions and must therefore have been aware that in all the formal representations put to Congress on behalf of Vermont and in all the different reports and resolutions of Committees and the resolutions of the Congress itself, it clearly stated that the eastern boundary of Vermont was described interchangeably as the west side of the Connecticut River. It held:

> "Although, these were public acts of notoriety, New Hampshire does not appear ever to have made any objection to these definitions of the boundary line. The conclusion [reached by the Court found support] in the long continued failure of New Hampshire to assert any dominion over the west bank of the river and in her long acquiescence in the dominion asserted there by Vermont".[62]

When the Court was asked to decide the boundary of the Delaware Bay and River, it refused New Jersey's claim on the ground that it acquired sovereignty 'through the exercise of dominion by riparian proprietors and by the officers of government, (so) title to the subaqueous soil up to the centre of the channel has been developed by prescription'.[63] Although the Court accepted that this exercise of authority was 'maintained without protest on the part of Delaware, and no doubt with her approval', it held that:

> "...[F]rom acquiescence in these improvements [carried out by New Jersey] of the river front, there can be no legitimate inference that Delaware made over to New Jersey the title to the stream...[because] the privilege

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[62] 289 US (1932) 613.

[63] 291 US (1934) 375.

> or licence was accorded to the owners individually [by the Delaware authority],... and there is nothing in their presence to indicate an abandonment by the sovereign of the title to soil.[64]

The Court concluded by quoting with approval a statement made by the Master, which reads as follows:

> "At no time has the State of Delaware ever abandoned its claim, dominion or jurisdiction over the Delaware River...nor has it at any time acquiesced in the claim of the State of New Jersey thereto...The truth indeed is that almost from the beginning of Statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them. There is no room in such circumstances for the application of the principle that long acquiescence may establish a boundary, otherwise uncertain...Acquiescence is not compatible with a century of conflict."[65]

What the Court found here was the absence of the proof of acquiescence by Delaware authority, but the Court still recognised acquiescence as an element for the formation of an historic title.

The US Supreme Court has, in the **United States v. California** Case, with regard to historic bays, held:

> "Essentially there are bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations".[66]

The most recent occasion was in 1985 and 1986 when the same Court reaffirmed that acquiescence is an element for the formation of historic title. This was in the **Alabama and Mississippi Boundary** Case, when the Court found that the

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[64] Id.

[65] Ibid., at pp.376-377.

[66] 381 US 139 (1965) at p.172.

waters of Mississippi Sound constituted an 'historic bay' under Article 7 (6) of the TSC, in view of the US exercise of sovereignty over the Sound as inland waters from the time of the Louisiana Purchase in 1803 until 1971, with the acquiescence of foreign nations. The Court stressed that among the factors to be taken into consideration in determining whether a body of water is a historic bay is the 'acquiescence of foreign nations'.[67]

The Court further added that:

> "In addition to showing continuous exercise of authority over Mississippi Sound as inland waters, the States must show that foreign nations acquiesced in, or tolerated this exercise. It is uncontested that no foreign governments have ever protested the United States' claim to Mississippi Sound as inland waters.'[68]

It ought to be noted here that the US Supreme Court in the above judgment considered that Mississippi Sound constituted an historic bay under the TSC. But as already established[69] the TSC did not define historic bays. It only made reference to this category of bay and made it an exception to the rules laid down in the above Article; hence, the Court relied on customary international law and not on conventional rules.

In a more recent case, the United States v. Maine Case, the US Supreme Court made a distinction between the doctrine of 'ancient title' and 'historic title'. The Court held Massachusetts not to have a valid claim to Nantucket Sound as

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[67] 470 US 93 (1985) at p.102.

[68] Ibid., at p.110.

[69] See chapter 2, section 3, 3.5 and section 4.

internal waters under 'ancient title' doctrine as the Court held that:

> "To claim 'ancient title' to waters which would otherwise constitute high seas or territorial sea, a State must base its claim on occupation as an original mode of acquisition of territory, and a State must affirm that the occupation took place before the freedom of the high seas became part of international law; effective occupation must have ripened into clear original title, fortified by long usage, no later than the latter half of the 1700s."[70]

According to this conception of internal waters status, which seems to have been inspired by the ICJ's judgment in the **Fisheries** Case,[71] acquiescence is not required for the formation of a title to waters or bays which were possessed before the era of the freedom of the seas.

Accordingly, Libya, which occupied and dominated parts of the southern coast of the Mediterranean Sea adjacent to its land territory prior to the freedom of the seas can rely on the 'ancient title' doctrine to claim sovereignty over the Gulf of Sirte since 'ancient title' could be established without regard to the continuity of usage or international acquiescence.

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[70] 475 US 89 (1986) 69.

[71] The Court mentioned the ancient usage when it referred to Norway's rights in the disputed area. It held that:

> "Such rights, founded on the vital need of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable."

ICJ Reports 1951, p.142. See also Goldie, op. cit., pp.224-225.

2.5. Other States' Knowledge of the Historic Bay Claim

A claimant State must notify its claim to other States in order to make it known to them, so they can either take no action, and in that case, with the lapse of time, they can be supposed to have implicitly accepted this claim, or they can react to the claim by protesting against it.[72] The awareness of other States is only possible if they are notified of the claim. Therefore, before passing on to a discussion of the international acquiescence in the Gulf of Sirte, attention must be drawn to the necessity of other States' awareness of the claim to historic bays.

When a State makes an historic bay claim, other States must acquire knowledge of that situation. In other words, a degree of notoriety or publicity of the new territorial claim must be shown. Knowledge of the claim is required because it cannot be presumed that a State is acquainted with this new situation without proof that this State has acquired knowledge of this situation. Therefore, "publicity is essential because acquiescence is essential", says Johnson, and "without knowledge there can be no acquiescence at all".[73]

A State cannot be seen as exercising its authority **à titre de souverain**[74] over the disputed area if its possession

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[72] See chapter 5.

[73] Johnson (1950), op. cit., pp.332-354 at p.347.

[74] See the **Island of Palmas** Arbitration, Vol.2 UNRIAA, p.868.

of this area remains clandestine.[75]

In practice, proof of knowledge of other States as a prerequisite for the presumption of acquiescence is required. Thus, in the Alaskan Boundary Arbitration between the UK and the US, the failure of the UK to protest was seen as an acquiescence by this country in the US sovereignty over the disputed area. The UK reply to this argument was based on the fact that it was not possible for her to protest because '...you cannot protest against a thing you have never heard of'.[76] Further, the UK Government asked:

> "How is Great Britain, on any ground of justice or fairness, to be affected with knowledge of such proceedings and acquiescence in them?...Surely at least we should have had some notice of it; and there is not even a shadow of pretence that we knew it."[77]

Similar views were invoked during the Island of Palmas Arbitration where Judge Huber concluded that the display of Governmental authority over the Island 'has been open and public. A clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible'.[78]

The principle of other States' knowledge of a claim to historic title was also discussed by the ICJ in the Fisheries Case. In that case, the UK made reference to her lack of

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[75] See chapter 3, section 3, 3.2.1.

[76] Vol.3, **Proceedings**, Alaskan Boundary Arbitration Tribunal, US Senate Doc. No. 162, 58th Congress, 2nd session, 7 Vols, 1904, Vol.3, p.531.

[77] Ibid., p.533.

[78] Vol.2, UNRIAA, op. cit., p.868.

acquaintance with the Norwegian straight baselines system of delimitation. The Court did not accept the UK Government argument.[79]

It seems from this Judgment, that the test of the notoriety of the Norwegian system of delimitation could be held enforceable against the UK only where it could be proved

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[79] It held that:

> "The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies a fortiori to the Decree of 1889 relating to the delimitation of Romsdal and Nordmore which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice. Norway's attitude with regard to the North Sea Fisheries (Police) Convention of 1882 is a further fact which must at once have attracted the attention of Great Britain. There is scarcely any fisheries convention of greater importance to the coastal States of the North Sea or of greater interest to Great Britain. Norway's refusal to adhere to this Convention clearly raised the question of the delimitation of her maritime domain, especially with regard to bays, the question of their delimitation by means of straight lines of which Norway challenged the maximum length adopted in the Convention. Having regard to the fact that a few years before, the delimitation of Sunnmore by the 1869 Decree had been presented as an application of the Norwegian system, one cannot avoid the conclusion that, from that time on, all the elements of the problem of Norwegian coastal waters had been clearly stated. The steps subsequently taken by Great Britain to secure Norway's adherence to the Convention clearly show that she was aware of and interested in the question".
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> ICJ Reports, (1951), pp.138-139.

that the latter was in fact aware of this system. This opinion was adopted by both the majority and the minority of the Judges. The differences between them did not arise from disagreement as to the legal rules applicable, their differences were due to their different interpretations of the same facts.

While the majority of Judges found that the UK must have been aware of the Norwegian system of delimitation, the minority of Judges concluded that the UK could not be regarded as having acquiesced in the Norwegian claim because the Norwegian system was not made known to the world and, as a result, the UK was not aware of it. In this context, Judge McNair states that:

> "I do not consider that the United Kingdom was aware...of the existence of a Norwegian system of long straight baselines connecting outermost points, before this dispute began".[80]

The same view was maintained by Judge Read. He writes that:

> "I cannot avoid reaching the conclusion that it has not been proved that the Norwegian system was made known to the world in time, and in such a manner that other Nations, including the United Kingdom, knew about it."[81]

However, the conclusion reached by the majority of the Court was also contested by Fitzmaurice and Waldock. For Fitzmaurice, the ICJ had too quickly assumed the knowledge of the UK of the Norwegian system of delimitation. His argument

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[80] Ibid., **Dissenting Opinion**, p.180.

[81] Ibid., **Separate Opinion**, p.205.

was based on the assumption that the 1869 and 1889 Norwegian Decrees only concerned parts of the coast of Norway, whereas the dispute was with regard to the application of the straight baseline system along the entire coast. In addition, the UK had never been notified of these decrees.[82]

In the opinion of Waldock, States would be asked to look continuously at other States' national legislation if one follows the argument established in the Judgment of the ICJ.[83]

In a Note delivered to the Spanish Minister in Washington on August 10th, 1863, by the then US Secretary of State Mr. Seward, the US did not accept the Spanish claim of six-mile territorial waters off the coast of Cuba. He further maintained that this claim was not enforceable as against other States unless it could be shown to have been brought to their notice.[84] Mr. Seward concluded that "nations do not equally study each other's statute books, and are not chargeable with notice of national pretensions resting upon foreign legislation".[85] But, Johnson maintains otherwise. He writes that:

> "...[I]gnorance as to another state's legislation on territorial waters, however excusable, can be fatal, and...states may neglect, at their own risk, to study

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[82] Fitzmaurice (1953), op. cit., pp.36-37.

[83] Waldock, C.H.M., The Anglo-Norwegian Fisheries Case, Vol.28 BYIL (1951), pp.114-171 at p.164.

[84] Moore., Digest of International Law, op. cit., Vol.1, 1906, pp.709-712 at p.710.

[85] Id.

each other's statute books".[86]

However, the notion that each State must pay continued and careful attention to the legislation enacted by other States, is one that should command no place in international law. The presumption that third States should be aware of territorial claims arises in three situations: First, that the claimant State makes notification of its territorial claims; secondly, that the claimant State continuously demonstrates an attitude consistent with its claim, by which the existence of the latter is guaranteed; and thirdly, the claimant State ought to provide information about its claim to any requesting State. Here, third States can adopt measures to limit their risks by pursuing inquiries via diplomatic channels.[87] In its reply to Soviet Union inquiries about the Gulf of Sirte status, the Libyan Bureau of Foreign Affairs has, in its **Note Verbal**, explained clearly the basis on which Libya based its claim.[88]

It is also in the interest of the claimant State to make known its territorial claims or at least to give information about its claim to other States. The claimant State's refusal to give information can only be interpreted to its detriment.

It is to be noted here that, with the development of modern technology, which made communication more easy and rapid, as well as the existence of the various international

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[86] Johnson, D.H.N.., The Anglo-Norwegian Fisheries Case, Vol.1 ICLQ (1952), p.166.

[87] Bouchez (1964), op. cit., pp.263-264.

[88] See the L.F.O. Doc., **Note Verbal** which was sent to the Soviet Embassy in Tripoli on Feb. 9th, 1986, No.222/250/7.

organisations such as the UN, States became more aware of other States' claims. One basic and generally accepted point is that, however vague the requirement of acquiescence may be, it still assumes the knowledge (or supposed knowledge) of States who may not wish to acquiesce in a claim. This was a point put forward by the US Supreme Court in the **United States v. Alaska** Case. It found that "acquiescence by foreign nations" constitutes an "essential element of historic title" which "was satisfied by the failure of any foreign nation to protest". But:

> "The failure of other States to protest is meaningless unless it is shown that the government of those countries knew or reasonably should have known of the authority being asserted."[89]

It should also be noted here that a State claiming an historic title is not necessarily required to prove that other States were actually aware of the claim, only that they should have known. Thus, if the claim is notorious, consistently asserted and not hidden in any way, it will be assumed that other States know of its existence.[90] As a result, all States are now aware of the Libyan claim, particularly after the US-Libyan incidents of 1981, and 1986.[91]

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[89] 422 US 184 (1975), p.122.

[90] ICJ Reports 1951, p.139.

[91] As seen in supra chapter 1, section 4.

III. International Acquiescence in the Case of the Claim over the Gulf of Sirte

Before assessing international acquiescence in the Libyan claim, it is important to examine other forms of consent such as recognition, toleration and silence. Similarly, it is relevant to deal with the issue of estoppel as related to acquiescence, and to adopt a comparative approach so as to appraise better the acquiescence in the case of the Libyan claim.

3.1. Other Forms of Consent

When a State protests or recognises expressly a claim to a historic right, its reaction is clear and there is no problem. But when a State is silent its attitude is sometimes difficult to appreciate.

3.1.1. Silence

Silence normally means the absence of an express protest or recognition, which is generally interpreted as meaning that the State has the intention to show acquiescence as regards the claim of the other State. Silence means also consent by virtue of the Latin dictum '**quis tacet consentire videtur; taciturnitas et patientia consensum imitantur**'.[92] In the same line of thought, O'Connell writes that:

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[92] As summarized in French as '"Qui ne dit mot consent".

> "The significance of...[the acquiescence]...varies, from the requirement of virtual assent to mere proof that the sovereignty has been 'peacefully and continuous, which seems to call for nothing more than an absence of actual resistance on the part of other States".[93]

It clearly appears then that the mere silence of foreign States in the face of an historic bay claim is enough for a claimant State to maintain that it benefits from international acquiescence.

3.1.2. Toleration

If the protagonists of the need for acquiescence are really only taking into account the negative aspect, i.e. toleration by the foreign States, it would be preferable to use the term 'toleration' as this would express their idea more clearly. Besides, it should not be difficult to discontinue the word, 'acquiescence' if the rather doubtful theory that title to 'historic waters' constitutes an exception to general international law has been discarded.[94]

As further testing of its suitability, toleration is the term used by the ICJ in the Fisheries Case when discussing

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[93] O'Connell (1982), op. cit., Vol.1, p.433.

[94] UN Doc., A/CN.4/143, op. cit., p.16. Acquiescence is the term preferred by the overwhelming majority of expert commentators and Judges, most likely because this word is suitably vague. Colombos, D.J., The International Law of the Sea, 5th ed., Longmans Green and Co. Ltd. London, 1962, p.186; see also the United States v. Alaska Case, 422 US 184 pp.112 and 116; United States v. California Case, 381 US 139; United States v. Florida Case, 420 US 531 (1975); and United States v. Louisiana Case, 470 US 93 (1984). However, the problem seems to have now been solved by the ICJ because it used the term "acquiescence" in its later Judgment in the Gulf of Maine Case, (ICJ Reports, 1984, pp.303-306).

Norway's historic title to the system of delimitation which was an issue in the dispute.[95]

However, the term 'acquiescence' rather than toleration, was used in the same case by other Judges of the Court in their **Separate and Dissenting Opinions**, for example, in his **Separate Opinion**, Judge Hso Mo stated that:

> "Norway is justified in using the method of straight lines because of her special geographical conditions and her consistent past practice which was **acquiesced in by the international community as a whole.** But for such physical and historical facts, the method employed by Norway in her Decree of 1935 would have to be considered to be contrary to international law".[96] (Emphasis added).

The way Judge Read deal with the question of historic title was equally interesting. He outlined the development of the idea that, whatever the breadth, the coastal State could treat as internal waters 'those bays over which they had exercised sovereignty **without challenge, for a long time**'.[97] In Judge Read's opinion, this was essentially the doctrine of historic waters. In considering Norway's historic claim in particular, he was of the opinion that if Norway wanted to make sure of its rights, it would be sufficient for Norway to prove that she 'had consistently and persistently asserted the right to apply the system to the Norwegian coast generally, and that there had been **acquiescence** in this claim by the

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[95] See ICJ Reports 1951, p.138. See supra notes 16 and 45. See also infra note 170.

[96] ICJ Reports, 1951, p.154, (emphasis added).

[97] Ibid., p.188, (emphasis added).

international community'.[98]

Judge Read considered the correspondence between Great Britain and Norway in 1913 in order to examine the way former had behaved with regard to the latter's claims and reached the conclusion that 'the information (i.e. the information sent by Norway to Great Britain concerning the application of her system of delimitation) was received in such circumstances that the failure to make immediate protest could not have been regarded as acquiescence'.[99]

Judge McNair came much to the same conclusion based on similar reasons but he was particularly concerned with the way Norway relied upon acquiescence in a rather special way in order to justify the 1935 Decree. He did not want to go so far as to accept that the UK behaviour amounted to acquiescence, yet he looked at the problem in a similar way by questioning whether 'the United Kingdom had precluded herself from objecting to it by acquiescing in it'[100] if the system of delimitation used by Norway could possibly be recognised as lawful.

O'Connell summarised his view on this matter by saying:

> "The real consideration is the toleration of the community of nations is essential...But this means in practice inaction or lack of protest and the question is really one of effectiveness, so that even if protests have been made, they cannot arrest the historic consolidation of title...if they are continuous, widespread and supported by commensurate action."[101]

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[98] Ibid., p.197.

[99] Ibid., p.204.

[100] Ibid., p.171.

[101] O'Connell (1982), op. cit., Vol.1, p.434.

Nevertheless, whether the term used is 'acquiescence' or 'toleration' there does seem to be considerable agreement that lack of action by foreign States is sufficient to allow an historic title to a maritime area to come about by effective and continued exercise of sovereignty over it by the coastal State for a considerable length of time.[102]

However, some writers commented on the use of the term, 'tolerance' by the Court. Johnson suggested that the ICJ has, in the Fisheries Case, 'upheld the United Kingdom contention that the establishment of an historic title requires the acquiescence of other affected States, but disagreed with the United Kingdom as to the meaning of acquiescence'.[103] For this reason, he maintains that the phrase 'general toleration' which is used several times by the Court 'is probably intended to have a rather weaker meaning than acquiescence'.[104]

According to MacGibbon, the use of the term 'general toleration' by the Court in the same case, instead of 'general acquiescence' is of no apparent significance. The terms are synonymous.[105] He suggests that the remainder of the Court hardly supports the view that it intended to make a distinction between the two terms, 'general toleration' and 'general acquiescence'. Confusion could arise from the looseness of terminology employed by jurists in the particular

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[102] UN Doc. A/CN. 4/143, op. cit., p.17.

[103] Johnson (1952), op. cit., p.165.

[104] Ibid., at note 33.

[105] MacGibbon (1954), op. cit., p.160.

matter.[106]

3.1.3. Recognition

There is a view which suggests that for a claim to be accepted as valid, it is necessary for foreign States to show their consent in a rather explicit way,[107] if this being the case, it might be preferable to use some other term and not acquiescence in this context in order to ensure greater clarity. Hence, recognition and its use can therefore lead to the conclusion that historic title can arise only if foreign States positively demonstrate their agreement.

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[106] Ibid., p.161. See also, McDougal who employed the term "tolerance" when he observed that the decision-makers:

> "...[H]onor each other's unilateral claims...not merely by explicit agreement but also by **mutual tolerances**...which create expectations that effective power will be restrained and exercised in certain uniform patterns. This process of reciprocal **tolerance** of unilateral claim is, too, but that by which in the present State of world organisations most decisions about jurisdiction in public and private international law must be taken". (Emphasis added).

McDougal, M.S., The Hydrogen Bomb Tests and the International Law of the Sea, Vol.49 AJIL (1955), pp.357-8. He gave further emphasis to the role of acquiescence in international law, using also the term "tolerance", when he added that:

> "It is not of course the unilateral claims but rather the reciprocal tolerances of the external decision makers which create the expectation of pattern and uniformity in decision, of practice in accord with rule, commonly regarded as law. The great bulk of claims of authority and control upon the high seas are honoured and protected, it may be emphasized not by explicit bilateral or multilateral agreement, but by this process of **mutual tolerance.**"(Emphasis added).

Ibid., p.358.

[107] UN Doc., A/CONF. 13/1, op. cit., pp.34-5.

However, other writers do not exactly share such opinion, for example, Brownlie maintains that acquiescence arises from conduct or from the absence of protest. He writes that:

> "Acquiescence has the same effect as recognition, but arises from conduct, the absence of protest when this might reasonably be expected".[108]

Recognition is, as he put it, rather 'a matter of intention and may be express or implied'.[109] Hence, and in this sense, i.e., when it comes to the effects, recognition is close to acquiescence. Consequently, what distinguishes acquiescence is the way the consent is expressed; in the former, it is implied from the conduct whereas in the latter, it comes from an express show of consent.

3.1.4. Is there Any International Acquiescence in the Libyan Claim?

In the case of the Libyan claim, it is vital to underline the fact that two States have explicitly recognized it such as Syria and Burkina-Fasso.[110] In this context, at the UN Security Council debates of March 1986, after the US attack against on Libyan targets both on land territory and in the Gulf of Sirte, which considerably added to the question of the

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[108] Brownlie, I., Principles of Public International Law, 4th ed., Clarendon Press, Oxford, 1990, p.16.

[109] Ibid., p.95.

[110] Keesing's, (1986), op. cit., 13 at p.34454. See also The Times, March 26, 1986, p.5.

justification of Libya's 1973 Law and its reasonableness,[111] and the lawfulness of the subsequent naval response of the US provocation, the Syrian Delegate stated that:

> "We do not for a moment doubt that the Gulf of Sidra is historically an Arab Gulf".[112]

At the same debates, the matter of the 'reasonableness' of Libya's claim over the Gulf of Sirte was raised directly by the Permanent Observer of the League of Arab States to the UN. He stated that:

> "Further, let me ask this. Is Libya's claim for the Gulf of Sidra totally without any element of logic? If the answer is yes, then perhaps resort to the International Court of Justice would have been the preferred option. But there is some logic to Libya's claim. It may not be universally accepted logic, but it exists. First of all the route over the Gulf of Sidra has been and remains the route used for flights by Libyan airlines from Tripoli and Benghazi. Commercial navigation without the Gulf of Sidra has been mostly Libyan for a long time...international air traffic does not fly over the Gulf of Sidra...if one travels from one place to another within the Gulf of Sidra one travels only from Libya to Libya - nowhere else."[113]

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[111] The term "reasonable" was used by the ICJ Justice in the Fisheries Case, when considering that the 'Norwegian rights in the disputed area were founded on the vital needs of the population... which...appears to the Court to have been kept within the bounds of what is moderate and reasonable'. ICJ Reports 1951, p.142.

[112] UN Security Council Doc. S/P.V. 2670, 27 March 1987, pp.55-56.

[113] Ibid.. See Marghani, A.B.D., Strategic Considerations and the Extent of the Domestic Air Network in Libya, in Libya: A State and Region, A Study of Regional Evolution, Allen, J.A., Mclachlan, K.S. and Buru, M.M., (eds.,), The Centre of Near and Middle Eastern Studies, School of Oriental and African Studies (SOAS), Univ. of London in association with Al-Fattah Univ., Tripoli, Libya, 1989, pp.179-192. He submitted that:

> "Libya's claim in the Gulf of Sirte may be additionally supported by the fact that the Gulf of Sirte forms part of the shortest air route between the agglomerations of

This statement, which should be construed as an implicit recognition of the Libyan right to the Gulf of Sirte, came from the Representative of an Arab Regional Organisation which consists of 22 States and which are also members of the UN. None of these Arab States has formerly protested against the Libyan claim despite the existence of some political disputes between Libya and other Arab States.[114] Among these Arab countries is Egypt, which has both land and maritime boundaries with Libya and has a potential interest in the Gulf area since Libya is situated between this country and the rest of the Maghreb and Egypt and has political and economic connections and interests with these countries.

In its condemnation of the US raid over Libya, the Ministers and Heads of Delegations of the Coordinating Bureau of Non-Aligned Countries held in New Delhi on 15 April 1986, acquiesced in the Libyan title to the Gulf of Sirte in their **Communiqué** which is especially worthy of note because it did not stop at condemning[115] the 'unprovoked aggression (of the US) which constitutes a violation of international law and the United Nations Charter', it called upon the US 'to desist forthwith from undertaking such aggressive acts, including the military manoeuvres in the Gulf of Sirte, which are considered

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Tripoli and Benghazi",

Ibid., p.179. See also Harris, F.M. and Voorhees Associates., Libyan Transportation Planning Study, Secretariat of Communications and Marine Transport (1985), Tripoli, (unpublished materials).

[114] See chapter 1, section 4.

[115] A/41/341, 28 May 1986. See also L.F.O., The Gulf of Sirte File, op. cit., 1986-90, No.70.

as a violation of the sovereignty and territorial integrity of the Libyan Arab Jamahiriya'.[116]

This appears to be a clear statement recognising that the military manoeuvres in the Gulf of Sirte constituted a violation of Libyan sovereignty over this Gulf. On the other hand, this act of the Non-Aligned countries should be seen as an implicit recognition of the Libyan right to the Gulf by the members of this political movement.

The same **Communiqué** was reissued by the Heads of States or Governments of Non-Aligned Countries in their meeting in Zimbabwe in September 1986.[117]

3.2. International Reaction to the Libyan Claim or Acquiescence and the 1973 Declaration

Very few States (fourteen in number) have reacted against the Libyan claim and only seven of them are considered as legal protests.[118] The rest of the States of the World, or at least the 130 States who signed the LOSC have not reacted either expressly or implicitly. The absence of reaction to the Gulf of Sirte enclosure by Libya could only be seen as tacit recognition or acquiescence to this claim.

At the meeting of the UN Security Council, the Chinese Delegate also condemned the US use of force in the Gulf of Sirte without mentioning the Libyan legality or otherwise of

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[116] UN Doc. 4/41/341, op. cit., p.72 (emphasis added).

[117] UN Doc. A/41/697, 14 Oct. 1986, pp.99-100. See also L.F.O., The Gulf of Sirte File, 1986-1990, No.82.

[118] See infra, chapter 5, section 3.

the closure of the Gulf, which would have been a good opportunity to do so if they had no wish to acquiesce in the Libyan right over the Gulf.[119]

A similar position was taken by the Indian Delegate at the same session of the UN Security Council, who also made reference to the Ministerial Conference of Non-Aligned Countries in Luanda in September 1985 and to the Valletta Conference the previous year.[120]

This attitude of the Chinese and Indian Representatives must, therefore, be construed as tacit consent or acquiescence by the two most-populated States of the world in the Libyan claim to the Gulf of Sirte.

It is to be noted here,[121] that the Soviet Union, who protested against the Libyan claim in 1973, has not repeated its protest, even when it has had the opportunity to do so, because 'opposition on the part of a foreign State must be maintained by renewed protests or some equivalent action' if it is to carry any legal weigh.[122] This may be due to its own closing of Peter the Great Bay and other waters on security grounds,[123] so its protest cannot be taken as seriously intended.

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[119] UN Security Council Doc. S/PV.2670, p.51.

[120] Ibid., p.53.

[121] As will be seen in infra chapter 5, section 4, 4.4.

[122] UN Doc., A/CN.4/143, op. cit., p.17; see MacGibbon (1953), p.310. See also chapter 5 about the legal concept of protest in section 2, 2.4.

[123] As already seen in supra chapter 3, note 207; see chapter 5, section 3, 3.2.7. and section 4, 4.4., notes 192, 217-225 and 229.

This was in fact, the case in the UN Security Council debates of 26, 27 and 31 March 1986. On several occasions during the debates of the UN Security Council, the UK tried unsuccessfully to find out what the Soviet Union's position was as regards the Libyan claim. The Soviet Union Representative insisted that it was simply a tactic to turn the subject away from the main purpose of the session which, he said, concerned the aggressive actions of the US.[124] The Soviet Union, and indeed nearly all other States who reacted against the Libyan claim, did not at any time repeat its protests made in 1973 and 1974 which go against the opinion that the protest must be repeated in order to invalidate the claim, as will be seen later.[125]

In the case of the Gulf of Sirte, it is important to underline the fact that the majority of foreign States have either remained silent, abstained or tolerated the Libyan claim and only a few protested about it. It is not unforeseen that States bordering Libya such as Egypt and Tunisia remained silent as they both have comparable historic bay claims.[126] In this context, the fact that Tunisia did not officially protest at the 1973 Declaration should be emphasised, however, in the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, it made reference to the Libyan claim to the Gulf of

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[124] UN Security Council Doc. S/PV.2670, op. cit., p.61.

[125] See infra chapter 5, section 2, 2.4.

[126] See Nixon, op. cit., p.335.

Sirte which cannot be seen as a protest,[127] although it may represent the lack of Tunisian acquiescence.

3.3. Estoppel and Acquiescence

The concept of estoppel or préclusion has a place within international law and has played a considerable role in territorial disputes.[128] Brownlie writes that:

> "Recognition, acquiescence, admissions constituting a part of the evidence of sovereignty, and **estoppel** form an interrelated subject-matter, and **it is far from easy to establish the points of distinction.** It is clear that in appropriate conditions **acquiescence will have the effect of estoppel**".[129]

Hence, there is a close relation between the concept of acquiescence and the principle of estoppel. The rule of estoppel operates so 'as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other party has acted to his detriment or the party making the statement has secured some benefit. The basis of the rule is the general principle of good faith and as such finds a place in many systems of law.'[130]

Estoppel exists in municipal law as well as in

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[127] See ICJ **Pleadings**, (1982), **Tunisian Counter-Memorial (TCM)**, Vol.2, para.1.26 at p.13. See also chapter 5, section 3, 3.1.5.

[128] Brownlie (1990), op. cit., p.161.

[129] Id., (emphasis added).

[130] Bowett, D.W., Estoppel Before International Tribunals and its Relation to Acquiescence, Vol.33 BYIL (1957), pp.176-202 at p.176.

international law, although it seems to be an Anglo-American concept.[131] However, most legal systems are more inclined to insist on negative duties rather than positive ones, and a duty to protest or to take some other effective action to protect already established rights should not be seen as a condition of the continuing validity of those rights even if it seems to be true. Even so, there are 'situations in which one party's failure to act or acquiescence will prejudice his rights against another who has been misled by that party's inaction or silence.[132]

Clearly, the concept of estoppel would have to be recognised as a rule of substantive law if it were to be involved as the basis of title in international law; otherwise, it could only be used in the area of procedure to those of extinctive prescription rather than acquisitive prescription.[133]

Nevertheless, it seems that in the last decades, there has been a move towards treating the rule of estoppel as a rule of substantive law. In the Temple of Preah Vihear Case between Cambodia and Thailand, Judge Alfaro, in his **Separate Opinion**, stated that:

> "The principle that condemns contradiction between previous acts and subsequent claims is not to be regarded as a mere rule of evidence...The principle is substantive in character. It constitutes a presumption **juris et de jure** in virtue of which a State is held to have abandoned its rights if it ever had it, or else

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[131] Id.

[132] Ibid., p.198; see also, McNair, A., Law of Treaties, Clarendon Press, Oxford, (1961), pp.485-489.

[133] Johnson (1950), op. cit., p.332.

that such a State never felt that it had a clear legal title on which it could base opposition to the right asserted or claimed by another State. In short, the legal effects of the principle are so fundamental that they decide by themselves alone the matter in dispute and its infraction cannot be looked upon as a mere incident of the proceedings."[134]

The same opinion was given by Judge Fitzmaurice in his Separate Opinion in the same case, who stated that 'the principle of préclusion...is certainly applied as a rule of substance and not merely as one of evidence or procedure'.[135]

Examples of inaction or acquiescence operating as an estoppel are to be found in many international judgments. Among these judgments, is the Costa Rica-Nicaragua Boundary Case in which Nicaragua argued that the 1858 Treaty which defined the boundary was not binding because it was not ratified by San Salvador in its capacity as a guarantor. The Arbitrator rejected this argument by saying that:

"These views are strengthened by a consideration of the evidence adduced on the part of Costa Rica to prove acquiescence by Nicaragua for ten or twelve years in the validity of the Treaty. I do not regard such acquiescence as a substitute for ratification by a second legislature, if such had been needed. But it is strong evidence of that contemporaneous exposition which has ever been thought valuable as a guide in determining doubtful questions of interpretation.[136]

The Arbitrator added:

"But the Government of Nicaragua was silent when it ought to have spoken, and so waived the objection now

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[134] ICJ Reports, 1962, pp.41-42.

[135] Ibid., p.62.

[136] Moore, J.B., History and Digest of International Arbitrations to which the United States has been a Party, op. cit., Vol.2, p.1959.

made. It saw fit to proceed to the exchange of ratifications without waiting for San Salvador...Neither may now be heard to allege, as reasons for rescinding this completed treaty, any facts which existed and were known at the time of its consummation".[137]

Examples of inaction or acquiescence operating as an estoppel are to be found in many other international cases. Among these cases, is the Island of Palmas Arbitration, when the sole Arbitrator found that 'the acquiescence of Spain in the situation created after 1677 would deprive her and her successors of the possibility of still invoking conventional rights at the present time'.[138]

In the Fisheries Case, the ICJ seems to have invoked estoppel without using the term itself by placing great emphasis upon the effect of absence of protest[139] by Great Britain against the Norwegian system of delimitation. The Court held:

> "In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of possessio longi temporis, with the result that her jurisdiction over these waters must now be recognised although it constitutes a derogation from the rules in force.
> The notoriety of facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom."[140]

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[137] Ibid., p.1961.

[138] Scott, The Hague Reports, 2nd Series, op. cit., p.129. See also Vol.2 UNRIAA, 1911, p.869.

[139] Bowett (1957), op. cit., p.199.

[140] ICJ Reports, 1951, pp.130 and 139.

It seems here, that the Court raised the acquiescence of Great Britain in the Norwegian system as an estoppel against her, which precluded her from opposing that system; and some writers, as was underlined by Bowett, 'stressed the similarity of effect between estoppel and acquiescence when acquiescence is treated as one element in the acquisition of title by prescription. It is believed, however, that this similarity in effect tends to confuse the notion of acquiescence with the doctrine of estoppel.[141]

It is to be noted that 'préclusion' is the term used sometimes to mean 'estoppel'.[142] In the Temple of Preah Vihear Case, the ICJ invoked the principle of préclusion when it held that:

> "Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it."[143]

In his Separate Opinion, in the same case, Judge Fitzmaurice maintains that the principle of 'préclusion' is 'the nearest equivalent in the field of international law to the common law rule of estoppel.'[144]

In the North Sea Continental Shelf Case, the Court did not accept the contention of Denmark and the Netherlands that

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[141] Bowett (1957), op. cit., pp.199-200.

[142] As already seen in supra 3.3., see also Brownlie (1990), op. cit., p.403.?

[143] ICJ Reports, 1962, p.32.

[144] Ibid., p.62.

the Federal Republic of Germany, although it had not ratified the 1958 Geneva Convention on Continental Shelf, had accepted the regime of Article 6 which is related to the Continental Shelf system in a manner binding upon itself.[145] The Court did not accept this contention because it was not convinced that the conduct of the Federal Republic amounted to the degree of acquiescence and as a result there was no reason for applying the concept of estoppel.

In the words of the Court:

> "Only the existence of a situation of estoppel could suffice to lend substance to this contention - that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations etc., which not only clearly and consistently evinced acceptance of this regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case."[146]

In the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, the line of delimitation at 45° between the two countries was considered by the Court as having been developed by Italy and it became a sort of 'tacit **modus vivendi** in 1919, that 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'.[147] Therefore, the tacit acceptance of **modus vivendi** which was never formally contested by Tunisia and Libya was held to warrant its acceptance as an historical

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[145] ICJ Reports, 1969, p.25.

[146] Ibid., p.26.

[147] Ibid., 1982, pp.70-71.

justification for the choice of the method for the delimitation of the continental shelf between the two States.

Because the Court was more concerned by the 'method of delimitation which would ensure an equitable result', rather than by the 'tacit agreement' between the two countries concerning the 'line of delimitation', the Court held:

> "It should be made clear that the Court is not here making a finding of tacit agreement between the parties - which in view of their more extensive and firmly maintained claims, would not be possible, nor is it holding that they are debarred by conduct from pressing claims inconsistent with such conduct on some such basis as estoppel."[148]

More recently, in the Gulf of Maine Case, the notion of acquiescence and its relation to the principle of estoppel was clearly discussed. During the case, the parties argued about the possibility of the existence of any conduct over a given period of their relationship which might constitute acquiescence by one of them in the application of a specific method favoured by the other party, or 'precluded it from opposing such action, or whether such conduct might have resulted in the **modus vivendi**, respected in fact, with regard to a line corresponding to such an application.[149]

A more clear-cut case involved Canada arguing that the US conduct amounted to some sort of substantive consent in one form or another, to the application of the equidistance method, especially concerning the delimitation carried out in

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[148] Ibid., p.84, (emphasis added).

[149] Ibid., 1984, p.304.

the Georges Bank sector.[150] Canada was of the opinion that the US conduct should be considered in three ways, some more essential than others. First, as proof of actual acquiescence when the median line was taken as the boundary between the maritime jurisdiction involved, resulting in estoppel against the US; secondly, when a **modus vivendi** or a **de facto** boundary was shown to exist because the two States had permitted it; and thirdly, no more than an indication of the kind of delimitation that those involved would find equitable. The US was very much against the idea that its conduct could have the legal or other consequences Canada attributed to it.[151]

Canada argued also that in international law, the doctrine of estoppel is still developing. Nevertheless, Canada maintains that all conditions allowing the invocation of estoppel are satisfied in the present case. Canada argued in the oral proceedings that estoppel is 'the alter ego of acquiescence' even if it were contended that the conditions for the recognition of an estoppel were more stringent than those for acquiescence (the US argument has it that a party who endeavours to invoke this kind of préclusion must have relied on the other party's statements or conduct either to its own detriment or to the other's advantage).[152]

The Court after regarding this latter criterion as satisfied, held that:

"That in any case the concepts of acquiescence and

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[150] Ibid., p.305.

[151] Id.

[152] Ibid., (1984), pp.305-6.

estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of préclusion. According to one view, préclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle. Without engaging at this point on a theoretical debate, which would exceed the bounds of its present concerns, the Chamber merely notes that since the same facts are relevant to both acquiescence and estoppel, except as regards the existence of detriment, it is able to take the two concepts into consideration as different aspects of one and the same institution."[153]

It is clear that this judgment as well as the North Sea Continental Shelf Case defines the conditions for involving the principle of estoppel quite precisely; however, even if the element of detriment or prejudice caused by a State's change of attitude is disregarded, it still assumes clear and consistent acceptance and this is what distinguishes estoppel **stricto sensu** from acquiescence.[154] The Court found that the concepts of acquiescence and estoppel 'both follow from the fundamental principles of good faith and equity'.[155] The element of good faith and equity is not a new concept.

In the Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906, this principle was clearly brought out.[156] In that Award, the close relationship between

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[153] Ibid., p.305.

[154] Ibid., (1969), p.26.

[155] Ibid., (1984), p.305.

[156] Ibid., (1960), pp.220, at p.222. In the Santa Isabel Claims, Perry, E.B., the US Commissioner said in his **Conclusion** that:

"The modern rule is: equitable estoppel is the effect of

the principle of estoppel and good faith on the part of the State relying on this doctrine was stressed. 'The principle of good faith', says Bowett, 'requires that the party adhere to its statement whether it be true or not.'[157]

By virtue of the 1812 Treaty between the UK and Libya, British vessels were given permission to take refuge in cases of emergency in the gulfs and bays which belong to the State of Libya. In addition, these vessels were not to 'lurk in the bays... belonging to the territory of [Libya]'.[158] The term 'bay' in the Treaty must be interpreted in its geographical sense. This view is the same as the British argument during the North Atlantic Coast Fisheries Arbitration.[159]

This Treaty constitutes clear evidence that the UK accepted the sovereignty of Libya over its bays including the Gulf of Sirte. This recognition of the UK should preclude her from making any objection against the Libyan claim over this bay. The same thing must be true with regard to the other nations which concluded treaties with Libya during the same period, by which they implicitly recognised the Libyan

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the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding rights, either of property, of contract or of remedy."

Vol.26 AJIL (1932), p.196.

[157] Bowett (1957), op. cit., p.184.

[158] See the above mentioned Treaty in supra chapter 3, note 21.

[159] As already seen in ibid., notes 22-25.

sovereignty over the adjacent waters of the Mediterranean Sea. Exercise of sovereignty over sea-areas at that time which came even before the appearance of the modern concept of the freedom of the high seas, must be construed as meaning that these States acquired historic rights over these areas.

But, what if a State protests against a claim to a historic title then by its statement or conduct acquiesces in the same right? In this case, the acquiescing State must not rely on its previous protest or make another protest and the case must be seen as 'estoppel by conduct' because "it is possible to construe the estoppel as resting upon a responsibility incurred by the party making the statement for having created an appearance of fact".[160]

Another example is the US protest in 1974 against the Libyan claim of 1973. When President Carter came to power, he ordered the American Sixth Fleet not to cross south of the Libyan line of 32° 30' which closed the Gulf of Sirte.[161] Can this order of the US President be considered as a change of attitude and be construed as an acquiescence in the Libyan claim? And as a result, should the US be 'precluded' from denying the truth of this 'statement of fact' made previously by her?

It is advisable for Libya not to attribute to such conduct legal consequences, as the main motivation behind this move was the US concern for not adding further diplomatic

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[160] Bowett (1957), op. cit., p.184.

[161] Keesing's, (1981), op. cit., p.31081.

problems to the Hostages crisis.[162] Besides, the US sought to protest at the Libyan claim, and given the above circumstances, one should not interprets such a conduct more than a mere indication of the existence of a **de facto** boundary which the two States have allowed to come into being.

However, it must be noted here that, even though the US military forces crossed the 32° 30' line in the Gulf of Sirte, it crossed it only for a few miles. These forces have never approached the Libyan coast for less than 60 miles in this Gulf.[163] This fact would at least mean that the US recognised implicitly as **de facto** that Libya could have exercised its effective authority over large parts of the Gulf.

3.4. The Soviet Practice: A Comparative Approach

It is to be noted here, that State practice which is similar to the Gulf of Sirte case will be dealt with later.[164] However, a brief mention of the Soviet practice is looked at hereunder in order to see how the Soviet Union applied the concept of acquiescence in their cases.

Soviet jurists define historic waters are those having a special economic and strategic importance for the coastal State or those established by historical tradition. According to Soviet writers, recognition or acquiescence seems to play a lesser role in the formation of an historic title than vital

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[162] Id.

[163] As seen in supra, chapter 1, section 4, particularly note 38.

[164] See chapter 5, section 4.

interests which are considered more important than the consent of foreign States; however, some of these jurists did mention the acquiescence requirement.

The legal status of polar seas such as the Kara Sea, which is considered to be Soviet historic waters, was based on discovery, geographical and geological data, utilisation of the sea, and economic development, as well as international acquiescence. According to Zhurdo, international recognition and acceptance over the polar seas was acquired. This acceptance is implied in the fact that foreign vessels agreed to follow the instructions given to them during their voyages by Soviet State agencies responsible for administering Arctic maritime operations. Zhurdo concluded that a generally recognised international custom had thereby been established.[165]

By a way of analogy, foreign vessels agreed implicitly to follow the instructions given to them by the Libyan authority with regard to the Gulf of Sirte. Evidence of this tacit agreement lies in the fact that foreign ships, including Soviet warships (with the exception of US warships) inform the Libyan authority before crossing the line 32° 30' north in the Gulf of Sirte.[166]

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[165] Zhurdo, A.K., (ed.,), Morskoe Provo, Moscow: Izd-Vo Transport (1964), p.100 as quoted by Butler, W.E., (ed.,)., The Soviet Union and the Law of the Sea, The Johns Hopkins Press, Baltimore and London, (1971), p.114.

[166] During a field study, the writer visited the Libyan Navy Forces and it was stated to him that in practice both commercial vessels and warships notify the Libyan authority before they enter the Gulf of Sirte, commercial vessels were heading to the area north of the Gulf area because there is no interest for international navigation in the Gulf as it lies south of the international maritime highway. As an

Vyshnepolskii established that the Kara Sea is Soviet historic waters which was recognised by foreign States at different times. He also based his argument on the acquiescence of foreign nations in the Russian legislation which regulated the navigation system in that Sea. He mentioned the Russian practice with regard to the refusal in 1583 to allow English vessels to navigate the mouths of the rivers flowing into the Kara Sea. He also mentioned the four decrees enacted between 1616 and 1620 by which navigation in the Kara Sea was forbidden as well as the enactment of other Russian laws in 1833 and 1869 which also regulated navigation there. He writes:

> "Notwithstanding direct knowledge of the Kara Sea on the part of several representatives of the Western and Scandinavian countries, the latter did not deem it possible to interfere with the regulations issued by the Russian authorities concerning that Sea. The right of Russia, and, by virtue of succession, that of the U.S.S.R. to establish autonomously any legal regime of navigation in the Kara Sea, a right exercised for centuries, was never subject to any protest on the part of the foreign powers and must be considered as an 'uninterrupted and indispensable custom'."[167]

The same jurist regards the Eastern Siberian Sea, the Sea of Chukostk and Lapten as Russian 'national waters...whose legal regime determined in virtue of the recognition of the

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example, several copies of permissions taken by different foreign ships to cross the line of closure in the Gulf were shown to the writer.

[167] Vyshnepolskii, S.A., The Question of the Legal Regime of the Arctic Region, No.7 Sovetskoe Gosudarstva i Prava, (July, 1952), pp.36-45, trans. Kulski, W.W., Soviet Comments on International Law and International Relations, Vol.47 AJIL 1953, pp.125-134 at p.132.

sovereignty of the USSR over these areas'.[168]

Kozhevnikov, another Soviet writer of international law, concluded that the Gulf of Peter the Great, the Kara Sea, Chukotsk Sea, the East Siberan Sea and the Laten Sea are Soviet internal waters. He writes:

> "So-called historic bays, the width of whose entrance considerably exceeds ten sea miles, are considered to be the internal waters of a State. For example...the waters of the Gulf of Peter the Great up to the line joining Cape Povorotny and the mouth of the river Turmen-Ula are historically internal waters of the Soviet Union...Soviet jurists rightly consider the Siberian Seas which are akin to gulfs (Kara Sea, Lapten Sea, East Siberian Sea and Chukotsk Sea) as Soviet internal waters. These seas, which in effect constitute gulfs and which are of exceptional economic and strategic importance to the Soviet Union, have over a prolonged period of history been used by Russian seafarers. This point of view corresponds to international practice and is in line with the judgment of the International Court of Justice...in the...Anglo-Norwegian dispute, in which...the sea route along the Norwegian coast was held to be Norwegian internal waters, having been marked for navigation by Norway."[169]

It is obvious from the above mentioned opinions that the Soviet jurists pay less attention to the role played by acquiescence in the formation of an historic title to bays and other waters claimed. It will be seen in the next chapter that other states have the same practice with regard to claims to historic bays.

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[168] Kulski, op. cit., p.133.

[169] Kozhevnikov, F.I. (ed.,), International Law, A Textbook for Use in Law Schools, Academy of Sciences of the USSR, Institute of State and Law, trans. by Ogden, D., Foreign Languages Publishing House, Moscow, (1961), pp.205-206.

IV. Assessment

It appears from the above that no major maritime power or neighbouring countries, nor a substantial number of States, have explicitly accepted the 1973 Declaration though many States have simply abstained from reacting. When about 90% of world community States did not react even indirectly against the Libyan claim for about two decades, this would only mean their acquiescence in the same claim, or one can say that the non-protest or non-reaction of almost all the States of the world can at least be (and was in the Fisheries Case) taken as tolerance,[170] because they have had no interest in that claim since the area is by no means useful for international transportation as will be recalled. Among these silent States were Japan, which is considered as a major maritime power, China and India, the most populated countries of the world. Consequently, the Libyan claim needs to be examined again in the light of protests which were made.

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[170] ICJ Reports 1951, p.138. See supra notes 16, 43, and 95.

CHAPTER FIVE :

THE CONCEPT OF PROTEST AND ITS APPLICATION TO THE LIBYAN CLAIM

I. Introduction

The aim of this chapter is to look at the reaction of the international community to the 1973 Libyan Declaration over the Gulf of Sirte. In this regard, it is important to note that despite the fact that most States have abstained from pronouncing themselves on the Libyan claim, there have, nevertheless, been several reactions. Hence, it is the purpose of this chapter to assess the impact of these reactions upon the validity of the Libyan claim; and among such reactions, there have been a few protests which will be dealt with herein.

However, this chapter is only concerned with protest in relation to historic bay claims and not with a comprehensive study of the role played by protest in international law. To carry out the study of these reactions, it is necessary to examine the concept of protest insofar as historic bays are concerned (section two). Once the theoretical aspects of protest are grasped, it is then time to turn to an analysis of the various reactions made by foreign States to the Libyan claim (section three). Moreover, because the Libyan claim has met some challenge and reserve from a certain number of States (including Mediterranean ones) who have themselves made similar claims, it is thus necessary to examine the 1973 Declaration within the context of reciprocity (section four) in order to undertake an evaluation of the impact of foreign

States' reactions to the Libyan claim (section five).

Finally, an assessment will be drawn from the above sections in relation to the Libyan claim over the Gulf of Sirte by taking into account its geographical area (Mediterranean Sea) and the new trends on the issue of historic bays which have emerged after the adoption of the LOSC (section six).

II. The Concept of Protest Insofar as Historic Bays Are Concerned

Before dealing with the formal and material aspects of protest, it is important to define it; and then to underline the fact that for a protest to be made, the claim itself must be known to other States. Similarly, the fact that a protest must be repeated will also be dealt with. Moreover, the question of 'interested' and 'affected' States will also be assessed with a view to analyse the impact of the protests made by some maritime powers upon the Libyan claim.

2.1. Definitions of Protest

Protest in international law has been defined as 'a formal communication from one State to another that it objects to an act performed or contemplated by the latter'.[1]

As to MacGibbon, he defines it as being:

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[1] Oppenheim, L.F., International Law, Lauterpacht., (ed.), 7th ed., Longmans Green and Co., London, (1948), Vol.1, p.789.

"...[A] formal objection by which the protesting state makes it known that it does not recognize the legality of the acts against which the protest is directed, that it does not acquiesce in the situation which such acts have created or which they threaten to create, and that it has no intention of abandoning its own rights in the premises".[2]

He goes on to add that:

"Protest is generally accepted by writers as a means of preventing the maturing of a prescriptive or historic title".[3]

It could be seen from the above that such a definition is more or less comprehensive. It is also important to underline the fact that this definition was given within the more general background of protest in international law rather than in the more limited area of historic bay claims. However, despite this, such a definition could easily operate in this limited field of international law.

2.2. Formal Aspect of the Protest

A protest must be an act of State which must go through the process of notification. Moreover, a protest is also a formal and primarily a peaceful act.

2.2.1. Protest Should be an Act of State

States may react when faced by a claim to historic bays

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[2] MacGibbon, I.C., Some Observations on the Part of Protest in International Law, Vol.30 BYIL (1953), pp.293-319 at p.298.

[3] Ibid., p.307.

and as a consequence they may either abstain, protest or recognize this claim. Only States are entitled to formulate a protest. Hence, protest is primarily and essentially an act of State. However, this does not mean that other subjects of international law cannot make a valid protest despite the existence of some controversy as to what entities can be considered as belonging to that category.[4] When a protest is made by a State or on its behalf by an authorised source, in order to preserve its rights, and to rebut a possible presumption of acquiescence in the claimed right, there is no disagreement as regards its legal validity.

In the case where a protest is made on behalf of a State by an unofficial source without being duly authorized by a Government, such a protest has often been rejected, as happened in the instance concerning the Alaskan Boundary Arbitration.[5]

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[4] Ibid., p.294.

[5] In the Alaskan Boundary Arbitration, the US and Great Britain allowed the settlement to be dealt with by an Arbitral Tribunal. During the proceedings of the Tribunal, the problems attached to the submission of a protest or a claim, by an individual who had not been allotted the appropriate authority, were demonstrated by the rival contentions concerning the effect of the so-called 'Dawson letter' of Feb. 1888. This letter was actually a report of an interview between a Canadian and an US Official who were members of the geological surveys of their respective Governments; the Canadian Official had adopted certain views on the boundary question which Great Britain relied on as notice to the US of the claims of the Canadian Government. However, neither Official had been empowered by his Government to make representations on the subject of the dispute. The letter was later laid before the US Congress together with other documents associated with the dispute. The British would have it that the Canadian official in question represented Her Majesty's Government and that his views were essentially the views of the Canadian Government. This caused the US Government to comment that it was undoubtedly 'a most remarkable procedure...for a Government to waive the usual

2.2.2. Protest Should be a Formal and Peaceful Act

To be effective, protest, just like acquiescence, must be made by the competent authorities of the protesting State and through the diplomatic channels, or at international and regional organisations such as the UN or the Arab League.

States which deem it necessary or advisable to react against the claim of another State can always make their protests orally during meetings.[6] Italy reacted orally against the Libyan claim by making some reservations during a meeting between Delegates of the two countries.[7] But States are advised to make their protest in writing through diplomatic channels which are considered as the normal State practice. Hence, States must protest in a notified document as underlined by Gidel.[8] Written protest[9] is more efficient

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channels of diplomatic communication on matters of great importance, and to entrust the advancement of [such] a contention...to be made by an unaccredited person to a person who understood that neither of the two 'had any delegated powers whatever'." (Proceedings, of the Alaskan Boundary Arbitration Tribunal, US, Senate Doc. No.162, 58th Congress, 2nd Session, 7 Vols., 1904, Vol.5, p.183).

[6] Norway recognised, during the Oral Proceedings in the Fisheries Case, that there have been an oral protest of the German Government against the Norwegian Decree of 1935, purporting to extend Norwegian territorial waters as a result of the enforcement of the Norwegian method of delimitation by baselines (ICJ Pleadings, 1951, Vol.4, p.234).

[7] See infra section 3, 3.1.4.

[8] In this context, Gidel writes that:

> "...[I]l est prudent pour les gouvernements intéressés de ne pas laisser le fait préjuger le droit, de formuler leurs réserves dans un document porté sous une forme appropriée à la connaissance de l'Etat qui accomplit des actes de nature à lui permettre un jour ou l'autre de revendiquer des droits sur un espace maritime donné".

because "the impermanence of the spoken word renders oral protests liable to the twin dangers of distortion and oblivion".[10]

In the case of the 1973 Declaration, it is pertinent to observe that such a course of action (i.e., written and notified protests) has indeed been followed as will be shown later.[11]

In addition to the formal protest, there are some other ways of showing a rejection of a claim. A State, for instance, could sever diplomatic relations with the claimant State, or ask for the UN General Assembly or the UN Security Council to be convened to discuss the matter, especially if the claim is strongly considered as a violation of international law.[12] The submission of the conflict to the ICJ with the consent of the claimant State might also be considered as a protest.

It is to be underlined herein that there are some forms of protest which are considered illegal according to international law such as the use of force against the claimant State because the prohibition of the use of force to

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Gidel, op. cit., p.634. See also infra note 63.

[9] Id.

[10] MacGibbon (1953), op. cit., p.295.

[11] See infra section 3.

[12] Libya protested several times against the US violation of Libyan territory and against the use of force by the same State against Libya. These protests were made to the UN Security Council and General Assembly. As an example, Libya protested, on Aug. 19, 1981, against the US violation of Libyan sovereign rights in the Gulf of Sirte where the US aircraft shot down two Libyan MIG's (L.F.O. Docs., Aug. 1981). See chapter 1, section 4, for more details on the US-Libyan incidents).

solve disputes between States is widely supported by the majority of UN Security Council members, as well as by the UN Charter[13] and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.[14] The declaration of war which is the extreme form

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[13] As will be shown later in Article 2 (4) of the UN Charter, infra note 46. See also chapter 1, section 4, 4.2.; and Thornberry, op. cit.

[14] Part of which reads as follows:

> "[the UN General Assembly] Solemnly proclaims the following principles:
> The principle that States shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.
> ...Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues...
> The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.
> States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.
> The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above by other peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.
> States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations."

Annex to the UN General Assembly Resolution No.2625 (XXV) of Oct. 24th, 1970 [Brownlie (1983), op. cit., p.35, at pp.38-40].

of protest "must be rejected because then a State is making itself a judge in its own case".[15]

During the UN Security Council debate of March 1986, many States expressed the opinion that the use of force is not appropriate to solve international disputes. The emergency session of the UN Security Council was to discuss the US attack against Libya in the Gulf of Sirte.[16] Similar opinions against the use of force were expressed at the UN General Assembly session, the result of which was the condemnation by the majority of the member States of the US use of force against Libya when it bombed Tripoli and Benghazi on April 15th, 1986.[17]

In Resolution 41/38 adopted on November 20th, 1986, the UN General Assembly condemned the US air and naval military action against Libya in April 1986, describing the attack as a "violation of the Charter of the United Nations and of international law". The Resolution called upon the US Government to "refrain from the threat or use of force in the settlement of disputes and differences with the Libyan Arab Jamahiriya and to resort to peaceful means".[18]

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[15] Bouchez (1964), op. cit., p.272. See also, Rowe, P., Defence: The Legal Implications, Brassey's Defence Pub., London, (1987), pp.94-106.

[16] See the UN Security Council debate, UN Security Council Doc., S/PV.2671, 26-28 and 31 March 1986.

[17] Rowe found it "difficult to bring these air raids [of the US on Tripoli and Benghazi] into any established view of self-defence", op. cit., p.102.

[18] UN General Assembly, OR, Forty-First Session, Supp., No.53, 1986 (UN Doc., A/41/53) at pp.34-35).

2.3. The Material Aspect of Protest

When a State is faced with a claim to historic title which is against its interests, it is advisable to protest as soon as possible, although "Il n'est guère possible d'établir une règle fixe à ce sujet".[19] If it remained indifferent to this claim, a lasting silence can easily be interpreted as tacit recognition of this claim.[20] So, it is in the interests of the State to protest immediately after being acquainted with a claim in case it disapproves it. In the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, Tunisia contented that its baselines in the claimed area, which were based on historic rights, were in any event opposable to Libya for lack of timely protest on its part.[21]

An immediate and formal protest may be seen as more serious and effective than a mere reservation. Three points ought to be discussed below: what is the nature and content of a protest?, what is the significance of protest in the formation of an historic bay claim, i.e., how effective should the protest be? and what is the role it plays in such a process?

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[19] Bruel, E., 'La protestation en droit international', Vol.3, Acta Scandinavica Juris Gentium (ASJG), 1932, pp.75-93 at p.84.

[20] As seen in chapter 4, section 3, 3.1.1.

[21] ICJ Pleadings, (1982), Vol.5, pp.303-4; see also ICJ Reports (1982), at p.71.

2.3.1. The Nature and Content of Protest

In their protests, States normally clarify the wrong points for objections. A protest is without significance and may be rejected if it does not clearly indicate the act against which it is directed. During the Alaskan Boundary Arbitration, the US did not accept the protests made by Great Britain because they were seen as vague or ambiguous and were described as ineffective to operate as notice of adverse claims on the grounds that they were neither precise nor explicit. For example, one of these protests was described by the US as "so artfully veiled as to make it entirely undiscernible, and consequently of no significance as a notice to the US Government.[22]

In the Minquiers and Ecrehos Case, the UK argued that the French protest against the British Treasury Warrant of 1875, constituting Jersey as a port of the Channel Islands, and including the "Ecrehos Rocks" within the limits of that port, was "related to the question of fisheries and did not involve any French claim to sovereignty" and for that reason this protest was not effective against the exercise of sovereignty by Great Britain.[23] The ICJ then, held that 'this legislative Act was a clear manifestation of British sovereignty over the Ecrehos' and that the French protest, which was based on the ground that 'this legislative act derogated from the terms of the Fishery Convention of 1839, was ineffective to deprive the

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[22] See Proceedings, Alaskan Boundary Arbitration Tribunal, op. cit., Vol.5, p.187.

[23] ICJ Pleadings, 1953, Vol.2, p.337.

Act of its character as a manifestation of sovereignty'.[24]

Most of the reactions as will be seen later[25] which were made against the Libyan Declaration, were presented in general terms, and without any relation to any wrong inflicted on the protesting States. Some of them made only reference to the Third UNCLOS and hoped that the Libyan claim would be solved in the light of that Conference. Other reservations were made without clarifying the specific wrong that had been made by Libya in its Declaration or to the legal points related to the issue.

There are no strict and detailed rules in international law as to the contents of a protest, but the protesting State must indicate clearly the action to which it objects and the reasons for its objections. The reasons, according to State practice in this matter, are normally that the protesting State indicates that the claim or act in question is contrary to international law. The US protest against the Libyan claim provides a good example of this practice.[26] A common feature of protests is that most protesting States reserved their rights in respect of the claim in question, as was indicated in the few protests which will be examined later.[27]

To be effective from the legal point of view, the protest must be directed against the violation of rights which are vested in the protesting State. Where territory is ownerless

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[24] ICJ Reports, 1953, p.66.

[25] See infra section 3.

[26] Vol.68 AJIL, 1974, pp.510-511.

[27] See infra section 3.

(terra nullius) or no State has a real interest in it except the claimant State, there would exist no legal basis for protest. It was suggested that States "may formally protest or interpose only when their rights are violated".[28] Moreover, the protest, it has been maintained, must be 'bona fide community interest'[29].

It was also suggested that a note of protest "alleging violation of international law or treaty is improper unless the protesting State has received material injury as a consequence of the violation".[30] This also means that a protest is not possible if it is formulated on a basis other than that of a violation of the rights of the protesting State. In this context, MacGibbon maintains that 'a protest is devoid of legal effect if the rights in defence of which it is made do not in fact pertain to the protesting States'.[31] Thus, in the Minquiers and Ecrehos Case, the UK stated that:

> "The whole subject of protests, of course, presupposes the existence of a title on the part of the protesting country and...we do not admit that France had any title...For this reason alone, French protests were necessarily without legal effect."[32]

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[28] Wright, Q., The Denunciation of Treaty Violations, Vol.32, AJIL (1938), pp.526-535 at p.529.

[29] Ahnis, F., The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea, Ph.D. Thesis, Cambridge Univ., April 1989, p.150.

[30] Wright (1938), op. cit., p.530.

[31] MacGibbon (1953), op. cit., pp.297-8.

[32] ICJ Pleadings, 1953 Vol.2, p.365.

MacGibbon comments on this argument, he writes:

> "If legal effect were to be given to protests not formulated on a basis of right the security of title of any state, however long, continuous and peaceful the possession on which it was based, might be hazarded by the simple expedient of formulating such a protest."[33]

Moreover, the PCIJ has, in the **Legal Status of Eastern Greenland**, held that mere protests from Norway did not alter the peaceful character of Denmark's display of State activity.[34] These protests were of course ineffective since Norway had no legal right which was infringed.

An example of a protest which might be based on reasons other than a violation of international law or a violation of the rights of the protesting State is the protest which arises from political considerations, such as the US protest at the Libyan claim which was considered as politically-motivated, as will be shown later.[35]

In practice, a State may protest although, as Bouchez writes:

> "...It does not have any direct or indirect interest with reference to a territorial claim, merely by virtue of its membership of a political block. In this case...the judgment of the protesting State is not really concerned with the territorial claim, but purely emanates from existing political situations. So, factors not at all involved in the object of protest are the real incentive for the attitude of the protesting State. In general, a State will be more inclined to agree with the territorial claims of its political friends than with those of its political

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[33] MacGibbon (1953), op. cit., p.298.

[34] PCIJ, Series A/B, No.53, op. cit., p.62.

[35] See infra section 3, 3.3.

adversaries."[36]

In the same line of thought, O'Connell maintains that 'the value of the protest should also be measured against the totality of the relations between the two States'.[37] Applying such an opinion to the US-Libyan relations, would lead to underlining the fact that the US made a strong formal protest against the Libyan claim because relations between Libya and the US had deteriorated during the previous two decades. At the same time, the US did not protest at the Italian claim because both countries belong to the same military organisation, i.e., NATO.[38]

2.3.1.(A). Protest Should be Effective

As already stated above, protest might be made orally or in writing or through the severing of diplomatic relations and appeals to international and regional organisations. But, the most effective protest is the submission of the claim to, for example, the ICJ. Since 1919, there have been many cases where reference of the matter has been made to the PCIJ or the League of Nations. After the establishment of the ICJ in 1945, there has been, where possible, reference of the dispute to it. The LOSC provides for the establishment of a new machinery

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[36] Bouchez (1964), op. cit., p.269.

[37] O'Connell (1982), op. cit., Vol.1, p.44.

[38] As will be seen later in infra section 4, 4.1.

for settling historic bays disputes [Article 298 (1) (a)];[39] and in this context, it is relevant to underline the fact that when Libya signed this Convention, it did not make a declaration in relation to the optional clause concerning recourse to the procedure provided by Article 298 of the LOSC.[40] Similarly, the US,[41] along with Libya, has not ratified this Convention.[42]

It could also be said that the existence of international adjudication has altered the role of protest in case of historic bay claims. As a result, the effect of diplomatic

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[39] Part of which reads as follows:

> "1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
> (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or **those involving historic bays or titles**, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation specified under Annex V, section 2;...". (Emphasis added).

Nordquist, M., (ed.)., United Nations Convention on the Law of the Sea 1982: A Commentary, Martinus Nijhoff Pub., Dordrecht, Boston, Lancaster, (1985), Vol.1, pp.335-6. See also the Final Act of the LOSC, ibid., p.404.

[40] As already underlined in chapter 2, note 300. See also infra notes 41-2 and 182. As for the exact quotation of the above provision, see supra note 39.

[41] Brownlie (1983), op. cit., p.127.

[42] Although Libya has signed the Final Act (Dec. 1982), it only recently signed the LOSC (Dec. 1985) LOS Bulletin No.7, April 1986, p.3.

protest has been reduced and "is certainly not now the principal method of interrupting prescription. A protest since 1919 can be said to have amounted to no more than a temporary bar".[43] In this regard, it is pertinent to note that Libya has twice submitted its continental shelf delimitation to the ICJ,[44] and more recently it submitted another boundary dispute.[45] Such a fact is undoubtedly evidence of the Libyan disposition towards international law.

The use of force as a means of protest has become illegal, in other words, the possibility of the use of force or the threat to use force in international law, is generally restricted by the conclusion of the General Treaty for the Renunciation of War, in conjunction with the provisions of Article 2 (4) of the UN Charter.[46]

In this context, Blum writes that:

> "The outcome of this development is that international tribunals can no longer insist, in addition to protest, on evidence of readiness to

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[43] Johnson (1950), op. cit., p.346.

[44] See for instance the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, ICJ Report 1982, and the Continental Shelf (Libya Arab Jamahiriya/Malta) Case, ibid., 1985.

[45] Libya has also submitted its frontier dispute with Chad to the ICJ (Vol.95 RGDIP 1991, pp.157-8).

[46] As already mentioned above in note 13, see also Article 2 (4) of the UN Charter on the prohibition of the US of force to solve international disputes. It reads as follows:

> "4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."
>
> Brownlie (1983), op. cit., p.4.

support the protest by force or show of force."[47]

Applying such hypothesis to the Libyan claim would result in condemning the US use and show of force against Libya.

In case of a disputed territorial claim, international tribunals have decided that, in order to be effective a protest must be made by using all reasonable and lawful means. The nature of means depends upon the gravity of the threat caused by the claim and the nature of the rights violated. It is not sufficient that a State makes a protest to prevent the acquisition of title by adverse possession. The protesting State may be required by tribunals to prove that it made efforts to settle the dispute by using all available international machinery.[48]

In the Fisheries Case, the UK argued that a diplomatic protest is by itself enough to demonstrate the objection of the protesting State and for a certain period reserve its rights. But, the State must take other steps to bring the matter to a contest and settlement before an international tribunal if it attaches importance to its rights.[49] This means that if a State contents itself with an oral or a written protest without using all "available means of pressing its objections [it] may after a certain lapse of time be

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[47] Blum (1965), op. cit., p.161.

[48] See the Minquiers and Ecrehos Case, (ICJ Reports, 1953, p.47), and in particular Judge Carneira's Opinion at pp.107-108. See also MacGibbon (1953), op. cit., pp.312-314; and Roche, A.G., The Minquiers and Ecrehos Case: An Analysis of the Decision of the International Court of Justice, (Travaux de juridiction internationale), Droz, Genève, (1959), 200pp., at p.70.

[49] ICJ Pleadings, 1951, Vol.2, p.654.

barred from further questioning what has become part of established legal order".[50] The reason for the bar of the protesting State by lapse of time is based on the principle that there is "a presumption that by its continued inaction it (the protesting State) has in fact acquiesced in the changed situation".[51]

When the protesting State does not use the available judicial machinery, its failure to do so will seriously reduce the significance of protest. In this context, Fitzmaurice writes that "the protest must be an effective one, depending on what the circumstances require",[52] and when the protesting State fails to make it effective its position could be undermined in the face of an unilateral claim which "because it has become effective, may prove decisive in establishing the rule of customary law".[53]

However, there are possible exceptions to the opinion that diplomatic protest is not now the principal mode of interrupting prescription to historic title. There still exist circumstances in which a diplomatic protest may be seen as a sufficient bar to the acquisition of historic title.

In cases where there is no binding obligation upon a State to submit disputes to international tribunals for resolution and where the State refused voluntarily to submit to international adjudication, a wronged State may have no

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[50] Id.

[51] Id.

[52] Vol.30 BYIL (1953), op. cit., p.42.

[53] O'Connell (1982), op. cit., Vol.1, p.42.

recourse other than protest.[54] This means that protest is still the only appropriate and adequate course of action in all cases "where the normal avenues of ascertaining disputed rights through the compulsory jurisdiction of tribunals are not...available".[55] In this context, one may underline the fact that several States are not bound by the LOSC and thus do not have to submit their disputes with Libya to the machinery provided by the LOSC. However, most of them, including the US, could be invited to refer their disputes to the ICJ.

Another example of a protest which may be considered as a proper and sufficient way of objecting against any exceptional claim is mentioned by Lauterpacht, i.e., a legislative or administrative measure which might take the form of a proclamation of intention and assertion of a right, even if it is not backed up by any actual attempt to enforce such an assertion by the application of the legislation in question. Lauterpacht adds that "until an injury has actually occurred, it is probable that no juridical remedy will lie".[56] The US decision to organize manoeuvres in the Gulf of Sirte, particularly in 1981 and 1986 (and the subsequent injuries sustained by Libya) is a good illustration which shows that the US protest did not follow the peaceful means of protesting.[57]

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[54] See Lauterpacht, H., 'Sovereignty over Submarine Areas', Vol.27 BYIL (1950), pp.376-433 at p.396.

[55] Id.

[56] Id.

[57] See the US-Libyan incidents in chapter 1, section 4.

There are also some other instances where a mere written protest is regarded as sufficient to reserve the rights of the protesting State, such as the absence of the possibility of appealing to an international organisation like the UN, because, as it has been maintained that 'according to its constitution, the controversy is not of sufficient importance in terms of preservation of international peace to warrant action...in relation to the subject-matter of the dispute'.[58] If the circumstances are like these, then a diplomatic protest would be sufficient to reserve the rights of the protesting State at least for the time being, or until an attempt could be made to put the legislation into practice.

2.3.1.(B). The Role of Protest in the Formation of an Historic Bay Claim

States always direct their protests against a claim which violates their rights. The purpose of protest is the maintenance of these rights.[59] In the case of an historic claim, a protest plays a more significant role because it is seen as a withholding of acquiescence. The latter, as already

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[58] Lauterpacht (1950), op. cit., p.396.

[59] In this context, Cavaglieri writes that:

> "La protestation donne une expression formelle à l'hostilité de l'Etat qui proteste et réserve ses droits, sa possibilité juridique d'agir en tout moment contre la situation ou la prétention dont la protestation conteste la légitimité".

Cavaglieri, A., Règles générales du droit de la paix, Vol.1, Recueil (1929), pp.315-581 at p.516.

seen[60] is a required element for the formation of an historic title.

In the case of historic claims, the courts always look for the establishment of toleration by those States who might be affected by the claim; the same conclusion was reached by the ICJ in the Fisheries Case.[61] Protest in this case, is the opposite of mere inaction,[62] which could lead to the assumption at some future date of the existence of toleration sufficient for an exceptional title to an historic claim to be vindicated.

Third States' failure to protest against an historic bay claim can later result in a successful plea of right by the claimant State. In this regard, Gidel, especially referring to historic bays, states that interested Governments must formulate their reservations in an appropriate document in order to ensure that their rights are not overruled by the facts of the claim.[63] As to Fitzmaurice, he maintains that 'the protest must be an effective one'.[64] The special effect of protest was clearly brought out by Hyde. He writes:

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[60] See chapter 4, section 2.

[61] ICJ Reports, 1951, p.139.

[62] See Fitzmaurice (1953), op. cit., p.42; Lauterpacht (1950), op. cit., p.395; and MacGibbon (1953), op. cit., p.398. See also the Fisheries Case, ICJ Reports, 1951, p.139; the Alaskan Boundary Arbitration (Great Britain v. United States), Vol.15 UNRIAA, (1903) p.494; the Temple of Peah Vihear Case (Cambodia v. Thailand) Case, ICJ Reports, 1962, pp.22-23, and in particular Judge Alforo's Opinion, at pp.40-41.

[63] Gidel, op. cit., p.634. See also supra notes 8 and 9, and for a full quotation, see supra note 8.

[64] Hyde, op. cit., p.42.

> "Obviously a state may actively challenge the encroachments of a neighbour upon its soil, and by so interrupting the continuity of the adverse claim, prevent the perfecting of a transfer of sovereignty that might otherwise result."[65]

The interruption of the continuity of the claim as Hyde states is an essential role played by protest because the peaceful and continuous exercise of sovereignty over the claimed area is the most important element in the formation of an historic title.

Explicit agreement may give proof of abandonment or this may be understood if there has been no action taken for a long time. Thus, the effect of protest has to be considered with regard to these particular circumstances. As a result, a protest is of great importance if the establishment of this historic title is to be prevented by interrupting the peaceful and continuous display of sovereignty.

It must be recalled that there is a relation between protest and acquiescence. Thus, in the United States v. Alaska Case, the District Court found that the historic title over Cook inlet was established because the essential elements required for the formation of an historic title were proved. One of those elements was the acquiescence of foreign nations which was satisfied by the failure of any foreign State to protest.[66]

Protest is seen both by writers and in State practice as necessary for the preservation of the rights of the protesting State. Its function is to prevent the maturing of an historic

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[65] Hyde (1947), op. cit., Vol.1, p.387.

[66] 422 US (1975) p.200.

title[67] and to serve as an indication that the protesting State will not abandon its rights.[68] In other words, the function of protest is to rebut the presumption of acquiescence[69] as rightly observed by O'Connell. He writes:

> "It is undisputed that a claim which encounters no opposition is readily legitimized, however irregular its origins, and that, it seems, within a relatively short period of time".[70]

As to MacGibbon, he argues that:

> "Since acquiescence is essential to the validity of a prescriptive or historic title, the relevance of protest in this connection may be ascertained by the extent to which it operates to rebut the presumption of acquiescence".[71]

In other words, a protest serves to preserve the rights of the protesting State because it constitutes "an effective bar to perfecting prescriptive and historic titles for the validity of which acquiescence forms an essential element".[72]

As to Blum, he writes that:

> "The absence of protest may be regarded as the cornerstone of the doctrine of acquiescence. It rests on the assumption that States will not remain silent when faced with a situation likely to affect adversely their rights, if there is the slightest justification for any objection on their part."[73]

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[67] MacGibbon (1953), op. cit., p.307.

[68] Hyde (1947), op. cit., Vol.1, p.387.

[69] Bruel, op. cit., p.89.

[70] O'Connell (1982), op. cit., Vol.1, p.40.

[71] MacGibbon (1953), op. cit., pp.306-7.

[72] Ibid., p.307.

[73] Blum (1965), op. cit., p.154.

He assumes that Governments "give air to their grievances" when faced by a claim made by a State by making a protest. He goes on to add that:

> "...[T]he purpose of which [protest] is to build up an almost instinctive defence mechanism designed to vitiate any possible interpretation of silence as acquiescence. Thus protest may be considered as the remedy resorted to by international law in order to prevent the extensive application of the principle qui tacet consentire videtur."[74]

The lack of protests leads to the conclusion that tribunals may assume that this absence means toleration or acquiescence of the States concerned. Thus, in the **Chamizal** Arbitration, the effect of protest in relation to territorial claims was clearly discussed, when the Tribunal held that:

> "Upon the evidence adduced it is impossible to hold that the possession of El Chamizal by the United States was undisturbed, uninterrupted and unchallenged from the date of the treaty of Guadalupe-Hidalgo in 1848 until the year 1895, when in consequence of the creation of a competent tribunal to decide the question, the Chamizal Case was first presented. On the contrary, it may be said that the physical possession taken by citizens of the United States and the political control exercised by the local and federal Governments, have been constantly challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents".[75]

In the **Fisheries** Case, the UK Agent stated that Governments protested "in order to make it quite clear that they have not acquiesced and to prevent a prescriptive case being built up against them".[76] The Norwegian Government

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[74] Ibid., p.155.

[75] Vol.5 AJIL (1911), p.806.

[76] ICJ Pleadings, 1951, Vol.4, pp.375-6.

argued that the usage on which historic title is based must be peaceful and continuous, and consequently that the reaction of foreign States must be taken into consideration in the appreciation of such title. However, Norway rejected the UK argument that the acquiescence of other States is the only basis of an historic title.[77]

The UK Counsel submitted during the Oral Hearings in the Minquiers and Ecrehos Case, that:

> "The exact legal effect of a protest depends very much on circumstances, but in general all it does is to register or record the opinion of the protesting country that the act protested against is invalid and is not acquiesced in."[78]

The effect of protest can be seen as having two aspects. First, the absence of protest on the part of other States may be assumed to mean that these States have accepted the situation by not formulating protests. Secondly, and in relation to the establishment of an historic title, the "absence of protest may...in itself become a source of legal right inasmuch as it is related to...estoppel or prescription". [79] In this context, Lauterpacht writes that:

> "...[A protest is an] essential requirement of stability...it is a precept of fair dealing inasmuch as it prevents States from playing fast and loose with situations affecting others; and it is in accordance with equity inasmuch as it protects a State from the contingency of incurring responsibilities and expense, in reliance on the

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[77] ICJ Pleadings, 1951, Vol.3, p.462.

[78] Ibid., Vol.2, p.171.

[79] Lauterpacht (1950), op. cit., p.395.

apparent acquiescence of others".[80]

It is important to underline the role that third States could play in such a process and in this context, the Fisheries Case constitutes the first authoritative statement of the role of third party States in agreeing to or preventing a claim to historic waters. It was decided by the ICJ in that case (and even made clearer by it in the Gulf of Maine Case)[81] that a claimant State had only to show that other States 'tolerated' its claim. As in the former case, the UK did not react to the claim and this was taken as toleration.[82] Thus, it is implied that the only effective way of expressing non-toleration is by active protest.

Protest would, if it is legally maintained, prevent a claim from being a valid claim whereas acquiescence is considered as the legal seal for the consolidation of a claim to historic title. Therefore, protest is different from acquiescence because each has its own legal effect. Protest can be described as a positive reaction of a State when it is faced with a claim to historic title by another State. Acquiescence can be seen as a negative reaction of a State towards a new claim to historic title. The effect of protest can also be considered as the opposite to the effect of acquiescence. An effective protest may be construed as evidence of the absence of the consent of the protesting State.

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[80] Ibid, p.396.

[81] ICJ Reports, 1984, p.305.

[82] Ibid., 1951, p.138.

If it can be proved that the other States do know, then it is necessary to consider what reaction is required in order to prevent a claim to historic waters being successfully made by disturbing the peaceful and continuous sovereignty over those waters. In other words, a protest of other States must be active if it is to prevent a claim to historic waters being successful.[83] 'Objections' by 'interested' States are the very least that need to be made and the opposition must be 'effectively expressed'.[84] In this context, O'Connell summarises his view on the matter by maintaining that:

> "The real consideration is that toleration of the community of nations is essential...But this means in practice inaction or lack of protest, and the question is really one of effectiveness, so that even if protests have been made, they can only arrest the historic consolidation of a title...if they are continuous, widespread and supported by commensurate action."[85]

The UN Secretariat Report has also supported the view that widespread active protest is essential to prevent a claim to historic title coming into being. Applying such opinion to the Gulf of Sirte situation, would result in maintaining that with the exception of the US, the other reacting States at the Libyan claim have failed to make a widespread protest or follow up an active protest.[86]

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[83] UN Doc. A/CN.4/143, op. cit., pp.17-28.

[84] O'Connell (1982), op. cit., Vol.1, p.434.

[85] Id.

[86] As will be seen later in infra section 3.

2.4. The Requirement of Repetition of Protest

A protest must not only be followed by a consistent attitude of rejection of the claim, but it must also be repeated, as a protest which is not repeated and not consistently reiterated is not sufficient. However, even repeated protests can have little effect. If the protesting State did not take further action by taking the issue to an adjudicatory machinery and the claimant State has, by a series of successful steps, consolidated its claim, the protest, even if repeated, can be undermined by a series of retreats on the part of the protesting State. The repetition of protest will not preserve the claimed rights indefinitely unless there is evidence that it is the only lawful means available to the State concerned. In this context, MacGibbon argues that:

> "...[The] failure to supplement the initial expression of disapproval will not unreasonably give rise to the presumption either that...opposition could not be supported by any show of legal right, or that, even if able to protest on the basis of a claim of right...[the State affected] was for some reason indifferent to the outcome".[87]

Applying such opinion to the protests made against the Libyan claim would lead to the view that protest on their own however repeated, would not, in the absence of resort to international adjudication, hamper the consolidation of the Libyan historical title over the Gulf of Sirte. The repetition of protest may not be considered as an appropriate remedy to prevent the completion of an historic title. According to

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[87] MacGibbon (1953), op. cit., p.310.

MacGibbon, 'scant regard will be paid to the isolated protest of a State which takes no further action to combat continued infringements of its rights'.[88] Again, some States have protested at the Libyan claim only once, such as the Soviet Union. As a result, its protest is not strong enough to invalidate the Libyan claim.[89] However, MacGibbon adds that:

> "...[I]ncreased weight will be attached to the cumulative effect of protests which have been persistently reiterated".[90]

Of course, such a cumulative effect on its own would not be sufficient to stop the validation of an historic bay claim.

During the Oral Proceedings in the **Fisheries** Case, it was argued on behalf of Norway that the oral protest of Germany against the Decree of 1935, claiming to extend Norwegian territorial waters as a result of the imposition of the Norwegian baselines system of delimitation, was devoid of any probative value, because the protest was not followed by any further action and that the later action of the German Government deprived its initial protest of all significance, i.e., preventing the Norwegian title from coming into being.[91]

At an earlier stage of the Proceedings, Norway asserted in its Rejoinder that the French protest of July 1870 against the principles contained in the Norwegian Decree of 1869 could

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[88] Id.

[89] As will be seen in infra section 3, 3.2.7.

[90] MacGibbon (1953), op. cit., p.310 at note 1.

[91] ICJ Pleadings, 1951, Vol.4, p.234.

not be accepted as a bar to the formation of exceptional rights by Norway, because France did not take her objection any further and the matter was allowed to drop.[92]

In its Judgment, the ICJ seems to have implicitly upheld the Norwegian argument and was not convinced by the French opposition to the principles contained in the Decree, since it concluded that the Norwegian system of delimitation 'was consistently applied by [the] Norwegian authorities and...it encountered no opposition on the part of other States'.[93]

Thus, it may be concluded that a repetition of diplomatic protests will not of itself be accepted by tribunals as a means to prevent the acquisition of an historic title over a claimed bay, for example, unless further effective measures of objection were taken by the protesting State. As a result, protests will lose their force if they are not supported by other action, such as taking the dispute to international adjudication.

In the case of the Libyan claim, with the exception of the US protest, the very few States which protested at the Libyan claim, have not taken any practical steps to follow up their protests. Hence, it could be maintained that in the long term, these protests are too weak to prevent the Libyan claim from being validated.

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[92] Ibid., p.138; see also ibid., Vol.3, pp.481-484.

[93] Fisheriess Case, ICJ Reports, 1951, pp.136-137.

2.5. The Issue of 'Interested and Affected' States:

If a claim to an historic bay is made "nearly all states will be interested, because the key problem is the limitation of the freedom of the seas".[94] Normally, all States are 'interested and affected' parties in case of historic bays claims and not just a few major maritime powers because the high seas from where these claimed bays would be detached are **res communis**. It is true that there is an opinion which suggests that these powers are more 'interested' than smaller States.[95] Similarly, there is another view which maintains that States which are 'economically involved' (such as in the case of a State whose economy primarily depends on fishing) in the claimed area, are as well 'additionally interested'. As a result, these 'interested and affected' States[96] must play a crucial part in the validation of an historical title and consequently, their reaction is significant when dealing with the issue of protest.

In this context, Gidel maintains that not all objections should 'be placed on an equal footing, regardless of their nature, the geographical or other situation of the objecting State'.[97] Therefore, it is implied that priority is given to the reaction of 'interested and affected' States over the reaction of other States. Gidel's opinion is not free of

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[94] Bouchez (1964), op. cit., p.266.

[95] Ibid., pp.266-267.

[96] See MacGibbon (1954), op. cit., p.144.

[97] Gidel, op. cit., p.634; see also infra note 199.

criticism. In this regard, Bouchez admits that there are difficulties attached to such an opinion despite the fact that he too argues for this concept of 'interested and affected' States.[98]

Such a concept conflicts with the doctrine of equality of States, which is according to Lawrence, an international law principle implying that all States' reactions should have the same weight.[99] Newly independent States are too jealous of their sovereignty and international status to accept Gidel's opinion and the subsequent implied treatment reserved for them. Consequently, the US and the UK protests, for instance, coming from States which could be said to be 'interested' should be given the same weight as a protest originating from, for example, Bulgaria.[100]

III. Explicit Reactions to the Libyan Claim over the Gulf of Sirte

The 1973 Declaration was sent as an official document by the Libyan Government to the UN General Assembly on October 19th, 1973 in a **Note Verbal** which justified the closing on the basis of 'security interests', 'sovereignty rights' and

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[98] Bouchez (1964), op. cit., pp.267-268.

[99] In this context, he writes that:

> "All independent States are equal in the eye of international law and have the same rights".

Lawrence, T.J., The principles of International Law, 7th ed., Winfield, London, 1923, p.245.

[100] See infra, section 3, 3.2.2.

'immemorial possession'.[101] It was also communicated to many States where Libyan embassies are based.[102]

At the time of the Declaration, no foreign State made an objection in the UN General Assembly to this Libyan official proclamation[103] until some months later. Of the 160 UN member States, only a few (fourteen) made reservations or protested against the Libyan Declaration. The reactions of these States varied from one State to another. In this context, it is possible to distinguish two different types of reactions: First, States which have only registered mere reservations; secondly, those which have registered a protest.

Among these protests, the US protest which was repeated, and which originated armed confrontation between Libya and the US needs to be studied within its historical and political context. The question of whether a protest from a single State can invalidate an historic bay claim of another State will also be addressed.

3.1. Reservations to the Libyan Claim

There have been some reactions made by other States which are not considered as protests against the Libyan claim, but could be seen as simple reservations. It is to be noted here, that a protest is usually stronger than a mere reservation.

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[101] See the Note Verbal presented by the Libyan Permanent Mission to the UN Secretariat, UN Doc. ST/LEG/SER.B/18 (1976), op. cit., pp.26-27.

[102] L.F.O., Maritime Boundaries File, 1973-1974.

[103] Rousseau, Ch., Chronique de droit international, Vol.78 RGDIP (1974), pp.1178-79.

Such reservations were the ones made by Austria, Denmark, Greece, Italy, Tunisia, and Turkey. They hoped that UNCLOS III would resolve the problem of large sea-areas and the historic bays disputes.

3.1.1. Austria

The Austrian Note Verbal of November 27th, 1973 was delivered by its Permanent Representative at the UN to the Libyan Permanent Representative. It only expressed its hope that it would be possible for the forthcoming UNCLOS to find a solution to the question of the unilateral extension of territorial waters, taking into account the interests of the coastal States as well as the international community. Austria reserved her right to examine all acts of individual States on this question in the light of the results of this Conference.

The Austrian Note may be interpreted as giving priority to the Libyan interest in this Gulf. According to the Austrian assertion, it would be possible for the Third UNCLOS to find a solution to the question of the unilateral extension of territorial waters by "taking into account the interests of the coastal States".[104]

3.1.2. Denmark

In its reply to the Libyan Declaration, the Permanent

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[104] L.F.O., Dept. of Treaties and Legal Affairs, Nov. 27, 1973.

Danish Representative to the UN made a reservation "with respect to such Danish rights that might be affected" by the Libyan decision, which declared that the Gulf of Sirte extending offshore to latitude 32° North was to form part of Libyan internal waters, beyond which its territorial waters started.[105] The Danish Government hoped that all nations would contribute to this Conference (UNCLOS III) and make the negotiations a success, and would refrain from any actions which could increase the difficulties in reaching internationally-agreed solutions. One can only remark that the Danish Note could not be considered a direct and express protest against the 1973 Libyan Declaration.

3.1.3. Greece

Greece did not make a formal protest to the Libyan Government despite the fact that it is considered as one of the Mediterranean countries which could be affected by the Libyan Law of 9 October 1973 which delimits the Gulf of Sirte by a closing line at point 32° 30' latitude, hence, a baseline from where the Libyan territorial sea starts. As a result, the Libyan continental shelf would also be calculated from this closing line and would extend in some cases up to 350 miles[106] northward, i.e., towards Malta, Italy and Greece whose coasts are opposing those of Libya.

But, the Greek Ministry of Foreign Affairs sent a letter

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[105] Ibid., Feb. 22nd, 1974.

[106] As regards Malta, this will be dealt with later in 3.2.5. See also Article 76 (1) of the LOSC in infra note 135.

to the Libyan Embassy in Brussels referring to the latter note 1247 of October 1973, concerning Libya's claim to the Gulf of Sirte. In that letter, Greece stated that important issues of this nature affecting basic principles of international law relating to the freedom of the seas, which Greece thought it had consistently upheld, should be examined and decided upon through proper international channels.[107]

The Greek Government noted that it reserved its rights and proposed to express its legal views on this issue when the matter came before UNCLOS III where a broad spectrum of important issues would have to be discussed in a spirit of goodwill, capable of accommodating the interests of all the members of the international community.[108] However, it is to be noted that the Gulf of Sirte issue was not discussed properly, though the subject of historic bays and waters was raised but was little dealt with.[109]

3.1.4. Italy

Italy, which had a special relationship with Libya as it colonised this country from 1911 up to its defeat by the Allies during World War II, did not react to the Declaration in writing. But at a meeting in Tripoli on April 23rd, 1974,

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[107] L.F.O., Dept. of Treaties and Legal Affairs, March 25, 1974.

[108] Id.

[109] See for example the discussions on the **Blue Papers** in chapters 2, section 3, 3.3.5., notes 274-5; see also the Recommendations on Historic waters adopted by the African States, chapter 3, note 92; and chapter 6, notes 65 and 100.

between the Counsellor of the Italian Embassy and the Head of the Western Section in the Libyan Ministry of Foreign Affairs, the former stated that his Government presented to the UN Secretary-General a Note expressing its view to the measures taken by some States regarding the unilateral delimitation of their territory. The Counsellor referred in particular to the 1973 Declaration to which he expressed reservations. He added that his Government did not wish to present a Note of protest to the Government of Libya, since Libya was a friendly State.[110]

In addition, the Italian Under-Secretary for Foreign Affairs, Mr. Bensi, in his reply to a question by an Italian member of Parliament on July 8th, 1974, stated that his Government made reservations to the Libyan Chargé d'Affairs with regard to the extension of Libyan internal waters in the Gulf of Sirte.[111] He also added that:

> "...[T]he Italian Embassy in Tripoli explained to the competent Libyan authorities the juridical and political 'reservations' of Italy with regard to the unilateral provisions on national maritime jurisdiction, especially when such provisions are made on the eve of the Caracas Conference on Sea Law".[112]

Moreover, Italy also used the word 'reservation' during the hearing of the Continental Shelf (Libyan Arab Jamahiriya) Case by the ICJ, when Italy made an application for permission to intervene in the case according to Articles 62 and 81 of

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[110] L.F.O., Dept. of Treaties and Legal Affairs, April 23, 1974.

[111] Vol.2, IYIL (1976), pp.422-23.

[112] Id.

the ICJ's Statute because it thought its interests were involved. The Italian Counsel stated that:

> "The interest relied upon by Italy is the protection of its claims to its sovereign rights over areas claimed by the parties to the present coast".[113]

Furthermore, its interests are involved inasmuch as it has 'reservations' to the Gulf of Sirte.[114] Italy did not protest against the Libyan Declaration, despite the fact that it is located on the north shore of the Mediterranean, just opposite to Libya. Such Italian position may be considered as a mere reservation rather than a protest.

This position may be explained by the fact that Italy had the intention to put into practice the same claim as Libya. In this context, Italy has, in April 1977, issued a Presidential Decree which provided for a closing line of about 60 miles to be drawn along the entrance of the Gulf of Taranto. The justification for the drawing of such a line given by the Italian Decree was the same as that made by the

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[113] The Italian application to intervene was rejected by the Court which held that:

> "...[It] tends inevitably to produce a situation in which the Court would be seised of a dispute between Italy on the one hand and Libya and Malta on the other, or each of them separately, without the consent of the latter States; Italy would thus become a party to one or several disputes which are not before the Court at present. In this, the character of the case would be transformed. These considerations, in the view of the Court, constitute reasons why the application cannot be granted".

Continental Shelf (Libyan Arab Jamahiriya/Malta) Application to Intervene, ICJ Report 1984, p.11, at p.25.

[114] See infra section 4.

Libyan Declaration i.e., 'historic' grounds.[115] Contrary to Italy, Libya has further elaborated on its historic claim, it states inter alia that its exercise of sovereignty over the Gulf was 'throughout history and without any dispute'.[116]

3.1.5. Tunisia

It did not react to the 1973 Libyan Declaration in writing, it made its reservations during the Oral Hearings of the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case. It then stated that:

> "[La Libya] ... a fermé le golfe de Syrte par une ligne de base droite longue de 465 km environ, en l'absence de toute justification historique."[117]

Such an informal remark made by Tunisia during that case cannot be considered as a protest. If Tunisia had the intention to protest against the Libyan claim, it would have made it as soon as the 1973 Declaration was issued because the time factor is vital, and it should not have waited until 1981 when Libya refused to accept the closing line of the Gulf of Gabes and the 1973 Tunisian Decree on Baselines,[118] to make a protest. Similarly, Libya failed to protest at the above

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[115] Durante, F. and Rodino, W. (eds.), Western Europe and the Development of the Law of the Sea, 3 Vols. Oceana Pub. Dobbs Ferry, New York, 1979, Vol.2, pp.147-51; see also Ronzitti, N., Is the Gulf of Taranto an Historic Bay?, Vol.11 SJILC (1984), p.225.

[116] See the Libyan Law of 9th Oct. 1973, in the Official Gazette of Libya, No.5, Special Supp., Oct. 15th, 1973.

[117] ICJ Pleadings, 1982, TCM, Vol.2, para.1.26 at p.13.

[118] Ibid., LM, Vol.1, para.141 at p.506.

Tunisian Decree between 1973 and 1979 for political reasons, i.e., Libya was trying to materialise a political merger with Tunisia in accordance with the 1974 Djerba Declaration of Unity.[119] Thus, protesting at a Tunisian law would have been politically inopportune. However, later on, Libya did notify Tunisia of its refusal to accept any delimitation based on the 1973 baselines.[120] The absence of protests in both cases, i.e., the Tunisian one in the case of the Libyan claim, and the Libyan one in the case of the Tunisian Decree equally bar Tunisia and Libya from having recourse to late protest.[121]

3.1.6. Turkey

The Turkish reaction was rather general. It reacted in much the same way as Greece. It registered no protest but reserved its rights to express its position regarding this decision taken by the Libyan Government on the Gulf in the light of the principles which the Third UNCLOS would adopt.[122]

3.2. Protests Other than the US Protest

Insofar as the Libyan claim over the Gulf of Sirte is

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[119] In its **Judgment**, the ICJ refers to it (ICJ Reports, at p.80), and it is included in the Documents submitted by Libya, **ICJ Pleadings**, Vol.2, Annex 30, op. cit.

[120] **ICJ Pleadings, LR**, (1982), Vol.4, para.39-40 at p.118-9.

[121] See infra section 4.

[122] L.F.O., Dept. of Treaties and Legal Affairs, Dec. 12, 1973.

concerned there have been some protests. Seven States have protested, as follows: Belgium, Bulgaria, France, the Federal Republic of Germany, Malta, UK, USSR, and the US which will be dealt separately. Their protests did not refer to the same legal reasons. One common feature of most of the reactions mentioned above is that they refer to the Third UNCLOS.

2.2.1. Belgium

The Belgian Note was sent on December 20th, 1973 and stated that it considered the Libyan claim of sovereignty over the Gulf of Sirte to be "incompatible with contemporary international law, especially Articles 7 (5) and 5 (2) of the Geneva Convention of 29 April 1958 on the Territorial Sea and Contiguous Zone". Accordingly, the Belgian Government reserved its rights as well as those of its nationals in the Gulf of Sirte area.[123]

3.2.2. Bulgaria

The Bulgarian Government made a formal protest in a Note Verbal of February 11th, 1974. It made reference to the "generally recognised rules of international law". According to these rules, the high seas are free for all nations and no State has the right to claim and to subject any part of the high seas to its sovereignty. It also made reference to the TSC (Article 7) according to which waters of bays whose

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[123] Id.

closing lines do not exceed twenty-four miles, are considered internal waters of the coastal State. As a result, the Bulgarian Government considered the Libyan action as:

> "...[I]ncompatible with the basic principles of the international sea law. They are an attempt to appropriate a large zone of high seas by extending over Sirte Bay the sovereignty of the Libyan State which the Government of Bulgaria cannot accept as legal".[124]

Bulgaria maintained that the Libyan claim happened when UNCLOS III began its work. This claim would create difficulties and complicate the work of the Conference when taking coordinated decisions.[125]

3.2.3. France

Although France's reaction to the 1973 Libyan Declaration was not strong, it did send a protest to the Libyan Government. The French Ministry of Foreign Affairs has, in its **Note Verbal** of November 26th, 1973, made reference to the historic rights aspect of the Libyan Declaration, stating that Libya unilaterally assimilated the Gulf of Sirte with 'historic bays' or 'internal waters'. But, to the knowledge of the French Government, no evidence existed which could prove that the previous Governments of Libya thought of it as such. The French Foreign Affairs Ministry added that it was faced with 'an unilateral decision related to a claim not in conformity with the present international law of the sea; the

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[124] Ibid., Nov. 2nd, 1974.

[125] Id.

French Government was obliged to reserve all its rights. The Law of the Sea Conference would take place in New York on 3rd December 1973, and each State would be able to make known its position regarding sea areas under their jurisdiction. That was what the French Government was going to do for its part'.[126]

3.2.4. Federal Republic of Germany

In addition to the **Note Verbal** from the Libyan Mission to the UN already mentioned, the Libyan Embassy in Bonn informed the Federal Foreign Office on October 17th, 1973, that the Libyan Government regarded the Gulf of Great Sirte[127] as an integral part of Libyan territory and under its sovereignty. 'Foreign ships', the **Note** says, 'are not permitted to enter the Gulf except with the prior approval of the Libyan authorities and only subject to the appropriate regulations'.

In reply to that notification, the Embassy of the Federal Republic of Germany in Tripoli wished to draw the attention of the Libyan Government to the legal 'standpoint' of the Federal Government regarding the question of unilateral claims by coastal States to parts of the high seas. In the opinion

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[126] Ibid., Nov. 26th, 1973.

[127] The word 'Great' Sirte goes back to time immemorial when the whole of North Africa including most of modern Egypt was known as Libya. The area situated west of actual Libya on the Mediterranean was referred to as the 'Minor Sirte' and what is now the Gulf of Sirte was known as 'Great Sirte'. These nomenclatures prevailed since the Phoenician era (Goodchild, R.G., Libyan Studies, 1976, pp.133-7).

of West Germany, it was not permissible for a coastal State to extend unilaterally its jurisdiction to parts of the high seas, whether in the form of an extension of territorial waters or a claim to bays hitherto considered as high seas.

According to the West German Government, the argument put forward by Libya in support of its claim, that the Gulf of Great Sirte was an historical bay, was not borne out by the history of the Mediterranean region. Nor did the security requirements of a State justify its laying claim to parts of the high seas as internal waters. As a result, the Federal Republic of Germany regretted that it could not recognise unilateral steps forestalling such an international settlement, especially with regard to the question of jurisdiction over coastal waters.

The Federal Republic of Germany also made reference to UNCLOS III and welcomed the decision to be taken by this Conference which would draw up an international convention to determine the width of coastal waters.[128]

3.2.5. Malta

Malta, being involved in the dispute regarding the delimitation of its continental shelf with Libya, did not recognise the Libyan claim over the Gulf of Sirte, south of a line drawn along latitude 32° 30' north as a part of Libyan territory or falling under Libyan sovereignty. The Maltese reaction was included in a response to a Libyan request for

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[128] L.F.O. Dept. of Treaties and Legal Affairs, May 5th, 1974.

information concerning the activities of a seismic ship operated by Texaco in the Medina Bank area and was clearly made in the context of the dispute between the two States over the delimitation of their respective continental shelves.

In its Note Verbal of August 8th, 1974, the Maltese Government stated that:

> "...[It] cannot accept or recognize the contention that the Gulf of Sirte, South of a line drawn along latitude 32°30' North is a part of Libyan territory or falls under Libyan sovereignty. The Government of Malta continues to regard as the baselines for the delimitation of Libyan territorial waters and continental shelf the internationally recognised baselines as applicable prior to October 1973. Accordingly, the Government of Malta must reserve all its rights as well as those of its nationals and licensees in the area"[129].

In his argument on behalf of the Maltese Government which made an application to intervene in the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, Lauterpacht, the Counsel for Malta, stated with regard to the Libyan claim that:

> "Malta has, since 1974, refused to recognise this claim and maintains that the baselines for the delimitation of Libyan territorial waters and continental shelf are those recognised as applicable prior to October 1973".[130]

It is to be noted from the above that Malta referred to the term "territorial waters" as used by Libya when it issued

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129 Note Verbal of the Maltese Embassy sent to the Libyan Ministry of Foreign Affairs, on Aug. 8th, 1974 (L.F.O., Dept. of Treaties and Legal Affairs, Aug. 8, 1974).

130 Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, ICJ Reports (1981), p.3, at p.297., ICJ Reports 1981, p.3.

the law of February 18th, 1959 which extended the breadth of the Libyan territorial waters from 6 to 12 nautical miles. The same term is reproduced in the Draft Law of Libyan Maritime Zones which is being considered by the Libyan Popular Committees (the equivalent of Parliament) despite the fact that the Gulf of Sirte is claimed by Libya as "internal waters" and not territorial waters.[131]

Lauterpacht has also indicated in the Oral Argument before the ICJ the reason behind the Maltese refusal to recognise the Libyan claim. He states:

> "This claim is contested by Malta. If Libya validates its claim to close the Gulf of Sirte in its relationship with Tunisia, then that will also have an impact upon the validity of the closure of the Gulf of Sirte in Libya's relations with Malta. It will have a direct effect on a basic ingredient of the equidistance line between Libya and Malta. The effect of a straight closing line across the Gulf of Sirte is to push the equidistance line between Malta and Libya northwards towards Malta by 35 nautical miles. A very significant impact in this area."[132]

The ICJ refused the Maltese application to intervene in the case.[133] However, the World Court found in its 1985 Continental Shelf (Libyan Arab Jamahiriya\Malta) Case, that

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[131] A coastal State exercises sovereignty over both its territorial sea and internal waters. One of the difference between the two consists in the right of passage, in the territorial sea, foreign vessels have the right of innocent passage (Articles 14 of the TSC and 17 of the LOSC); they do not enjoy such a right in the internal waters except in some circumstances [Articles 5 (2) of the TSC and 8 (2) of the LOSC]. See also chapter 5, note 8 and section 3, 3.3., note 256.

[132] ICJ Pleadings (1982), Vol.3, p.313.

[133] Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, ICJ Reports (1981), p.3. at p.20.

the delimitation area of continental shelf appertaining to Libya and Malta is at latitude 34° 30' north, which is north of the straight baseline along the line of latitude 32° 30' north drawn by Libya across the Gulf of Sirte.[134]

If Libyan sovereignty over the Gulf of Sirte is successfully asserted, then it will have a straightforward effect on the extension of the Libyan continental shelf evidently at the expense of Malta whose southern shores face the Libyan coast. This is particularly true in case of the implementation of the 350 miles distance in the area between Malta and Libya coasts. As a result, if the closing line of the Gulf of Sirte is taken into consideration when measuring the Libyan continental shelf and applying the 350 miles, it follows that this will result in an encroachment on the Maltese continental shelf if measured up to the 350 miles.[135] The use of the closing line (32° 30' line) is manifestly not in the best interests of Malta.[136]

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[134] ICJ Reports, 1985, p.57 at p.79.

[135] As shown above in supra note 106. Article 76 (1) of the LOSC reads as follows:

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

Although the 1958 Geneva Convention on the Continental Shelf does not provide, in its Article 1 (definition of the continental shelf) or other provisions, that the continental shelf is measured from the baselines of the territorial sea as explicitly laid down above, it is assumed that was the case.

[136] ICJ Pleadings, 1982, Vol.3, p.313.

3.2.6. UK

In its Note Verbal of December 20th, 1973, the UK Government stated that it could not recognise or accept that the Gulf of Sirte south of a line drawn along latitude 32° 30' north was a part of Libyan territory or falls under Libyan sovereignty. Her Majesty Government's reserved its rights as well as those of its nationals and ships flying its flags in the area.[137]

Moreover, the UK maintains that the question of maritime jurisdiction was to be discussed at UNCLOS III, in which each Government would be able to make known its position on the question of the territorial sea. After 1981, the British Government clearly sided with the US view.[138]

Furthermore, Lord Kennett has, in the House of Lords, asked whether Her Majesty's Government recognize certain historic seas such as the Gulf of Sirte and the Gulf of Taranto. In a written answer, Baroness Young, speaking on behalf of the Commonwealth and Foreign Office, stated that:

> "...[W]e do not regard the baseline drawn by the Libyan Authorities in the Gulf of Sirte as reconcilable with international law. The Gulf of Taranto is claimed by

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[137] L.F.O., Dept. of Treaties and Legal Affairs, May 12, 1973.

[138] It is noted in Vol.52 BYIL (1981) p.467 that:

> "In a reply to a question asked at a news conference on the subject of aerial incidents over the Gulf of Sirte (Sidra) involving United States and Libyan military aircraft, a spokesman for the Foreign and Commonwealth Office said on 19 August 1981 that he had only the United States statement before him but it would appear from that to have been an unprovoked attack by the Libyans in what are generally recognized to be international waters".

Italy as a bay but the arguments on which the Italian Authorities rely are not known".[139]

Again, on the occasion of the UN Security Council debate on the 1986 incidents, the UK Representative reiterated Her Majesty's Government position as follows:

"...[W]e all have a right to traverse international waters [i.e., the Gulf of Sirte]".[140]

It clearly appears from the above UK stance that it considers the Libyan-claimed Gulf as high seas, and a result Libya has no right to close it to international navigation.

3.2.7. USSR

After describing the Gulf of Sirte geographically, the Soviet **Note Verbal** of December 5th, 1973, stated that the Libyan Declaration was not in conformity with the rules of international law. These rules were provided by the TSC and stipulated that a bay is to be considered as internal waters if its closing line does not exceed twenty-four miles. The USSR added that in fact, sovereignty of the Libyan Arab Republic over the Gulf of Sirte is but an attempt to appropriate a large area of the high seas, a matter which is not in harmony with the principles reflected in the 1958 Geneva Convention on the High Seas which provides that "high seas are open to all Nations and no State has the right to

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[139] Vol.450, **Hansard**, House of Lords, (col. Written Answers), April 4th, 1984.

[140] See UN Security Council Doc., S/PV 2669, (1986) p.32.

claim sovereignty over any part of it".

The Soviet Union disputed the claim contained in the Libyan Declaration that Libya had exercised sovereign rights over the Gulf throughout its long history and that it was Libyan property; it found such a claim unjustified, since principles of international law had always been applied in relation to this Gulf. It also noted that the Libyan Arab Republic had taken this decision at a time when special arrangements were being made to hold an international conference on the law of the sea within the UN and according to a resolution of its General Assembly. The Soviet Government concluded that it could not consider the action taken by the Government of the Libyan Arab Republic justified or that it had a legal base.[141]

In these circumstances, according to the Soviet Union, the adoption of unilateral and unjustified actions by any State in this field would impede the work of the Conference in reaching a common agreement on law of the sea issues.

The question to be raised here is whether the above protests are strong enough to invalidate the Libyan claim. Answering such a question requires dealing, though briefly, with writers' opinions on this issue.

Sørensen suggests that a practice followed by the great majority of States, i.e., generality of practice, rather than unanimity of States, or universality of practice could validate an historic bay claim.[142] Similarly, Charney

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[141] L.F.O., Dept. of Treaties and Legal Affairs, May 12, 1973.

[142] Sørensen, op. cit., p.102.

maintains that when a claim is made by a coastal State and receives a general toleration by other States, such a claim 'cannot be frustrated or invalidated by the opposition or protest by a small minority of States'. According to him, the formation of new customary rights does not require unanimity.[143] It is clearly implied that a majority of States which accept such new rights is enough.

It is not easy to disagree with Sørensen's and Charney's views as above, and if their opinions are applied to the Libyan claim, where there is neither universal protest nor unanimous acquiescence, one might conclude that such a claim could be characterized as new customary Libyan rights over the Gulf of Sirte which is in the process of being consolidated.

Another view is maintained by Kunz who advocates the 'functional majority' test, meaning that there must be a majority of States which are affected or likely to be affected by the claim, and not a mere majority of States.[144] Applying this view to the Gulf of Sirte, one might stress the point that the States which have protested are States whose

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[143] Charney, J.I., The Persistent Objector Rule and the Development of Customary International Law, Vol.56 BYIL 1985, pp.1-24, at p.22.

[144] Kunz, J.L., The Nature of Customary International Law, Vol.47 AJIL (1953), pp.662-9 at p.666. See also Johnson's opinion which is similar to Kunz's. He writes:

> "...It is not possible to lay down a general rule stating how many states must protest and how strongly they must protest in order to prevent the growth of a prescriptive claim over areas of the high seas, but at least the governing principle is clear_there must be 'a general recognition of it by the maritime Powers of the world".
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> (1950) op. cit., p.351.

interests were affected, such the naval powers (the US and the UK, for example) or neighbouring States (for instance, Malta). According to Kunz's logic, their reaction should be determinant in the process of acquisition of sovereign rights by Libya over this Gulf. Kunz's view is difficult to accept without criticism, as it clashes with the doctrine of equality of States.[145]

3.3. The US Protest to the Libyan Claim

As already mentioned,[146] the US reaction to the Libyan Declaration is regarded as the strongest one because the US Government delivered a firm protest to the Libyan Government and it followed it up by a series of military actions in the territory claimed by Libya as its internal waters, i.e., the Gulf of Sirte. However, the US protest was mainly considered to be based on political motivations. For these reasons, the historic and political background to the US-Libyan relations need to be discussed starting with the political and historical background of US-Libyan relations. Moreover, the fact that the US protest has been repeated needs to be examined and it remains to be seen whether a protest of a single State, such as the US, could invalidate the Libyan claim.

3.3.1. The Political and Historical Context of the US-Libyan

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[145] As seen above in section 1; see also supra section 2, 2.5.

[146] As shown in chapter 1, sections 3 and 4.

Relations

The above consideration should be considered only in brief as this study does not concern itself with either the political dispute between the two countries or with international law relating to the use of force. The US-Libyan relations have known two different periods: (i) before the advent of the Libyan Republic (1969) and (ii) since then within which time came the 1973 Libyan Declaration, the 1974 and subsequent US protests.

3.3.1.(A). US-Libyan Relations from the 18th Century to 1969

In the 18th and 19th centuries the Libyan fleet dominated the central Mediterranean during this era, US and European ships operating in this part of the Mediterranean were protected by the Libyan fleet against pirates and were even given permission to navigate in Libyan waters (including gulfs) and enter Libyan ports.[147] On November 4th, 1796, the US and Libya signed a treaty and US ships were given permission to navigate peacefully off the Libyan coast. In return, Libya levied a tax to be paid by the US. When Libya increased this tax in the 19th century, the US entered into conflict with Libya. The US fleet attacked Libya, some of its warships were destroyed and others were captured along with their crews. The result was the signing of another treaty by

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[147] See provisions of some treaties concluded by Libya with some European States in chapter 1, section 5, 5.2; see also chapter 3, section 2, 2.1. and 2.2.

which Libya released the US crew prisoners. It is important to be reminded of the fact that in the past, US and Libyan navies confronted each other such as in the 1803 incident when Libya captured and held the US S. Philadelphia, and took its crew as prisoners.[148]

The US abstained during the last two centuries from taking any action against Libya. In 1954, the US concluded a treaty with Libya by which US forces were given the right to use both Libyan waters and land territory.[149]

3.3.1.(B). US-Libyan Relations Since the Advent of the Libyan Republic

The changing economic circumstances of the 1960s, brought about by the discovery and establishment of oil fields, demanded the need for more specific and detailed regulations as to Libya's maritime limits. Correspondingly, the status of the Gulf of Sirte assumed profound importance. Libya's vital interests in the region acquired growing importance as the pace of economic development quickened. Since 1973, the region has been regarded as the vital centre of the country, and its importance has continued. In addition, Libya was also urged to declare the Gulf as internal waters by the US military air force's violation of Libyan air space.

After the 1954 Treaty between Libya and the US was

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[148] The Times, Aug. 21st, 1981. For more details on the Historical background on Libya, see chapter 1, section 5, 5.2.; see also chapter 3, section 2 and in particular 2.1.

[149] See chapter 1, section 4, notes 29-30; and chapter 3, section 2, 2.4.1., note 82. See also infra note 237.

terminated on December 23rd, 1969, US-Libyan relations entered another phase. Political disputes over various issues emerged. The more serious issues were the economic problems over the oil companies and the Middle East problem.

Before 1969, US oil companies ran most of the oil industry in Libya. After 1969, Libya nationalised some of the oil industry. Despite such nationalisations, the US tried to keep to the 'safeguarding of the dominant position of US oil companies in Libya' as this was its 'principal commercial objective'.[150]

Similarly, Libya chose the context of the 1973 'Ramadhan War' in making its claim, in order to disrupt, as far as possible, the US shipment and airlifting of arms supplies to Israel both in the Libyan 'security zone', territorial waters and the Gulf of Sirte and the airspace above them. As a result, only a narrow flight corridor in the central Mediterranean remained, because most European States refused the US any transit facilities. The Libyan Government probably thought that the international community of States would be more concerned with the 1973 'Ramadhan War' rather than with its historic bay claim, the importance of which would hopefully go unnoticed, thus, enhancing its chances of it being accepted after a lapse of time. With the growing number of incidents between Libyan and US aircraft in the zone,[151] Libya perceived that it was in the interest of peace to put an end to such incidents by formally claiming most of the Gulf

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[150] Haley, P.E., Qaddafi and the United States Since 1969, Praeger, New York (1984), p.4.

[151] See chapter 1, section 4.

of Sirte up to the 32° 30' line as delimited by the 1973 Declaration.

Moreover, Libya had presumably realized that its historic bay claim over the Gulf of Sirte would be very difficult to assert in time of peace.[152] Such an assumption may at least partly explain why Libya did not immediately make a formal claim over this Gulf following the Revolution of 1st September 1969. Furthermore, before the Libyan Revolution, it was not very feasible for Libya to make an historic bay claim as Libyan foreign policy was geared towards US foreign policy. However, as soon as the pro-Western Libyan King was overthrown by the Libyan Revolutionary Council, Libya set to pursue its national interests, which were indeed disregarded at the time of the monarchy. As a result, the Libyan Government embarked on a policy of asking both the UK and the US to close their military bases in Libya. Once this had been done, Libya felt free to endeavour to implement a new and independent policy based upon its national interests.

Such political considerations, and the end of the 1973 'Ramadhan War', which resulted in strained relationships between the US and the Arab States, in particular Libya, led the US to protest at the Libyan claim in February 1974, only five months after the Libyan Declaration.[153] The US protest was made by the US Department of State in February 1974 and transmitted to the Libyan Embassy through the diplomatic

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[152] Lahouasnia, op. cit., p.181.

[153] See chapter 1, sections 3 and 4; see also infra 3.3.1.(C).

channels in Washington.[154] Other US protests were subsequently made to Libya in the 1980s after the US-Libyan incidents. They constituted a consistent course of US conduct.[155]

Relations between the two countries started to deteriorate not only over the disputes over the US oil companies that occurred from 1969-1975 with the Libyan Government over price, control of production levels, and 'participation',[156] but also over various issues. Libya told the US that 'as long as the US supported Israel it could never have good relations with Libya'.[157] The US accused 'Libya of supporting the Palestinians, of being a bitter opponent of Israel and the West, of terrorism and armed intervention in Arab and African countries'. The US was not satisfied with Libya 'having good relations with the Soviet Union and buying arms from it'.

Relations became worse after President Reagan came to power. Diplomatic relations between the two countries had been reduced to a minimum level by May 1980[158] and on May 6th,

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[154] Vol.68 AJIL (1974), pp.510-11.

[155] See the US-Libyan Incidents in chapter 1, section 4.

[156] See Adelman, M.A., The World Petroleum Market, Johns Hopkins Univ. Press, Baltimore, (1972); Sheikh Rustum Ali, Saudi Arabia and Oil Diplomacy, Praeger, New York, (1976); Sampson, A., The Seven Sisters: The Great Oil Companies and the World They Shape, Bantam, New York, (1976); Waddams, F.C., The Libyan Oil Industry, Johns Hopkins Univ. Press, Baltimore, (1980); and Greenwood, C., State Contracts in International Law: The Libyan Oil Arbitrations, Vol. 53 BYIL (1982), pp.27-81.

[157] Haley, op. cit., p.5.

[158] Keesing's, (1981), op. cit., p.30613A.

1981, the Reagan Administration asked Libya to close its People's Bureau (i.e., Embassy) in Washington and ordered diplomatic staff to leave the country because of, according to the US, 'a wide range of Libyan provocations and misconduct, including support for international terrorism' and 'a general pattern of unacceptable conduct'. In response, Libya, accused the US of acts of 'international terrorism', making reference to its intervention in Vietnam and El Salvador, its development of nuclear weapons and its deployment of warships in the Mediterranean.[159]

The Reagan Administration broke all ties with Libya and the 'shoot-out' between US and Libyan aircraft began in 1981 over the Gulf of Sirte. In this context, Haley writes:

> "Under Reagan the United States applied a 'bare-knuckle' approach of all-out opposition to Libya. A systematic plan to increase all kinds of pressure on Libya was formulated and put into action in the first months of the new administration. The plan was comprehensive and multifaceted. The United States sought the help of its European allies against Qaddafi."[160]

The Reagan Administration accused the Libyan Leader of 'sponsoring terrorism'[161] and accused him of being 'an international outlaw'. Haley adds that:

> "The purpose was not merely to tarnish the Libyan leader's reputation but to isolate Qaddafi and deprive him of aid in the event of a showdown with the United States, or one of its allies..."[162]

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[159] Ibid., p.31181.

[160] Haley, op. cit., p.7.

[161] Vol.80, AJIL (1986), pp.632-636.

[162] Haley, op. cit., p.7.

The Reagan Administration took many other actions against Libya. In addition to the rupture of diplomatic relations with Libya, it asked its citizens and companies to withdrew from Libya, put a ban on Libyan oil imports and on the export to Libya of all items containing advanced technology. The withdrawal of the US sent a signal that the US was 'clearing the decks' and was ready for any kind of political and military developments'. It was a message which 'was reinforced by the trap laid for Libya in the Gulf of Sidra,[163] and this inevitably led to armed confrontation between the two countries in 1981 and 1986.

Pressure against Libya on the covert side also took place. In the summer of 1981, there occurred a series of leaks, ostensibly from the US Congress and Administration itself, about a covert plan funded and organised by the CIA to overthrow Qadaffi.[164] In 1986, the same Administration leaked certain information in order to destabilise the Libyan regime, and the result was the resignation of an US Official.[165] This happened after the publication of an article which quoted a 'senior US Official' as stating that Libya was planning and preparing for terrorist acts. The article further stated that the Reagan Administration was preparing to bomb Libya.[166] This information was found later to be false and deliberately leaked by US Officials to

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[163] Id.

[164] Id.

[165] See infra note 168.

[166] The Wall Street Journal, Aug. 25th, 1986.

destabilise the Libyan regime.

White House staff had, in August, launched a campaign of 'disinformation' in an effort to persuade the Libyan Leader that the US would shortly launch another attack on Libya. To support such a claim, the Washington Post quoted a leaked **Memorandum** prepared by Admiral John Poindexter, who was the National Security Adviser to the US President. The **Memorandum** outlined a plan adopted at a White House meeting on August 14th, 1986, and approved by Reagan. According to the **Memorandum** 'one of the key elements' of the plan 'is that it combines real and illusory events through a disinformation programme-with the basic goal of making Kadhafi think that there is a high degree of internal opposition to him within Libya;...and that the US is about to move against him militarily'.[167]

As a result of this 'disinformation', the US Assistant Secretary of State for Pubic Affairs, Bernard Kalb, resigned on October 8th, 1986. He resigned because he did not want his credibility 'to be caught up in this controversy'. He added that:

> "I am distancing myself from this reported disinformation campaign".[168]

The US Administration attempted to assassinate the Libyan

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[167] The Washington Post, Oct. 3rd, 1986.

[168] Keesing's, June 1987, op. cit., p.35221; see also supra note 165, and infra note 176.

Leader several times.[169] The US Administration organized several political, economic and military actions as underlined by Haley who writes that:

> "By a prolonged and systematic effort involving a number of Arab, African and European Governments, the Reagan Administration brought Qaddafi's Libya under severe diplomatic, military and, to a lesser extent, economic pressures."[170]

The US boycotted Libyan oil. Haley adds that:

> "Administration spokesmen openly spoke of a campaign against Qaddafi, of which the boycott was a part. They

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[169] It is claimed in an article published in the New York Times of Feb. 13th, 1987, that the attack on Libya on 15 April 1986 was originally intended to kill Qaddafi. The residence of the Libyan Leader was one of the targets hit by the US warplanes on that raid; see also The Times, 16 April 1986, The Guardian of 16 April 1986; and JANA Daily News Bulletins of April 16 and 17, 1989 and Oct. 16th, 1989; Keesing's, Nov. 1981, op. cit. See also a **Memorandum** presented by the Libyan Permanent Representative to the UN on August 11th, 1981. The **Memorandum** accused the US of 'escalating a campaign' against Libya to prepare the way for direct or indirect aggression. In support of its accusations, it listed many acts meant to attack or put pressure on Libya, such as the movements of the Sixth Fleet near the Libyan coast and the CIA plans for the 'physical liquidation' of the Libyan Leader (L.F.O., A **Memorandum** from the Libyan Foreign Office to the UN Security Council dated Aug. 4th, 1981, and to the UN General Assembly dated Aug. 11th, 1981). See also The New York Times of March 12, 1991, in which it was reported that there was a CIA covert operation to overthrow the Libyan Leader.

[170] Haley, op. cit., p.9. A top CIA Officer told Time magazine during the US attack on the Libyan military installations inside the Gulf of Sirte hinterland, and the destroying of Libyan ships inside the Gulf, that they (the CIA) had 'many contingency plans. Among these plans: a joint US-Egyptian operation aimed at toppling the Libyan Leader, a plan to work with the French that included 'offensive actions from both Mediterranean and Chad, and covert action involving other North African Governments. He said that: "We even approached Israel", the intelligence Official noted to Time magazine. When the response was discouraging and 'intelligence reports showed little chance of fomenting a coup within Libya, and none of the ideas jelled we learned the hard way', he said that: "that if we want to settle the account with Gaddafi we will have to do it ourselves", Time magazine, 7 April 1986.

rehearsed for reporters the various steps in the campaign, from the break in relations, through the air battle in the Gulf of Sidra to the strengthening of friendly Governments around Libya."[171]

When Libya made the 1973 Declaration, US-Libyan relations took another turn. The US found a reason to exercise pressure on Libya by allegations that it was defending the freedom of navigation in the Gulf area to the extent of taking military action against Libya instead of other legal action, such as the use of the available international legal machinery. With regard to this last point, Libya is considered to have a real and substantial commitment to international law for, since 1980, Libya has twice appeared before the ICJ - on one occasion with Tunisia and on other with Malta - to seek the Court's help in maritime delimitation.[172] There is some evidence that Libya, is in fact fully committed to the implementation of international law as a means of solving international disputes. In this context, and in order to find a solution to the border dispute with Chad, Libya asked, unilaterally, the ICJ to settle this dispute.[173]

Another indication of the fact that the US military use of force against Libya was not used as a means of protest against the Libyan claim in the Gulf area, but was for political reasons, is the bombardment of Libya by US aircraft in April 1986, as distinct from the 1986 March confrontation.

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[171] Haley, op. cit., p.291.

[172] See the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, ICJ Report 1982; and the Continental Shelf (Libyan Arab Jamahiriya\Malta) Case, ICJ Report 1985.

[173] See JANA News Bulletin of Sept. 5th, 1990, London, p.10. See also Vol.95 RGDIP 1991, pp.157-8.

This military action of April 1986 increases evidence that the US actions, far from being intertwined with the concept of freedom of navigation, were designed to act as a deterrent against 'acts of terrorism blamed by the US upon Libya'.[174] Following bomb explosions aboard a TWA airliner during a flight from Rome to Athens on April 2nd, 1986, and in a Berlin nightclub on April 5th, 1986, US air strikes were launched against Tripoli and Benghazi from bases in the UK and from the Sixth Fleet.

President Reagan defined these actions as 'a single engagement in the long battle against terrorism', but the consequence of the air strikes was to divorce the US-Libyan dispute from any issue concerning the freedom of navigation in the Gulf of Sirte. The US actions further reinforced the assertion that Libya did indeed possess a vital interest in protecting its national security interests in the Gulf, as will be shown later in the thesis.[175]

The true motives for the US actions in the Gulf must be seriously questioned. Subsequent disclosures of the illegitimacy of the factual suppositions on which the US attacks were premised, in conjunction with the deliberate and premeditated White House 'disinformation' campaign have seriously compromised any claim to legitimacy that the US may have relied upon in relation to its military exercises in the Gulf of Sirte.[176]

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[174] **Keesing's**, op. cit., (June 1986), p.34455.

[175] See infra chapter 6.

[176] As shown earlier in relation to the resignation of the Spokesman of the US State Dept. Mr. Kalb, in supra note 168.

3.3.1.(C). The 1974 and Subsequent US Protests

The US protest described the Libyan action as an 'unacceptable...violation of international law'. It stated:

> "...The Libyan action purports to extend the boundary of Libyan waters in the Gulf of Sirte northwards to a line approximately 300 miles long at a latitude of 32 degrees, 30 minutes, and to require prior permission for foreign vessels to enter that area. Under international law as codified in the 1958 Convention on the Territorial Sea and Contiguous Zone, the body of water enclosed by this line cannot be regarded as the juridical internal or territorial waters of the Libyan Arab Republic. Nor does the Gulf of Sirte meet the international law standards of past open, notorious and effective exercise of authority, continuous exercise of authority and acquiescence of foreign Nations necessary to be regarded historically as Libyan internal or territorial waters. The United States of America views the Libyan action as an attempt to appropriate a large area of the high seas by unilateral action, thereby encroaching upon the long-established principle of freedom of the seas. This action is particularly unfortunate when the international community is engaged in intensive efforts to obtain broad international agreement on the law of the sea issues, including the nature and extent of coastal State jurisdiction. Unilateral action of this type can only hinder the process of achieving and accommodating the interests of all Nations at the Law of the Sea Conference.
>
> In accordance with the positions stated above, the United States Government reserves its rights and the rights of its nationals in the area of the Gulf of Sirte affected by the action of the Government of Libya."[177]

The US protest was based on the following points: the status of any bay could not be determined by 'unilateral action' of the coastal State; the closing line of the Gulf of Sirte did contradict the terms of the TSC, probably meaning

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[177] US Dept. of State, File No.P.740020-2088, reprinted also in 68 AJIL (1974), p.510. Repition is for the convenience of the Reader.

Article 4 (on straight baselines); and this closing line was not consistent with general international law, implying paragraphs (1,2,3,4 and 5) of Article 7 (on bays); and paragraph 6 (on historic bays) of the same Article of the TSC.

As to the first point, it is important to underline the fact that indeed the coastal State has both the right and the duty to delimit its territorial waters (including internal water, thus comprising historic bays). In this context, the ICJ has, in the Fisheries Case, stated that:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law".[178]

Such opinion was repeated in the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case.[179]

Moreover, in the same line of thought, Judge McNair stated in the Fisheries Case, that:

> "To every state whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory... International law does not say to a state: 'You are entitled to claim territorial waters if you want them'. No maritime state can refuse them. International law imposes upon a maritime state certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the state, but

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[178] ICJ Reports, 1951, p.132.

[179] Ibid., 1982, p.67.

compulsory".[180]

So the unilateral act taken by Libya is consistent with international law as Libya saw that its interests were to close the Gulf of Sirte and it stated in its 1973 Declaration that it had taken this decision according to international law, which gives the individual State the right to delimit its territorial waters, including its internal waters such as historic bays. Consequently, only Libya can delimit its territorial waters and in doing so must indeed act 'unilaterally' as the act of delimitation must be a municipal act and thus 'unilateral'.

As for the second point raised by the US with regard to the possible method of using straight baselines in closing off the Gulf of Sirte, it was not the intention of Libya in doing so as it based its claim over the Gulf of Sirte on historic grounds rather than straight baselines.

As regards the third point, i.e., the application of the bays provisions including historic bays (paragraph 6 of Article 7 of the TSC) to the Gulf of Sirte as being not consistent with the TSC, it is important to underline the fact that the method of closing off historic bays was also used by many States, such as Italy in 1977 when it closed the Gulf of Taranto.[181] As to the hypothesis of using what is known as the juridical bay provisions in closing off the Gulf of Sirte, this is not feasible as this Gulf does not constitute a juridical bay because its opening is nore than twenty-four

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[180] Ibid., 1951, Dissenting Opinion, p.160.

[181] See infra section 4, 4.1.

miles.[182]

Moreover, the US contends in its protest that Libya should abide by the TSC. This is arguably not correct as Libya, unlike the US, has neither signed nor ratified the TSC,[183] hence, the TSC is not binding on Libya. Nevertheless, the TSC could be binding on Libya only insofar as its customary international law provisions are concerned. In this context, Francioni writes that:

> "...[W]hile the Geneva Convention on the Territorial Sea and Contiguous Zone [on which the United States of America relied in its protestation against Libya] is applicable to the United States, which ratified it on April 12, 1961, it is not binding on Libya, who has not ratified it. It is obvious, therefore, that the provisions of the 1958 Convention are not relevant in determining the legality of Libya's action, unless their normative content is proved to be declaratory of customary international law."[184]

Furthermore, the US argues that the closing of the Gulf of Sirte by Libya was inconsistent with general international law. It can be noted that Libya relied mostly on customary international law which has subsequently developed. In this context, Francioni writes:

> "State practice and pronouncements by scholars with regard to the problem of delimiting bays show remarkable dynamism in the sense of reflecting a consistent evolution of powers on behalf of the

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[182] See Westerman (1987), op. cit., pp.176-8.

[183] See United Nations Treaties Series (UNTS), UN Secretariat, New York, 1980, p.565. See also chapter 2, note 300, and supra notes 40-2.

[184] Francioni F., The Status of the Gulf of Sirte in International Law, Vol.11 SJILC (1984), pp.311-326 at p.315.

coastal State."[185]

Hence, it can be maintained that the theory of historic and vital bays forms part of the development of customary international law on bays which is probably gaining international recognition.[186]

The 1974 US protest described the Libyan Declaration as 'an unacceptable violation of international law'. It contended that the Gulf of Sirte could not be closed off in accordance with the TSC and is not an historic bay as it does not comply with international law standards such as acquiescence of States so as to be considered as Libyan internal or territorial waters.[187] The US protest emphasised the fact that the US Government viewed the Libyan claim as:

> "...[A]n attempt to appropriate a large area of the high seas by unilateral action, thereby encroaching upon the long- established principle of freedom of the seas...the United States Government reserves its rights and the rights of its nationals in the area of the Gulf of Sirte affected by the action of the Government of Libya"[188].

In 1985, Libya issued **Notices to Mariners**. The US issued a protest which was sent to the UN since no diplomatic relations existed between Libya and the US.[189]

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[185] Id.

[186] See chapter 6, section 4.

[187] Vol.68 AJIL (1974), pp.510-11.

[188] Id. Repitition is for the convenience of the Reader.

[189] It read as follows:

> "...The United States reiterates its rejection of the Libyan claim that the Gulf of Sidra constitutes internal waters to the latitude of 32°30' North".

However, it is important to stress that the US has not always had a consistent policy in this area. In this context, it is necessary to underline the fact that it remained silent insofar as other historic bays were concerned such as those claimed by Italy[190], Thailand[191], and Bulgaria[192]. It is true that in some other instances, it did protest, as in the case of the Soviet claim over Peter the Great Bay,[193] although this was not followed by a practical form of challenge as in the case of the Gulf of Sirte.[194]

3.3.2. The Effect of the Protest of a Single State

It is relevant to say that an historic bay claim will not ripen into a right if the majority of the 'interested' States react against it. The problem arises only when a single State protests. In this case, it looks as if there is some doubt about the effect of the protest of a single or two States on

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LOS Bulletin No.6, Oct. 1985, p.40. See also chapter 1, notes 14, 51 and 52; and chapter 3,

[190] See infra section 4, 4.1.

[191] See Nixon, op. cit., p.336.

[192] It is implied that the US did not protest, see Pundeff, M., Bulgarian Decree on Territorial Waters, Vol.46 AJIL (1952), pp.330-3.

[193] It stated:

> "Under international law, the body of water enclosed by the line drawn between the estuary of the River Tyumen-Ula and the Povorotny promontory cannot, either geographically or historically, be regarded as part of the internal waters of the U.S.S.R".

Whiteman, op. cit., Vol.4, (1965), pp.254-257.

[194] See the Libyan-US Incidents, in chapter 1, section 4.

the acquisition of title to historic rights. A difficulty arises when nearly all States agree to a concrete limitation of the freedom of the seas, whereas if one or two States have protested expressly this is not enough.[195] In practice, and in the long term, it is difficult for an individual State to maintain its position with regard to a territorial claim. O'Connell asserted that 'in the case of historic claims a single... protest may be insufficient to conserve rights'.[196]

Moreover, such an issue is also examined by the UN Secretariat Report which states that:

> "...[W]hat happened if at any one time or another opposition from one or more foreign States occurred? Does any kind of opposition by any one State at any time preclude the historic title? It is prima facie highly improbable that the terms 'inaction' or 'toleration' would have to be interpreted so strictly".[197]

The UN Secretariat Report supported the view that widespread active protest, not just the few who protested in the Libyan case, is essential to prevent a claim to historic title coming into being.[198]

Furthermore, Gidel maintains that one objection formulated by a single State will not invalidate the usage. It is impossible to require the universal recognition of the historic title and a single objection formulated by one State will not invalidate the usage. He further asserts that 'all

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[195] Bouchez (1964), op. cit., p.270.

[196] O'Connell (1982), op. cit., Vol.1, p.40.

[197] UN Doc., A/CN.4/143, op. cit., p.17.

[198] Id.

protests should not be treated as being on the same plane but that they should be distinguished according to their nature and to the geographical situation of the protesting State in relation to the waters claimed'.[199] Applying his opinion to the Libyan claim would result in maintaining that the US protest against Libya must be treated as void because this country is situated far away from the area claimed by Libya, whereas the protest of Tunisia, if any, or other surrounding countries must be seen as important and might affect the Libyan claim if followed by other means of protest.

It is to be noted here that in its Reply in the Fisheries Case, the UK stated that the "words used by Gidel are 'geographical situation' but equally legitimate maritime interests of a protesting State would be material in assessing the weight to be attached to the protest."[200]

The UK further submitted that:

> "The protest of a single state is ineffective to keep alive its rights to object to the assertion of authority by another state over areas of sea which under the general rules of international law form part of the high seas.[201]

In addition, a protest by a single State or a few States, even if repeated, loses its importance with the lapse of time and by virtue of acquiescence by the other States of the

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[199] Gidel, op. cit., p.634. See also supra note 97.

[200] ICJ Pleadings, 1951, Vol.2, p.653. Bourquin's opinion is similar to Gidel's (in supra notes 97 and 198). The former maintains that a single objection of one State would be insufficient to invalidate the acquisition of a historic right (Bourquin, op. cit., pp.47-48).

[201] ICJ Pleadings, 1951, Vol.2, p.653.

international community.[202]

Thus, this issue may be summed up by stating that an exceptional claim to historic waters in derogation of international law will not be invalidated merely because one State has objected, or 'even because more than one State has protested'.[203] A claim may be consolidated only if the protesting State or States have failed to follow up their protests.

IV. The Issue of Reciprocity

By applying the principle of reciprocity, which is considered a well-established principle of customary international law, Libya and States which protested at its claim should respect each other's claim. In this context, the case of the historic bays claims of Italy, Tunisia, the UK, the US and the USSR should be compared with the Libyan claim in order to assess their impact in the light of the reciprocity principle.

4.1. The Italian Historic Bay Claim

As regards Italy, the issue to be answered is whether its historic bay claim over the Gulf of Taranto is compatible with customary international law and the principle of reciprocity. Italy has reacted to the Libyan claim. In this context, the

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[202] Fisheries Case, ICJ Pleadings, 1951, Vol.3, p.462.

[203] O'Connell (1982), op. cit., Vol.1, p.40.

Italian Under-Secretary for Foreign Affairs stated in the Italian Parliament that the Italian Government made a "reservation" to Libya.[204]

This statement must be examined within the context of the Italian claim over the Gulf of Taranto.[205] If this Italian claim is taken into account, then it may be maintained that the Italian protest could not be opposable to Libya because of the application of the reciprocity principle.

Considering this opinion, it could be argued that at the beginning, Italy could make a reservation with regard to the Libyan claim as it reacted in 1974, it has, as a result, prevented itself from making a similar historic bay claim in 1977 to the one which it subsequently criticized.

Further, Italian writers maintain that the Gulf of Taranto does not constitute an historic bay.[206] In this context, it is important to refer to Francioni who maintains that the Italian reaction **vis-à- vis** the Libyan claim is not opposable to Libya. He writes:

> "...[T]he principle of reciprocity which...**involves an obligation to respect the Libyan claim on the part of those States** which by their domestic legislation and their international practice have proceeded to the

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[204] Vol.2 IYIL (1976), p.423.

[205] Article 2 of the Presidential Decree on Baselines in Durante and Rodino, op. cit., p.147.

[206] Ronzitti, op. cit., p.465; Gaja, G., Incoerenze sui golfi, Vol.69 Revista di Diritto Internazionale (RDI) 1986, pp.68-9; Francioni, F., The Gulf of Sirte Incident (United States v. Libya) and International Law, Vol.5 IYIL (1980-81), pp.85-109 at p.99, and Francioni (1984), op. cit., p.325; Adam, R., Un nuova Provedimento in Materia di linee di base del Mare Territoriale Italiano [A New Enactment Concerning the Baseline of the Italian Territorial Sea], Vol.61 RDI (1978), pp.469-495 at p.479.

> assertion of similar claims over their respective coasts...The application of this criterion [reciprocity] to the Gulf of Sirte situation leads to the interesting result of finding that the Libyan claim is indirectly supported by the practice followed by other neighbouring Mediterranean countries. Tunisia, for instance, has asserted territorial powers over the Gulf of Gabes, and Italy [which],...has closed the entire Gulf of Taranto, allegedly on the basis of a historic title, but, in reality, since such a historic title does not appear to have roots in the past, on the basis of national security considerations and interests which are similar to those invoked by Libya in its 1973 declaration"[207].

If one applies the principle of reciprocity, the result would be that Italy would not be able to protest at the Libyan claim.

It is to be noted here that the UK did not protest or make any reservation against the Italian claim. It only made a reference to the TSC.[208] The UK position regarding the Italian claim should be viewed within the NATO context. Such position has indeed been influenced by the fact that Italy is a NATO ally, and that the Gulf of Taranto is significant for the southern wing of NATO, as an important NATO naval base is situated in its vicinity. Besides, it is important to observe that there was no explicit recognition of the Italian claim, whereas there have been two recognitions in the case of the Gulf of Sirte [209].

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[207] Francioni (1980-1), op. cit., p.101 (emphasis added).

[208] Vol.424 Hansard, House of Lords, (5th series), Written Answers, Oct. 13th, 1981 (col.368).

[209] See Burkina-Fasso and Syria, chapter 4, section 3, 3.1.4.

4.2. The Tunisian Historic Bays Claims

Although Tunisia did not make a protest against the Libyan claim, it noted during the Oral Hearing of the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, that it does not accept the Libyan claim.[210] However, in 1973, Tunisia had itself, through a process of legislation, provided for a system of straight baselines and closing lines which has the effect of closing off the Gulf of Gabes, the Gulf of Tunis and the area of sedentary fisheries, i.e., the Kerkennah Islands.[211] Tunisia's claim to the historic waters (such as the Gulf of Gabes) was not adjudicated upon by the ICJ.[212] However, the waters around the Gulf of Gabes, for example, were considered in ascertaining the issue of proportionality of the continental shelf between the two countries.[213]

Virally, Counsel for Tunisia in the same case has, in his Oral Argument, stated that the Tunisian straight baselines, which closed off the Gulf of Gabes, were based on historic grounds and Libya must understand this situation as it had itself closed off the Gulf of Sirte "par l'invocation des droits historiques". These arguments could be seen as an implicit recognition of the Libyan claim by Tunisia, based on

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[210] See supra, section 3, 3.1.5.

[211] See the Tunisian Territorial Sea Law (1973) and the Decree on Baselines (1973), ICJ Pleadings, 1982, TM, Vol.1, Annex 86, p.410.

[212] Continental Shelf (Tunisia/Libyan Arab Jamahiriya Case, ICJ Reports, 1982, pp.71-75.

[213] Ibid., pp.75-76.

the reciprocity principle.[214]

4.3. The UK and US Historic Bays Claims

It can be noted that the UK protested against Libya when it had itself made claims to large maritime areas throughout history. In this context, the claims of Great Britain to the King's Chambers[215] must be mentioned, when it enclosed large as well as small indentations around the coasts of England.[216] Similarly, up to now, there are some historic bay disputes between the Federal Government and the other States of the Union still pending at the US Supreme Court.[217]

4.4. The Soviet Historic Bays Claims

The Soviet protest at the Libyan claim may be regarded as unusual because the Soviet Union had made a claim similar to the Libyan one. In this context, it is important to underline, for example, that on July 21st, 1957, the Soviet Union enacted a decree declaring the waters of Peter the Great Bay as Soviet internal waters. It states:

"The Council of Ministers of the U.S.S.R. has

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[214] ICJ Pleadings, 1982, Vol.4, p.605.

[215] As shown in chapter 2, section 2, in particular notes 42-3.

[216] See O'Connell (1982), op. cit., Vol.1, pp.339-41; Bellot, op. cit., and Beckett, op. cit.

[217] As it has been underlined several times throughout this study; see also chapter 6, section 2, 2.3.5. For a comprehensive list of such cases, see Goldie, op. cit., pp.231-243.

> considered the question of the boundaries of Soviet internal waters in the region of Peter the Great Bay and has determined that the boundary...is the line connecting the estuary of Tyumen-Ula River and the Povorotny promontory."[218]

The Soviet Foreign Minister, in his reply to the Japanese Embassy in Moscow, when the latter delivered a **Note Verbal** to the Soviet Government, said that the Bay (Peter the Great) was an historic bay.[219] In its **Notes** sent to the Governments of Japan, the US and the UK, the Soviet Government stated, **inter alia**, that:

> "...[T]he area of the waters of Peter the Great Bay historically belongs to the Soviet internal waters, owing to the special geographical conditions of the Bay and its significance in economy and national defence."[220]

The width of that closing line is 108 miles while the depth of the indentation is only 37 miles. The width of the Gulf of Sirte (300 miles) is greater than that of Peter the Great Bay; however, the depth of the Gulf of Sirte (135 miles) is greater than the latter.

Diplomatic protests against the Soviet Decree were issued by Japan,[221] Italy, Greece, Sweden, Germany,[222] the UK,[223]

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[218] Whiteman, op. cit., Vol.4, p.250.

[219] Vol.2 Japanese Annual of International Law (JAIL) 1958, p.214.

[220] Ibid., pp.215-6.

[221] Ibid., pp.214-218.

[222] Vol.62 RGDIP (1958), p.63.

[223] The New York Times, Sept. 19th, 1959, p.7.

France[224] and the US.[225] Despite these protests at the time of the claim in 1957 and afterwards, Peter the Great Gulf is now a consolidated historic bay claim.[226]

Other claims, similar to the Libyan one, were made by the Soviet Union. These claims concern Beloye More (the White Sea), the Kara Sea, the Later Sea and the East Siberian Sea.[227] Almost the same reasons which were given by Libya when it claimed that the Gulf of Sirte was internal waters, were given by the Soviet Union.[228]

V. Evaluation of States' Reactions to the Libyan Claim

It might be noted that three of the fourteen States' reactions discussed above reacted within a delimitation context. These States are Italy, Malta, and Tunisia; all of which have adopted measures amounting to the closure of gulfs or bays under virtually similar circumstances: Tunisia, with relation to the Gulf of Gabes; Italy, with respect to the Gulf of Taranto; and Malta in relation to the use of straight baselines along its islands.[229] Similarly, the USSR has also

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[224] Vol.62 RGDIP (1958), p.162.

[225] Vol.37 US Dept. of State Bulletin, Sept. 2nd, 1957, p.388.

[226] See Butler (1971), op. cit., p.108.

[227] Ibid., p.13. See also other historic bays and waters discussed in chapter 4, section 3, 3.4.

[228] As shown earlier in notes 218-20.

[229] Prescott, J.R.V., Delimitation of Maritime Boundaries by Baselines, Vol.8 Marine Policy Reports (Univ. of Delaware) 1986, No.3, pp.1-5 at p.3.

closed off Peter the Great Bay.[230]

Turkey, Greece, Austria and, arguably Italy, registered no protests at all. None of the fourteen States voiced objections to Italy's closure of the Gulf of Taranto in 1977, suggesting a 'double standard" for NATO member States, primarily because that Gulf contains an important NATO naval base.

The Mediterranean States of Malta, Tunisia, Italy and Greece all reacted to the Libyan claim, their reactions being inspired by potential delimitation claims which means that their reaction should be viewed with some reserve. These States saw that protest could be used as a kind of negotiating tactic when it comes to dealing with the delimitation of their continental shelves with Libya.

Only the reactions of Belgium, Bulgaria, France, the Federal Republic of Germany, the US, the USSR, and the UK can be considered as protests based on actions allegedly incompatible with international law. Four of these States are major naval powers whose interests lie in the fact that other smaller States could only appropriate sea-areas as small as possible because the former possess strong and large maritime forces, so they can defend their coasts even with small areas of territorial waters. But, smaller States such as Libya need a larger area of internal and territorial waters for their security and defence as well as for economic reasons, as they do not have the possibility of preventing external threats coming from a long distance and for example, exploiting the

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230 As underlined earlier, section 4, 4.4., notes 218-20.

high seas.

Austria, Turkey and Greece deferred their positions until the issue was discussed at UNCLOS III, and no official protests have been received from any of these three States.

It is clear that the objections to Libya's 1973 Declaration originate in the major naval powers. Although there exist some 130 signatories to the LOSC, 'meaningful' protests have emerged from fewer than seven States. The fact that those strongest protests came from the major naval powers, would indicate that it is the strategic and economic importance of the Gulf - the very basis of the 1973 Declaration - that constituted the principal motivation behind the **Notes Verbals** sent to Libya. In contrast, no such vigorous protests emanated from Japan, whose interests in the Mediterranean Sea, if any, are clearly of a commercial and navigational rather than of a military nature.

In addition, some of these countries had political and economic disputes with Libya, such as the US, so its protest has much greater political than legal significance.[231]

VI. Assessment

Protest aims at preserving the protesting State's rights that have been breached by the claim made by another State. It may be said that a protest plays a more significant role

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[231] Neutze, op. cit.; the New York Times, Aug. 20th, 1981; UN Security Council Doc., 2/14626, Aug. 20th, 1981; Al-Fajr Al-Jadid (Arabic Newspaper), Tripoli, Aug. 20, 24, and 25, 1981, and March 1986, and of 18 April 1986; Week of the Big Stick: Reagan Flexes U.S. Muscle but the End is Unclear, (Time Magazine), April 7th, 1986.

in the case of historic claims because it is considered as a withholding of acquiescence. The relevance of protest in this connection, may be ascertained by the extent to which it operates to rebut the presumption of acquiescence.

It has been submitted that:

> "A protest, if it is prompt, unequivocal and maintained, and if it is coupled with recourse by the protesting state to all other legitimate demonstrations of its will to preserve its rights, will suffice to counter effectively the continuity and the peaceful character of a nascent prescriptive claim and will prevent the creation of any general conviction that the condition of affairs is in conformity with international order."[232]

A claimant State will often reply when it receives a protest by making it clear that further protests will in no way alter the situation. In the case of the Gulf of Sirte, Libya announced several times that the US actions in the Gulf area would not have any effect on the Gulf's legal status as Libyan internal waters. Libya repeated its assertion that it would continue to exercise its full sovereignty over the Gulf and would ignore all US protests using force if necessary to encounter any violation of its rights south of the line of enclosure of the Gulf.[233]

To be seen as an effective legal protest, a State must

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[232] MacGibbon (1953), op. cit., p.319.

[233] The Libyan Leader asserted at a press conference in Ethiopia on 20 Aug. 1981 that Libya would be ready to defend its territorial waters in the Gulf of Sirte, even if it meant bilateral war with the US or a third world war (Keesing's, Nov. 1981, op. cit., p.31181). He made the same assertion several times. In his speech at the ninth meeting of Non-Aligned Countries held in Yugoslavia in Sept. 1989, he reaffirmed the Libyan assertion of sovereignty over the Gulf of Sirte and its continuity because the Gulf is vital to Libyan security (JANA News Bulletin, Sept. 1989, March 13th, 1988 and Aug. 22nd, 1989).

follow peaceful means of solving problems, such as the use of the available judicial machinery, i.e., recourse to international arbitration or the ICJ. Libya has shown itself to be one of the States which has used the latter to find solutions to maritime delimitation problems in the Mediterranean.[234]

A protest must be directed to a real interest of the protesting State which it feels the claimant State might have encroached upon. The potential interest of the US in the Gulf is to carry out military manoeuvres which could be performed somewhere else, in the oceans for example, and not "thousands of miles away from its territory" as the Maltese Representative stated during the UN Security Council debate of March 1986.[235]

In addition, what can be derived from the assertion of sovereignty over the Gulf of Sirte is that there is an absence of any real conflict of economic interest, as between Libya and other States, with respect to this bay, over which one neighbour State, for example, claims some economic dependence in this Gulf as will be seen later.[236] The US opposition to Libya's claim is difficult to justify legally because it does not fit into this category of economic dependence. Hence, it

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[234] See for example, the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, ICJ Report 1982; and the Continental Shelf (Libyan Arab Jamahiriya) Case, ICJ Report 1985.

[235] UN Security Council Doc., S/P.V.2668, 26 March 1986, p.13. Besides, it should be emphasised that it is not the purpose of this study to deal with the issue of the use or the threat of the use of force as underlined in chapter 1, section 1, 1.1.

[236] See chapter 6, section 3, 3.3.1. See also chapter 6, section 3, 3.2. and 3.3.

must be seen for what it is: loss of privileges previously granted to the US armed forces within Libyan land territory and waters.[237]

According to Article 2 (4) of the UN Charter, the US does not have the right to challenge the Libyan claim by resorting to violence, as such a use of force cannot solve disputes over the delimitation of maritime zones. In this context, the Permanent Observer of the Arab League (Mr. Maksoud) stated during the emergency session of the UN Security Council of March 27th, 1986 that:

> "... [I]f every time some State wants to test the claim of another State as to the scope of its territorial waters through the deployment of warships and military exercises, then we are opening the floodgates to international anarchy and to the brinkmanship of confrontation."[238]

He gave examples of territorial claims which were claimed in excess of the conventional rules as well as customary international law. He added that:

> "For example, Chile, Ecuador and Peru claim 200 miles as their own territorial waters. Does that mean the Soviet Union, the United Kingdom or the United States should go to those waters and undertake military exercises to ascertain that the claim of Chile, Ecuador or Peru is in violation of international law.[239]

Following the 1973 Declaration, very few States reacted against the Libyan claim at that time. Since then, however,

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[237] See for example the 1954 Treaty concluded between Libya and the US, supra chapter 1, section 4, in particular notes 29-30; and chapter 3, section 2, 2.4.1., note 82. See also supra note 149.

[238] UN Security Council Doc., S/P.V.2669 (1986), p.51.

[239] Id.

only the US seems to have repeated its protest by using force which was proved to be illegal by the international community.[240] This single protest, even if considered as based on legal considerations, cannot invalidate the Libyan claim. Libyan rights over the Gulf of Sirte may be consolidated with the lapse of time. This might happen simply as a result of future lack of other States' protests. The fact that the US has continued to send its forces into the Gulf area in spite of strong Libyan protests does not thereby hinder or extinguish Libyan rights over the Gulf. Military supremacy does not allow a State to dictate policy to other smaller States.

Moreover, one may view the emergence of a new custom in the Mediterranean region insofar as historic bays are concerned. For this purpose, it is necessary to resort to an analogy with what could be described as American international customary law. And in this context, it is very relevant to refer, for example, to the **Asylum** Case, when Colombia attempted to appropriate for itself the right to qualify an offence as political; and in doing so, it referred to a regional law, i.e., American international law. Colombia has also maintained that there is a local custom which is peculiar to Latin-American States in this field. However, it did not succeed in proving the existence of such a custom.[241]

Once a regional custom is established and accepted in a

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[240] See for example, the resolutions adopted by the UN General Assembly in 1981 and 1986. See supra section 2, 2.2.2., in particular note 18.

[241] ICJ Reports, 1950, p.266.

regional context, it becomes necessarily a sort of international custom as a regional grouping comprises several States. The Colombian attempt is not inconsistent with the legal methodology because in the case of absence of international law regulating a particular issue, there is still the possibility of investigating other sources of international law in order to find a legal rule for solving the above issue, for example. In this regard, it is appropriate to refer to Article 38 (1) of the ICJ Statute which reads as follows:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) **international custom, as evidence of general practice accepted as law;**
> (c) the general principles of law recognized by civilised nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of rules of law".[242] (Emphasis added).

Hence, reference to 'international custom as evidence of general practice accepted as law' may as well be applied to the Mediterranean context in order to find a solution to the dispute relating to historic bays in the Mediterranean region.

From the above, it could be maintained that there is a 'sort of Mediterranean practice relating to historic bays',[243] which could be characterized as a 'local custom'

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[242] Brownlie (1983), op. cit., p.387.

[243] See Francioni (1980-1), op. cit., pp.100-1; Queneudec, J.P., Les baies historiques, Vol.90, RGDIP (1986), p.1038.

peculiar to the Mediterranean Basin. This is particularly true as some Mediterranean States such as Egypt and Libya have claimed historic bays which have been not recognized by States outside the Mediterranean region.[244]

In this context, it has been maintained that such a 'local custom' constitutes a 'regional application of the doctrine of historic bays'.[245] Such opinion is indeed strengthened by a sort of 'emerging regional practice in the Mediterranean, particularly in fields of pollution and related matters'.[246] In the same line of thought, Scovazzi writes:

> "The trends towards a regional law system is progressing in the Mediterranean, as in other enclosed or semi-enclosed seas, like the Baltic, the Gulf, the Caribbean"[247].

Emergence of such a 'regional law system' covering historic bays practice, for example, would favour the economic, geographical and security factors, and as a result, reduce the importance of the other traditional criteria such as international acquiescence.[248] Consequently, protest by a non-Mediterranean State would not invalidate an historic bay

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[244] For example, in the case of Egypt's claims over some Mediterranean bays, see the protests made by both the UK and the US (Vol.7 Revue Egyptienne de Droit International (REDI), 1951, pp.91 and 94). See also Nixon, op. cit., p.335; and Shukayri, p.173. As regards the Libyan claim, see supra section 3.

[245] Lahouasnia, op. cit., p.200. See also Francioni (1984), op. cit., p.325; and the Asylum Case, supra, note 240.

[246] Lahouasnia, op. cit., p.200.

[247] Scovazzi, T., Implications of the New Law of the Sea for the Mediterranean, Vol.5 Marine Policy, (1981), pp.302-312 at p.312.

[248] Id.

claim by a Mediterranean State.[249] However, the absence of support from the Mediterranean countries, with the exception of Syria, and the existence of an opposition of some Mediterranean States to the 1973 Declaration over the Gulf of Sirte, would not give a strong support to the Libyan claim for at least another short period of time, or until an evidence emerges that these States do not repeat their protests or take the matter to international judicial machinery.

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[249] In reaching this conclusion, Lahouasnia has referred to an US case. He writes:

> "...[In] the Civil Aeronautic Board v. Island Airlines, Inc. case,...the US District Court for Hawaii held that there are two steps necessary to establish a claim in the absence of international approval:
>
> "1. The sovereignty claimed must be effectively exercised; the intent of the state must be expressed by deeds and not merely by proclamations, e.g., keeping foreign ships and foreign fishermen away from the area, or taking action against them.
> 2. The acts must have notoriety which is normal for acts of the state".

He goes on to argue that Libya has followed the above approach, i.e., that failing to obtain international acquiescence, it effectively exercised its authority over the Gulf of Sirte; and that its 1973 Declaration has gained notoriety as illustrated by the notification procedure followed by Libya and the US-Libyan incidents (op. cit., p.200).

CHAPTER SIX :

THE GULF OF SIRTE AS A VITAL BAY

I. Introduction

Although Libya claims the Gulf of Sirte as an historic and vital bay,[1] some protesting States, such as the US and a few other States maintain that the historical element in the Libyan claim is lacking.[2] It was suggested that there is little doubt that a strict application of the historic element criteria in the Gulf of Sirte is quite unlikely to produce an unequivocal finding of historic claim.[3]

Historical considerations alone, however, will not produce a complete solution to the problem. Other theoretical and factual suppositions must be utilised in order to construct an unassailable claim. The theory of "vital interests" or "vital bays" is one which has emerged recently, predicated upon security or economic considerations, or a combination of both, and capable of existing independently of any true historic title. The concept of "vital" bays has proved particularly valuable to the newly-independent States by combating their obvious inability to establish historic title based upon the long passage of time, when compared to those States more readily able to rely on this notion due to their comparative length of existence within the international

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[1] As already seen in chapters 1 and 3.

[2] See chapter 3, note 2.

[3] Francioni (1984), op. cit., p.322; see also Blum (1986), op. cit., pp.668-677; and Spinnato, op. cit., pp.65-85.

community.[4]

It is to be noted here that although it is true that the theory of "vital" bays seems to be "politically" motivated by the widespread suspicion and even intolerance that has been shown by many newly-born States towards the traditional slow process of custom formation,[5] it is also correct to state that old and big powers have, in fact, made similar claims which were based on the vital interests theory, both in the past and in recent times.[6] The argument used by the newly-independent States, such as Libya is, based on the assumption that international law rules which were made by a small number of States in the old days must be changed and replaced by new ones such as the new emerging rules of international law of the sea and in particular in the field of historic and vital bays. The theory of "vital bays and interests" is not one especially new in the international law of the sea, and was discussed as early as 1910 in Drago's **Dissenting Opinion** in the North Atlantic Coast Fisheries Arbitration.[7]

By comparative analogy, the 1973 Libyan Declaration cannot be categorised either as radical or isolated. In that Declaration, Libya announced that the Gulf is an historic bay and that it is a bay vital to its security and defence. Moreover, the Libyan Bill on Maritime Zones provides expressly

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[4] Such as those referred to by Francioni (1984), op. cit., p.322.

[5] Id. See also the Separate Opinion of Judge Ammoun in the Barcelona Traction Case, ICJ Reports 1970, pp.286-333.

[6] As will be seen below, section 2 and in particular 2.2. and 2.3.

[7] Scott, op. cit., 1st series, pp.141-207.

that the Gulf of Sirte is an historic and vital bay and over which Libya exercises its sovereignty but where foreign ships are allowed innocent passage according to the provisions of this law.[8]

However, what is of concern to international law is the conceptual basis of this theory, and the confines within which it may be said to function.

The purpose of this chapter is to try to show that the Libyan practice is not isolated or new (section one). Therefore, the theory of "vital" bays will be discussed first, referring to its definition, and to writers'views, then to the State practice and to the tribunals' decisions (section two). Secondly, the Libyan vital interests (military, security, economic) and to the fact that this Gulf does not constitute an international maritime route will be examined (section three) in order to assess whether the Gulf of Sirte constitute a vital bay or not (section four).

II. The Theory of Vital Bays

It is necessary to examine the foundations and the place of the theory of vital bays in international law, and for this, it is useful to deal with the theoretical context of this theory, then to assess how it was applied in State practice, and lastly to refer to its place in tribunals' decisions.

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[8] Article 9 of the Bill on the Maritime Zones of the Great Socialist People's Libyan Arab Jamahirya No.2/1/4545 and No.1/2/4844. See also infra section 3, 3.3., note 256

2.1. The Theoretical Context of the Vital Bay Theory

Before dealing with this theory, it is necessary to define what constitutes vital interests, the emergence and the scope of this theory, writers' opinions on this theory, to review the views of those writers who are critical of this theory, and then to appraise such theory in the emerging new international economic order.

2.1.1. Definition of Vital Interests

Because of their wide use in international law of the sea claims, 'vital interests' need to be defined in order to grasp the true meaning of the vital bay theory. 'Vital interests' as a concept often refers to economic interests that the claimant State would have. But, it is important to point out that more recently they have been defined in a more extensive manner.[9] Hence, the emphasis of such usage is nowadays put on security, as rightly underlined by Brierly. He writes:

> "Most of the **vital interests** which the law finds so intractable have their origins in the insecurity of the existing order, in the fact that every state has hitherto had to make its **own defence** the **prime consideration** of all its policies, and so long as that state of things continues, it is inevitable that the **interests of defence** should be **given priority over everything else, including respect for the law**".[10]

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[9] Lahouasnia, op. cit., p.202.

[10] Brierly, J.L., Vital Interests and the Law, Vol.21 BYIL (1944) pp.51-57 at p.56. In the same line of thought, Bouchez writes:

> "**Vital interests** can be defined as interests to which such a great value is attached by a State that their

(Emphasis added).

Moreover, the importance of security in cases of maritime delimitation has also been stressed by Bowett as follows:

> "...[C]ertainly security has been thought to have some relevance. It was one of the prime considerations in motivating the Truman Proclamation in 1945, for the United States took the view that its assertion of exclusive jurisdiction over these adjacent areas was justified on grounds, inter alia, of security...The United Kingdom/France Award of 1977 acknowledged that the security arguments of France were entitled to some weight...And in the 1982 Judgment of the International Court of Justice, Judge ad hoc Arechaga linked the security needs of the coastal State to the principle of non-encroachment...In the Malta/Libya Case the Court expressly accepted that 'security considerations are of course not unrelated to the legal concept of the continental shelf'..., and the Court implies that had its proposed delimitation line been close to the coast of either Party it would have taken this factor into account. So it is difficult to discard security considerations as legally irrelevant".[11]

'Vital interests' have also been extensively defined by O'Connell in the following terms:

> "The relevance of local economic interests in the delimitation of coastal jurisdiction which the International Court of Justice recognized in the Anglo-Norwegian Fisheries Case has made it clear that the whole doctrine of maritime domain is suffused with the notion of vital interests"[12].

Of these factors, he underlines the security and economic ones as follows:

> realization is seen as a necessity for the existence of a national community". (Emphasis added).
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> Bouchez (1964), op. cit., p.297.

[11] Bowett, D.W., The Economic Factor in Maritime Cases, Vol.2, International Law at the Time of Codification, A. Giuffré, Milano, 1987, pp.45-63 at pp.58-9.

[12] O'Connell (1982), op. cit., Vol.1, p.437.

> "In the North Atlantic Coast Fisheries Arbitration, the majority opinion favoured the possibility and the necessity of a [bay] being defended by a state in whose territory it is indented; and referred to the 'special value which it has for the industry of the inhabitants of its shores. The actual expression 'vital interests' crystallized in this line of thought in the Gulf of Fonseca Case where the tribunal said: '...that the Gulf's geographical position and the intense development along its shores made it an area of 'vital interests' to the littoral States. The Court specifically adverted to the...[economic] features of the Gulf' and to the strategic situation of the Gulf...[which] is so advantageous that the riparian states can defend their great interests therein."[13]

Hence, it could be maintained from the above that vital interests include both economic and security interests which are used to boost claims in State practice.[14]

2.1.2. Emergence of the Vital Bay Theory

Before the emergence of the vital bay theory, there was overwhelming support for the doctrine of historic bays; however, at the beginning of this century, a new formulation of this doctrine appeared and is known nowadays as the 'vital bay' theory. It has its origins in the North Atlantic Fisheries Coast Arbitration when Drago dissented from the majority view[15] which advocated the traditional criteria in defining historic bays, whereas Drago emphasised the importance of vital interests in such a process. He maintains that bays could be considered as historic if the following criteria are fulfilled: (i) the existence of an assertion of

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[13] Ibid., p.436.

[14] Lahouasnia, op. cit., p.205.

[15] Vol.11, UNRIAA, Dissenting Opinion, op. cit., p.203.

sovereignty by the claimant State over the claimed bays; and (ii) some 'particular circumstances' such as geographical and economic, immemorial usage, and 'above all, the requirements of self-defense' within the claimed bay so that the claimant State can claim it.[16] Clearly, Drago is the first to introduce the concept of vital interests whether security and/or economic considerations. His opinion is probably based on the case of Chesapeake and Delaware bays which are regarded as examples of historic bays, and that the above requirements were resorted to in order to justify them as such.[17]

In this context, and regarding the former bay, O'Connell writes that:

> "The **emphasis placed on the defense aspects** of waters which penetrate a nation's frontier by the Second Court of Commissioners of the **Alabama Claims**, when dealing with Chesapeake Bay, is **significant**".[18] (Emphasis added).

Similarly, it is important to underline the fact that in the Gulf of Fonseca Case, the geographic, economic, commercial, agricultural, industrial and defence interests of the riparian States have been emphasised.[19]

Moreover, the Portuguese Representative has, in the 1930 Hague Codification Conference of International Law stated that:

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[16] Ibid., p.206.

[17] Id.

[18] O'Connell (1982), op. cit., Vol.1 at p.436.

[19] See UN Doc A/CONF. 13/1, op. cit., para.161, p.31. See also infra section 2, 2.3.2.

> "From a variety of circumstances, the State to which the bay belongs finds it necessary to exercise full sovereignty over it without restriction or hindrance. The considerations which justify their claim are the security and defense of the land territory and ports, and the well-being and even existence of the State".[20] (Emphasis added).

He went on to stress the fact that no limitation can be put on the opening of a bay as described above and that such bay should belong to the claimant State.[21] Applying such an opinion to the Libyan case leads to the rejection of the view that the opening of the Gulf of Sirte is too large.[22] And as a result, a State may claim any bay contiguous to its coasts and which is vital to its economy or security without having to resort to the historic bay traditional criteria.[23]

During the 1930 Codification Conference of International Law, the British delegation drafted three separate texts on bays for discussion. Although the acquiescence of other States was required in these texts, the element of vital interests of the claimant State was also emphasised. The second text, which was not included in the records of the proceedings of the Conference, but was cited by Gidel, the French Delegate commented on it as follows:

> "In any case it is incumbent upon the state to prove that the claim to treat such an area as part of the national water of the state is justified by long usage and special geographic configuration, regard being had also to the economic needs of the population or to the requirement of national

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[20] L.O.N., Doc., C. 74. M. 39. 1929. V, p.184.

[21] Id. For similar views, see Shukayri, op. cit., p.86.

[22] Spinnato, op. cit., p.78.

[23] As seen in chapter 2, section 4; see also infra notes 25-7.

defence".[24] (Emphasis added).

In its reply to the questionnaire related to the problem of historic waters during the same Conference, Portugal stressed the security and economic importance of historic bays when it stated that these bays should be regarded as part of the national territory of the State to which their shores belong. It went on to add that:

> "This exception [of large bays], is founded on domestic legislation of the various states, their **higher interests and necessities** and long established usage...From a variety of circumstances, the state to which the bay belongs finds it necessary to exercise full sovereignty over it without restriction or hindrance. The considerations which justify their claim are the **security and defence** of the land territory and ports, and the well-being and even the existence of the state."[25] (Emphasis added).

The historic waters doctrine, according to the Portuguese Government, was based on many elements: domestic legislation, the vital interests of the State and long usage. However, it is not necessary that these elements must be present together. It was stated that:

> "In the case of any bays possessing some or all of the characteristics mentioned above, no limitation is or can be placed on its breadth reckoned along the line joining the outermost headlands. These bays belong wholly to the states concerned and form an integral part of their territory.[26]

In other words, the historic element may be absent.

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[24] Gidel, op. cit., p.636.

[25] L.O.N., Doc., No. C.74.N.39.1929.V, p.184.

[26] Id.

National legislation which confirms the vital interests of the State is enough to justify an exceptional situation.

An amendment which confirms this argument was presented to the Codification Conference of 1930 by de Magalhaes, the Portuguese Delegate, when he suggested that it should be added that it was for the State affected to secure its defence and its neutrality and to maintain navigation and maritime police services.[27] He defended this amendment during the 11th session of the Second Committee, making reference to the Dissenting Opinion of Drago in the North Atlantic Coast Fisheries Arbitration which emphasised the role of vital interests of the coastal State. De Magalhaes made reference to the proposal presented in 1922 by Captain Stroni to the Buenos Aires Session of the ILA.[28]

De Magalhaes also cited the reasons which were behind Stroni's proposal. According to Stroni, the Draft Article is:

> "...[O]f the greatest importance; it affirms in a more decisive form the last part of Article 3 of the 'projet de définition et régime de la mer territoriale' of the Institute of International Law. Clearly, too, it contains in synthesis the doctrine of historic bays, according to the manner in which the old principle was formulated by Drago. The final stipulation of the article is perfectly explicable as regards the new nations - the American nations, for example - many of which possess long and still very thinly populated coasts, and in respect of which the condition of long-established dominion cannot be adduced, as in the case of nations which have already existed for

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[27] L.O.N., Pub., V., Legal, 1930, V.16, Doc. C.351(b). M.145(b) 1930, VI, p.107.

[28] ILA, Reports of the Thirty-One Conference, Buenos-Aires, 1922, p.98. See also infra, note 53.

a thousand years or more."[29]

In his support of the amendment, the Portuguese Representative asserted that the notion of usage envisaged in the Basis of Discussion No.8 was no longer unanimously accepted within the community of States. On the contrary, usage could only be considered one amongst a series of other factors in establishing the character of historic bays. The Portuguese Representative continued:

> "Generally speaking, usage must be represented, but sometimes usage may be unjustified. Moreover, if certain states have essential needs, I consider that those needs are as worthy of respect as usage itself, or even more so. Needs are imposed by modern social conditions, and if we respect age-long and immemorial usage which is the outcome of needs experienced by states in long past times, why should we not respect the needs which modern life, with all its improvements and its demands, imposes upon states."[30]

On this basis a State's right to a bay could derive either from the notion of usage, or from that of the vital interests of the coastal State. A coastal State would consequently be entitled to claim such a right by relying upon circumstances which excluded historical considerations. Gidel maintains that:

> "In this way, the description 'vital bays' is gaining currency. This expression, which is placed on a footing of equality with the expression 'historic bays', sums up in one word the conditions of substance to be fulfilled by the areas in question, whereas the expression 'historic bays'

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[29] L.O.N., Pub., V., Legal, 1930, V.16, Doc. C.351(b). M.145(b) 1930, VI, pp.98-99.

[30] Ibid., Pub., V, Doc. C.351(b). M.145(b).1930.V, p.106.

suggested conditions of form only".[31]

Commenting on the value of the concept of "vital bays", Gidel writes that:

> "...[C]laims based purely and simply on the needs or interests of the coastal state, capable of being cited as precedents by other states having coastlines with a different geographic or hydrographic configuration, would be arbitrary."[32]

Similarly, Bourquin writes that:

> "If the territoriality of a bay is to be determined in the light of all the circumstances which characterise each of them, then clearly the vital interests of the coastal state must be taken into account."[33]

As regards the formula proposed by Stroni and later by the Portuguese Government as mentioned above, Bourquin maintains that these proposals tend perhaps to "over-simplify the issue". He goes on to say that:

> "But,...it expresses something which is not only common sense but also good law, consistent with the practice of states, namely, that the vital interests of the state in the possession of a bay constitute, side by side with historical tradition, one of the bases on which it may rely in claiming sovereignty therein."[34]

Bourquin concluded that there is a difference between the concept of "historic bays" and the concept of "vital interests". He asserts that the notions of "historic bays" and

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[31] Gidel, op. cit., p.629.

[32] Ibid., p.635.

[33] Bourquin, op. cit., p.51.

[34] Id.

"vital interests" must be kept separate, although each constitutes an important factor in determining the regime applicable to bays.[35]

In the Fisheries Case, the Norwegian Government gave another explanation of the role played by the theory of historic waters in the law of maritime territory. Time is said to operate as a consolidating force in law, but to do so in different ways. It may either operate by itself in isolation, transforming a situation of fact into a situation of law, or it may operate together with other factors. In the latter case, the historic title is only one of the titles invoked; it is then merely a supplementary ground confirming conclusions already reached on other grounds, such as the geographical configuration or the economic and security interests. For this reason, the Royal Decree of 21 July 1935 was based on geographical considerations and on the "vital interests" of Norway.[36]

2.1.3. The Scope of the Vital Bay Theory

In general, the dominion of the State is limited to the waters adjacent to its land territory which might be considered as 'l'accessoire de la terre ferme'.[37] The rights of the adjacent State over these waters, such as bays, must be for the purpose of guaranteeing the interests of this

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[35] Id.

[36] ICJ Pleadings., 1951, Vol.1, pp.562-63.

[37] Ibid., Vol.1, p.372.

State, otherwise, these waters would be part of the high seas.[38]

In the Fisheries Case, Norway argued that it is not enough for the State to appropriate or occupy certain adjacent areas to its territory in order to establish rights over these areas, but "Il faut encore que les intérêts légitimes de l'Etat côtier justifient ses prétentions".[39] Norway made reference to the Codification Conference of International Law of 1930, where it was recognised that international law attributed to each coastal State the sovereignty over zones adjacent to its territory and this zone must be considered as necessary to the protection of its legitimate interests.[40]

In its Note Verbal of 9 February 1986 delivered to the Soviet Embassy in Tripoli, the Libyan Foreign Office made it clear that the Law of October 9th, 1973, by which Libya declared the Gulf of Sirte to be wholly under its sovereignty, was based on, inter alia, its necessity to the country. The Gulf of Sirte is so vital that Libya must dominate it completely to ensure the security and safety of the country.[41]

The necessity of the protection of the legitimate

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[38] Verdross, A., Règles générales du droit international de la paix, Vol.5, Recueil (1929), p.391; see also Fauchille, op. cit., p.147.

[39] ICJ Pleadings, 1951, Vol.1, p.372.

[40] Rapport du Professeur François, adopté par la Deuxième Commission, Actes, Séances des Commissions, Vol.3, L.O.N., Doc., p.209.

[41] L.F.O. 222/250/7. See also: A Concise Memorandum on the Gulf of Sirte, L.F.O., 26/3/1986, Dept. of Treaties and Legal Affairs, Maritime Boundaries File, at No.3 (unpublished).

interests of the coastal State is therefore a justification of the authority which this State exercises over the adjacent waters. For these reasons the necessity for the theory of vital bays became important. This theory attracted the attention of writers on international law whose opinions became part of international practice and were formulated in the tribunals' decisions.

The vital bay theory has as its object to allow States which cannot rely on the historic bay doctrine to claim bays. Hence, the newly-independent States have indeed resorted to this theory rather than the historic bays doctrine as the later would have required them to show evidence that they have exercised their sovereignty over the claimed bays in a continuous, effective and for a long time. And, as a result, such a requirement would have been very difficult to satisfy because of lack of sovereignty during the colonial era. In this context, one of the Third World writers, Malek, attempts to explain this approach in the following terms:

> "[U]ne...baie peut être appropriée par l'Etat adjacent sur la base de considérations de pure nécessité, cette doctrine a été crée pour répondre à une situation de fait que la théorie des baies historiques, prise dans sa conception d'origine, ne saurait couvrir".[42]

It could be maintained that the reason why the 'vital bay' theory exists is to provide a sort of 'safety valve' in instances where the category of historic bays is closed, i.e., that States are no longer in a position to claim historic bays

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[42] Malek, Ch., La théorie dite des baies historiques, Vol.5-6, Revue de Droit International du Moyen Orient (1958), pp.100-195, at p.170.

as if vigilance is both universal and persistent.[43] In such circumstances, O'Connell writes:

> "This raises the question whether, under the exception of 'historic bays', in Article 7 (6) is included a category of 'vital bays', which are attributable to the coastal State without the elements of historic title being present, but when enclosure is a non-negotiable national interest".[44]

He goes on to say about 'vital interests' that:

> "The question, however, is whether such interests by themselves constitute the basis for a legitimate exercise of authority, or whether, in conjunction with other more basic and intrinsic factors they play a role in liberalizing the application of standard rules".[45]

States have tried to answer this question by their attempts to claim sea-areas including bays on the grounds of 'vital interests' even though they have formulated their claims within the historic bay category.

2.1.4. Writers' Opinions on the Theory of Vital Bays

One of the first writers to acknowledge the existence of vital bays is Fauchille. He writes that:

> "...[T]here exist certain gulfs and bays which despite their great width, must be declared under the sovereignty of the State which surrounds them. These gulfs and bays are what are called historic or vital bays, as distinct from others which are referred to as common or ordinary bays."[46]

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[43] Gidel, op. cit., p.651.

[44] O'Connell (1982), op. cit., Vol.1, p.435.

[45] Ibid., pp.437-8.

[46] Fauchille, op. cit., p.380.

The theory of vital bays was widely invoked by writers of international law. Aubert, a member from Norway at the 1894 meeting of the Institute of International Law, appears to have been one of the first writers to take up the matter of historic bays and vital bays in more clearly understood economic terms. He writes:

> "It is within the role of the Institute to leave the poor and small countries the means to struggle against other states".[47]

Westlake maintains that a State had the right to extend its sovereignty over certain areas of the sea adjacent to its territory. 'The appropriation of those waters by the sovereign of land is legitimate in principle', he says, but there must be sufficient motive to justify such appropriation.[48] There are many motives according to Westlake: The sea is a source of wealth from fishing, pearls, minerals and the control over this littoral sea and gulf 'is necessary for the defence of the coast and the prevention of smuggling'.[49]

It seems that Westlake requires two conditions for the State to establish sovereign rights over littoral gulfs and waters: actual occupation of these parts and reasons for this occupation. This appears from his conclusion when he says

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[47] Vol.3 AIDI (1894), p.4. Martens maintains that a nation may occupy and extend its dominion over large areas of waters beyond the then recognized customary international law limit "on...bays, straits, or the ocean; and such dominion may, if the national security require it, be maintained", Martens, G.F., Law of Nations Being the Science of National Law, trans. Corbett, W., (1829), p.161.

[48] Westlake, J., International Law, Part 1, Peace, Cambridge Univ. Press, 2nd ed. (1910), p.187.

[49] Ibid., p.188.

that: 'For the establishment of sovereignty the motive and occupation must be combined.'[50]

During the debate of the Preparatory Committee of the 1930 Codification Conference, Spiropoulos writes:

> "Everything depends on the meaning we attach to the word historic...The reasons which make a bay historic are diverse...The reasons may be military, economic, connected with national defence, or even archaeological...".[51]

Moreover, the Portuguese Delegate to the Hague Codification of International Law Conference of 1930, stated that:

> "...[N]eeds are imposed by modern social conditions, and if we respect age-long and immemorial usage which is the outcome of needs experienced by states in long past times, why should we not respect the needs which modern life, with all its improvements and demands, imposes upon states."[52]

Similarly, Article 7 of the Draft International Convention which was submitted by Captain Stroni at the Buenos-Aires Conference of the International Law Association in 1922 reads as follows:

> "A State may include within the limits of its territorial sea the estuaries, gulfs, bays or parts of the adjacent sea in which it has established its jurisdiction by continuous and immemorial usage or which, when these precedents do not exist, are unavoidably necessary according to the conception of

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[50] Id.

[51] L.O.N., Pub., Doc., C.351(b) 1930, V, p.105.

[52] Ibid., Doc. C.351(b) M.145(b) 1930 v, p.106.

article 2...".[53] (Emphasis added).

That is to say, for the requirements of self-defence or neutrality or for ensuring the various navigation and coastal maritime police services.[54] It could be seen from the above, that States may claim sea-areas adjacent to their coasts, and in particularly bays, whether on the grounds of historic title as a historic bay or on the 'vital bays' grounds if the historic bays criteria are not present. As a result, States do not need to resort to historic grounds alone but instead they can base their claims on other factors such as security or economic needs. In this context, Stroni states that:

> "...[T]he final stipulation of the article is perfectly explicable as regards the new nations-the American nations, for example-many of which possess long coasts and still very thinly populated [areas], and in respect of which the condition of long-established dominion cannot be adduced, as in the case of nations which have already existed for a thousand years or more".[55] (Emphasis added)

Similarly, the Representative of Portugal during the 1930 Conference on the Codification of International Law, maintained that the essential needs of a coastal State must be taken into account in the same way as the historic bays requirements implying the proposition that if past usage is respected, so must the above needs.[56]

Moreover, Portugal regards the bays formed by the

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[53] ILA, Reports of the Thirty-One Conference, Buenos-Aires, 1922, p.98. See also supra note 28.

[54] Ibid., Article 2, p.95.

[55] Ibid., pp.98-99.

[56] L.O.N., Doc., V. Legal, 1930, V.16., pp.106-107.

estuaries of the rivers Tagus and Sado, i.e. the sea-areas included between Cape Razo and Cape Espichel (26 miles width) and between Cape Espichel and Cape Sines (a distance of 40 miles), as historic waters and bays on fishing grounds.[57]

As regards the Latin American writers, it is worth citing Garcia Amador who views the historic bays doctrine as serving only the major powers and not the newly-independent States in Africa, South America, the Far East and the Middle East as they are not able to resort to this doctrine. As a result, to remedy this handicap according to him, reliance on the 'vital bay' theory must be made.[58] Accordingly, newly-independent States need not show their immemorial usage in the claimed bays.[59]

During the Codification Conference of International law, it was recognised that international law attributed to a coastal State sovereignty over a zone adjacent to its territory but that this zone had to be necessary for the protection of the legitimate interests of a State. This received express articulation in the Fisheries Case, where Norway agreed, inter alia, that "adjacent waters" were those which the coastal State had the power to appropriate and occupy on the basis of its legitimate interests, these interests being definable only by the coastal State.[60]

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[57] Ibid., L.O.N., Doc., C.74. M.39, 1929, V., p.184.

[58] Vol.1 YILC (1955), p.211.

[59] UN Doc. A/CN.4/143, op. cit., para.7, p.138; see also infra section 2, 2.1.5.

[60] ICJ Pleadings, 1951, Counter-Memorial of Norway, Vol.1., p.373.

Earlier, the Territorial Waters Jurisdiction Act of 1878 extended the jurisdiction of the UK over the open seas adjacent to its coast and to the coasts of all Her Majesty's Dominions, to such a distance as was necessary for the defence and security of such dominions.[61] To give a clear idea of the relevance of vital interests as basis of claims to large areas of water, more examples of State practice must be discussed below in some detail. Although it was suggested that "some writers have asserted that the establishment of historic rights over bays and offshore waters may arise from the vital interests of the coastal state",[62] it remains uncertain if the theory of "vital interests" can be subsumed within that of "historic waters", or whether the former may legally be considered an independent and autonomous principle. Goldie asserts that "vital interests can create historic title".[63]

O'Connell suggests that vital interests may only be relevant as part of the doctrine of historic waters for such interests can be utilised in the evaluation of long usage.[64] However, this may not necessarily prove accurate when measured against actual State practice, and may be of limited value when assessing the basis of claims to vital interests made by new States, where the notion of "long usage" has no relevance because of the relatively brief periods of time involved,

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[61] See Law Reports, The Public General Statutes, Vol.13, 1878, pp.579-581.

[62] Goldie, op. cit., p.226. See also Francioni (1980-1), op. cit., pp.83-109.

[63] Goldie, op. cit., p.226.

[64] O'Connell (1982), op. cit., Vol.1, p.438.

since the creation of those States. O'Connell admits that:

> "...[S]pecial situations crystallise as the result of historical evolution. To arrest this process is to produce an artificially stable international situation, which is unlikely to be tolerated by those states which feel discriminated against, as most countries which became independent after 1958 must feel when they reflect upon the broad expanses of water effectively enclosed by some great powers, and compare the restrictions now imposed upon them when their history is just beginning."[65]

François, Expert to the Secretariat of the First UNCLOS writes that:

> "As regards historic bays, the International Law Commission has given no definition for it thought that the concept is familiar to everyone concerned with international law...Can the 'vital interests' of the coastal state be the sole root of a right? The 1930 conference thought that."[66]

The Delegate of India stated at the same Conference:

> "We do not want too wide a definition [of historic bays] but we want it reasonably wide to enable claims to be put forward. I venture to think that it may be necessary to take the question of configuration into account and whether a claim on historic grounds can be based on the necessities of defence."[67]

Strohl emphasises the role played by the interests of the

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[65] Ibid., p.425; see also the reported comments of Garcia-Amador in UN Doc., A/CN. 4/143, op. cit., para.7, note 7 and para.138. A similar view was expressed in the Report following the Regional Seminar of African States on the Law of the Sea held in Yaoundé in June 1972 [UN., General Report of the African States Regional Seminar on the Law of the Sea, UN General Assembly Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of the National Jurisdiction, UN Doc., A/AC. 138/79, Vol.2, or in UN Doc., ST/LEG./SER. B/16 (1974), op. cit., p.661, and for more comments, see supra section 2, 2.4.1., note 100; and chapter 3, section 2, 2.4.1., note 92].

[66] Quoted in UN Doc., A/CONF. 13/39 (1960) at pp.68-70.

[67] L.O.N., Doc., C.351 (a) M.145(a) 1930.

coastal State which must be seen as the basis of a claim to large bays.[68] He maintains that if the closing of a large bay to foreign fishermen will greatly increase the gross national product of the littoral State, and that such closing will decrease very little the gross national product of another State whose flag vessels have previously fished in the area in question, it is the prerogative as well as the moral interest of the first State to assert that the income therefore derived from the fishing in question is absolutely essential to her economy.[69] The security interests of the nations have exercised a considerable and specific influence upon the development of the law of bays, because a bay is important from a military point of view for many reasons, as will be recalled.[70]

In addition, the international law rules on bays which had evolved by the close of the 18th century were the result, primarily, of military influences.[71] Such influences were due to the development of weapons which made some States exercise authority over certain bays whereas other States had ceded sovereignty over sea areas because they could not defend it.

The commencement of the 19th century provides a somewhat different perspective. The law relating to the international status of bays developed with particular emphasis upon economic factors. Indeed, when the principles of neutrality

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[68] Strohl, op. cit., p.24.

[69] Ibid., p.25.

[70] Ibid., p.48.

[71] Ibid., p.147. See also chapter 2, section 2, 2.3.

were formulated, these tended to adopt the patterns evident within economic spheres. The 20th century, however, presents a blurred image, because of the potentially troublesome blend of economic, political, ideological and military considerations.[72]

In determining the legal status of any bay, as Strohl maintains, one should discuss it from an economic, military and geographical point of view as well as the political climate of the time in which it occurred. In other words, those economic, strategic and political factors which tend to produce a linkage between a bay and the surrounding land, and thus, to produce a state of mind or political position which may sharpen into a legalistically conceptualised position, must be looked at carefully.[73]

To support his view, Strohl gave examples of State practice among which was the assertion of Canadian sovereignty over nine bays in Nova Scotia and Newfoundland which was "almost entirely a function of the economic interest", and the economic was the prime factor in the continuing controversy concerning the sovereignty over these bays.[74] The defence interest was also another factor because the quality of shelter is evident in most of these bays. As an example of these bays, is the Bay of Placentia in Newfoundland, which is now a special case in view of its having become the site of a defence installation. These bays were considered as historic

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[72] Ibid., p.148.

[73] Ibid., p.243 and p.303.

[74] Ibid., p.286.

bays.[75]

Francioni supports the theory of vital interests and bays.[76] In his opinion, the Libyan claim is only an example of many similar claims, as a result, he concluded that this vital bay claim may not be 'labelled as a radical and isolated Libyan doctrine'.[77] The same writer maintained the view that the 'claim is, indeed, indirectly supported by the practice of other neighbouring Mediterranean countries'.[78] This fact makes 'the Libyan claim over the Gulf of Sirte may not qualified as a violation of international law'.[79]

From what has been said above, it seems that the doctrine of vital interests has clearly not yet crystallised into a practical corpus of rules which allows an application of those rules or standards to individual situations. The law is in a state of some fluidity, but the competing principles which vie with each other are those of the freedom of the seas and the essential needs of various States. An examination of State practice reveals that the latter has greatly encroached upon the former.

Besides, dealing with Libya, an Arab State requires necessarily to consider Arab views and in this context, it is important to underline the fact that the 'vital bay' theory is well received favourably by Arab writers such as Malek.

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[75] Id.

[76] Francioni (1984), op. cit., pp.322-4.

[77] Ibid., p.324.

[78] Ibid., p.325.

[79] Id.

According to him, the coastal State in claiming a bay may take into account all reasonable interests such as navigation, security, economic and geographical factors.[80]

However, some opinions have been voiced against the view that the 'vital bay theory' cannot be utilised as a sole basis for claiming bays. The argument put forward by followers of this opinion, is that the doctrine of historic bays is nowadays already abused by States. If the 'vital bay' theory is accepted in international law, it will complicate the existing historic bays claims. As a result, States would abuse the liberty they enjoy to decide what are their 'vital interests'.[81] Such opinion was underlined by Gidel.[82]

Similarly, Bourquin made a difference between the vital bay theory and the historic bay doctrine.[83] However, his opinion is not shared by all writers. In this context, Malek for example, is of the opinion that the distinction between the 'historic title' and the 'vital interests' exists only in theory but not in practice. For him, at the beginning of an historic or vital bay claim, there must be first of all 'a

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[80] Malek, op. cit., p.171.

[81] Lahouasnia, op. cit., p.215.

[82] As already underlined in supra note 32 (Gidel, op. cit., p.635).

[83] He writes:

> "The 'historic title' is one thing; the 'vital interest' is another. Each has its place among the factors to be considered in determining the régime applicable to bays, but they must not be confused".

As translated by UN Secretariat, UN Doc., A/CONF. 13/1, op. cit., p.30, at para.158.

necessity' for the existence of a claim.[84]

Ronzitti also criticised the 'vital bay' theory in international law.[85] However, his view is not sustained by State practice; and in this regard, Kobayashi has, after surveying the post-Fisheries Case State practice, reached the conclusion that several States have claimed bays without resort to the historic bays doctrine.[86]

Nevertheless, one must recognize that this issue is far from resolved although it is very difficult to grasp the 'vital bay' theory independently from the historic bays doctrine because the later has always been invoked within the doctrine of historic bay. That is why many writers have indeed dealt with it in an interchangeable manner with the 'historic bays criteria ' or 'vital interests' as a ground for claiming bays. In this context, the Italian writer defines the historic bays doctrine by referring to vital interests (economic, security and geographical factors). He also advocates that the exercise of sovereignty by the claimant State must be backed up by the existence of geographical, security and economic considerations of the claimant State.[87]

It could be easily argued that State practice has tended not to distinguish between the vital interests and the

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[84] Malek, op. cit., p.172. See also Lahouasnia, op. cit., p.216.

[85] Ronzitti (1984), op. cit., p.286.

[86] Kobayashi, T., The Fisheries Case of 1951 and the Changing Law of the Territorial Sea, Univ. of Florida Monograph, 1965, at pp.18-9, 32, and 57-8.

[87] Adam, R., L'incidente del golfo della Sirte [The Gulf of Syrte Incident] Vol.64 RDI (1981) pp.1025-8 at pp.1025-26.

historic bays criteria. This is particularly true because States always claim vital bays within the context of historic bay doctrine.

2.1.5. The Emerging New International Economic Order

The development of international law occurs primarily through the acts of States in the form of custom and international agreement. Third World countries, which represent 70% of the world population, and most of which were not sovereign States until recent years, did not actively participate in the creation of international law. These States now argue that the existing law does not protect sufficiently their interests and it should therefore be reformulated in the changed circumstances.[88] The Argentine Representative at the Third UNCLOS in Caracas expressed this view by suggesting that the extant doctrine of the law of the sea was ill-equipped to address the demands and needs of third world states, many of which had never consensually participated in the development of the law of the sea. Indeed, significant aspects of the rules of the law of the sea developed as a direct response to the broader strategic goals of the great maritime Powers towards control over the seas. The Argentinean Representative concluded by arguing that "The new law of the sea must

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[88] Osieke, E., The Contribution of States from the Third World to the Development of the Law on the Continental Shelf and the Concept of the Economic Zone, Vol.15 Indian Journal of International Law (IJIL), 1975, p.311.

contribute to changing the present system".[89]

Similarly, the Representative of the United Republic of Tanzania stated that political developments and realities over the past fifteen years mandated that the traditional rules of the law of the sea undergo a metamorphosis to effectively embrace new and previously unorthodox attitudes. Essentially, "many States that had recently acquired independence had been confronted with rules that ran counter to their interests, and in some cases had led to conflicts."[90]

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[89] UNCLOS III, OR, Vol.1, p.73. In the same line of thought, McWhinney writes that:

> "The established states, and particularly the two superpowers, tend to find that the existing classical international law rules correspond very well to their own national self-interest and to the political accommodations inevitably made within their own national political community to produce the external consensus reflected in their own national foreign policy at any time. For example, the practical compromise evidently made within both the Soviet Union and the United States between national fishing interests and national defence interests will be augmented by the political trade-offs that the contemporary nationalist proponents of mare clausum are able to offer in other cognate areas - the gulfs and bays, the continental shelf, for example, and the development of the economic resources of the sea-bed and the ocean floor."

McWhinney, E., The Codifying Conference as an Instrument of International Law Making from the Old Law of the Sea to the New, Vols. 3-4 SJILC (1975-77), pp.301-318 at pp.312-313.

[90] UNCLOS III, OR, Vol.1, p.93. Similarly, Ajomo expresses Third World concerns in the following terms:

> "The law of the sea is an area of international law which has met harsh criticism from developing nations, especially with regard to customary international law of the sea. Like most customary international law, the rules governing the oceans were mainly formed by the practice of maritime European nations and a few other countries, long before the emergence of many nations of the Third World. Since a large number of the newer members of the international community gained independence only after struggles with the colonial powers - often the same nations which shaped the bulk of

Martens maintains that although Third World States tend to accept international law norms, they do nevertheless seek to modify some of them in order to suit their needs.[91]

It could appear from the above that traditional international law, and in particular the customary international law on historic bays have run against claims made by Third World States. In this context, it was submitted that law is not normally created for its own sake, but to cater for the interests of some or all the entities within the community in which it operates including those of its creators. Thus, in considering the contributions of States from the Third World to the development of the law of bays, it seems appropriate to identify the interests which these States may wish to protect. These interests of coastal States in the gulfs and bays in the seabed areas adjacent to their coasts are derived mainly from the fact that many resources are today extracted or extractable from the subsoil of the sea as well as from the security interest.[92]

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customary international law of the sea - the new states have understandably tended to regard such norms as the legacy of colonial rule.

Ajomo, Third World Expectations, in Churchill, R., Simmonds, and Welch, K.J., (eds.), New Directions in the Law of the Sea, Vol.3, (1973), p.392.

[91] In this context, Martens writes that:

"However, not all the rules of traditional norms of international law have been accepted by the Third World. Since international law is a dynamic, constantly changing system, there is hope that certain modifications can be made to meet the needs of the new members of the international community."

Martens, E.K., Evaluation of Coastal State Jurisdiction: A Conflict Between Developed and Developing Nations, Vol.5 Ecology Law Quarterly (ELQ) (1975-76), pp.531-553 at 531.

[92] UNCLOS III, OR, 1974, Vol.1, p.73.

Most of the countries of the world are "rightly calling for the formulation of new rules of sea law which would favour their legitimate interests" said the Albanian Delegate to the Third UNCLOS.[93] However, a few other countries 'continued to put obstacles in the way of development and modification of the law of the sea. He argued that the dynamics of power politics necessitated interference by major Powers to stifle a more progressive development in the law of the sea.[94]

Congo was more diplomatic; it believed that:

> "...[T]raditional international maritime law was prejudicial to the vital interests of the developing countries and aggravated the extreme inequality of international economic relations. The new international law could promote a minimum of security in these relations only if it embodied the values which could serve as a basis for the establishment of a just and equitable order in the...world."[95]

The Congolese Representative pressed the "need for fixing new maritime borders capable of ensuring the protection of the resources of the developing States against the claims of developed countries". Traditional maritime law would no longer meet the new realities of today's world. The maritime borders of States were "legal realities in accordance with their vital

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[93] Ibid., p.99.

[94] Id.

[95] Ibid., pp.106-7. In this context, it is submitted that:

> "It is common knowledge that with certain exceptions, the law of nations was actually the making of a few nations, not all the nations. In fact it is the making of a few states or empires. In the field of international law, the rest of the nations were objects rather than subjects. They did not possess themselves nor their waters whether inland or territorial."
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> Shukayri, op. cit., p.15.

interests, and for that reason any new definition of the limits of the territorial sea must take those interests into account".[96]

During the course of the Third UNCLOS, the Tanzanian Representative stated that the concept of the "freedom of the seas" was one entirely outmoded, and irrelevant to the present circumstances of international reality. Moreover, it remained at odds with international justice because:

> "It had become a catchword and an excuse for a few countries to...terrorise the world and to destroy the marine environment."[97]

The concepts of bays, territorial sea, high seas, and freedom of the sea, among others, were merely a reflection of the political interests of certain powers at a given point in history. Thus, the powers which had formerly clung to the principle of **mare clausum** had become the champions of **mare liberum**. At that time, the doctrine had been based upon colonialism. In the present day, it was the actual situation of peoples, not of interests of a group of powers, that made the transformation of the law of the sea imperative. The formulation of the concepts involved should correspond to the

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[96] UNCLOS III, OR, 1974, Vol.1, p.118.

[97] Ibid., pp.118-9. Similarly, the Representative from Yugoslavia stated that:

> "As to the idea that the extension of national jurisdiction might threaten the traditional freedom of the sea, he stressed that it was the strong countries that profited most from those unlimited and undefined freedoms...that in the interests of peace...such a state of affairs should be urgently changed".
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> Ibid., p.92.

realities of life, of which the law should be the truest expression.[98]

Third World States have indicated their desire to see a new development and codification of the principles of the law of the sea premised upon considerations of equity, sovereignty, security and participation. It was also maintained that the sovereignty of the coastal States should be upheld over bays and gulfs adjacent to their territory, without prejudice to the interests of other States.[99]

The African States at their Regional Seminar on the law of the sea held in Yaoundé in 1972, refused to be bound by policies stemming from the colonial era which they viewed as stultifying their national interests in coastal waters. They adopted a few recommendations on "Historic Bays" and "Historic Rights".[100] However, the Seminar did not provide its members with a definition of historic bays.

The international law of the sea is not and must not be static. Its rules are being developed all the time. For example, before the LOSC was adopted, many principles relating to juridical bays and the EEZ for example, were not accepted by many States. The twenty-four mile closing line for bays has come to be accepted as part of conventional international law. This may seem a modest closing line to many, but in the early days of this century, it would have been regarded as too much. At that time the closing line of bays was widely held to be

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[98] Ibid., p.122.

[99] Ibid., p.125.

[100] As already seen in chapter 3, section 2, 2.4.1., note 92; and referred to in supra section 2, 2.1.4., note 65.

limited to double the distance of the breadth of the territorial sea - no more than six miles.

Today, the 200-mile limit for the EEZ was in fact first claimed by Chile as exclusive fisheries zone which was not accepted at the beginning, but with State practice it became part of the LOSC.[101] The Chilean Delegate to the Third UNCLOS noted at the 30th meeting of the Plenary Meetings held in Caracas on July 4th, 1974 that:

> "It was a source of great satisfaction to Chile that the 200 mile limit, which it had been the first country to declare 27 years before and which together with Ecuador and Peru it had long defended, had been made the central pillar of international negotiations.[102]

When in the 1960s, some Latin American States had claimed maritime jurisdiction of up to 200 miles,[103] third States and in particular Western States made protests against these claims. About a decade later, the protesting States evoked identical reasons to claim economic and fishing zones. The change in the attitude towards this facet of the law of the sea reflects the dynamism and resilience of international law.[104]

It is true that the Third UNCLOS approved the 200-mile economic zone (Article 57). But, it must be underlined that a 200-mile territorial sea has also been claimed by States such as Argentina, Benin, Brazil, the Congo, Ecuador, El

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101 See the EEZ provisions.

102 UNCLOS III, OR, Vol.1, 1974, p.117.

103 See Martens, E.K., op. cit., pp.534 and 538.

104 Osieke, op. cit., p.371.

Salvador, Liberia, Nicaragua, Panama, Peru, Sierra Leone, Somalia and Uruguay.[105] There are seven other States which claim between 15 and 70 miles; these are Albania, 15 miles; Angola, 20; Mauritania, 70; Nigeria, 30; Syria, 35; Tanzania, 50 and Togo, 30.[106]

During the second half of this century, international law of the sea has changed in favour of the coastal States. In this context, it was submitted that:

> "The world has witnessed a breakdown in the relatively stable legal regime that existed in the oceans for a period of a century and a half. This breakdown has come about as coastal States have sought to protect what they perceive as their interests in the ocean adjacent to their coasts".[107]

In practice, therefore, there have always been new rules relating to all aspects of the law of the sea, and most of these rules became conventional rules. In his individual opinion in the **Fisheries** Case, Judge Alvarez argued that the interpretation of general principles of law would remain static if it did not consider alterations and subsequent modifications of these principles. He continued by suggesting that new principles had to be created to account for entirely new realities generated by the vast changes in international life, so that:

"...[T]he traditional distinction between legal and

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105 See the Summary Table of Limits of Sovereignty and National Jurisdiction in the LOS Bulletin, No.8 (Nov. 1985), pp.30-31.

106 UNCLOS III, OR, 1974, Vol.1, p.128.

107 The Panel on the Law of the Sea Uses, US Interests and the UN Convention on the Law of the Sea, Vol.21 ODILJ 1991, pp.373-410, p.379.

political questions, and between the domain of law and the domain of politics is considerably modified at the present time."[108]

It is within such context that the vital bays theory is at present evolving rapidly as illustrated by States' declarations and practice.[109]

2.2. The Theory of Vital Bays in State Practice

State practice is not only the most apposite indication of the precise status of the vital interests theory, but it also serves to illustrate those situations in which factors other than that of historic title are used to justify extended claims over maritime areas of bays. Moreover, illustrations of State practice, together with decisions of the courts and arbitral tribunals, establish that other States have, in the past, acted in ways comparable to Libya's action in 1973 in relation to the Gulf of Sirte.

It is necessary to comment briefly upon the importance of bays to coastal States, so that the actual State practice may be placed in better perspective. The ports contained within a State's bays may prove of crucial commercial interest, thereby generating economic considerations of a fundamental nature to the economy of that State. Moreover, the natural resources (both living and non-living) contained within the waters of the bay may also have a profound effect

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[108] Individual Opinion of Judge Alvarez, ICJ Reports, 1951, pp.147-148, at p.149.

[109] As shown above in 2.1.4.; see also 2.2. below.

upon the economy of the State concerned. For example, the natural shelter provided by bays is important in both the harvesting and processing of marine resources for the following reasons:

(i) fish and other marine life tend to prefer the relatively quieter waters of bays;

(ii) fishing may be conducted from smaller vessels for longer periods without fear of adverse weather conditions to be found on the open seas.

In addition, bays may possess particular relevance for strategic policies of national defence. For instance, ports are critical factors in the creation of a system of logistics, but equally, may be targets of attack by unfriendly or hostile powers. Moreover, the geographical causes for the creation of a bay will have had attendant effects on the land mass itself, creating physical depressions in the land which have the effect of assisting in the egress of communications from the water's edge to the hinterland. For the above reasons, States have claimed sovereignty over large bays. Examples of these claims will be seen hereunder.

2.2.1. The Chinese Declaration of 1958 Relating to Pohai Bay

China's 1958 Declaration claimed Pohai Bay as internal waters, because of the overwhelming presence of national security interests, which in turn constituted the definitional elements of the theory of "vital" bays. The bay itself is 45 miles across the mouth, 180 miles wide, and 300 miles long. The Pohai Straits eventually enter the port of Tientsin, and

the entire bay is classified by China as a military zone. Tao Cheng maintains that Pohai Bay was without doubt vital to the security of China. He writes that:

> "Access to its waters would permit an attack supported by naval forces against any part of an area within a gigantic circle from Manchurian industrial centers to the heart of the North China plain".[110]

To support his argument, Cheng assumes that the Ch'ing Dynasty was overcome in the 19th century because of the military use of the bay by the attackers.[111]

2.2.2. The Burmese Declaration of 15th November, 1968

The Declaration is illuminating because yet again "vital" interests (here economic considerations) were used to justify an exception to the normal baseline along the low-water line of the coast. The closing line for the Gulf of Martaban is 222 miles long.[112] Paragraph 3 of the Declaration reads as follows:

> "...[I]t is necessary by reason of the geographical conditions prevailing on the Union of Burma coasts, and for the purposes of safeguarding the vital

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[110] Tao Cheng., Communist China and the Law of the Sea, Vol.63 AJIL (1969), pp.47-73, at p.61.

[111] Id.

[112] Prescott stated that:

> "It is possible that the Gulf of Martaben could be claimed as an historic bays, but the Burmese declaration did not use this option".

Prescott, J.R.V., The Maritime Political Boundaries of the World, Methuen, London, 1985, p.166.

> economic interests of the inhabitants of the coastal regime, to establish the system of straight baselines".[113]

The Gulf of Martaban was subsequently closed by a line 222.3 nautical miles in length, which is far removed from the limits imposed in Articles 7 of the TSC and 10 of the LOSC.

2.2.3. The Icelandic-British Controversy

Although the dispute is not strictly relevant to the precise juridical status of "vital" interests in the law relating to the delimitation of bays, it does confirm the view that factors beyond that of mere historical usage were utilised to justify extended maritime claims. Iceland invoked its economic interests, arguing that fisheries are a condition **sine qua non** for the national economy. In July 1959, the Icelandic Ministry of Foreign Affairs stated that:

> "The dependence of the Icelandic people upon fisheries can be explained...through the fact that almost all the necessities of life have to be imported from abroad due to the barrenness of the country itself. These imports have to be financed through the exports and of these, 97% consists of fishery products. That is why...the fisheries... constitute a matter of life or death for the Icelandic people - for without them, the country would not be habitable."[114]

Essentially, therefore, the 12 mile-limit claimed by Iceland was, as Bouchez states, "a necessary consequence of

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[113] Limits in the Sea, No.14, (1970).

[114] Ministry of Foreign Affairs, The Icelandic Fishery Question, British Aggression in Iceland Waters, Memorandum, Part 2, Reykjavik (1959), p.17.

the economic structure of the country".[115]

In the Fisheries Jurisdiction Case (United Kingdom v. Iceland), no Pleadings were filed by the Icelandic Government and it was not represented at the Oral Arguments because its national interests were at stake. The attitude of that Government was, however, defined in its letter of 29 May 1972 to the Court. That letter stated, inter alia, that:

> "The Government of Iceland, considering that the vital interests of the people of Iceland are involved, respectfully informs the court that it is not willing to confer jurisdiction on the court in any case involving the extent of fishing limits of Iceland."[116]

Iceland invoked its vital interests also in its letter of 27 June 1972 to the same Court in the case concerning the Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland).[117] In this case, the Court in its judgment of 2 February 1973 made reference to the invocation by Iceland of its "vital interests". In this connection, the Court referred to its order of August 17th, 1972,[118] by saying that:

> "It should be observed in this connection that the exceptional importance of coastal fisheries to the Icelandic economy is expressly recognised [by the Federal Republic of Germany] in the 1961 Exchange of Notes".

It went on to add:

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115 Bouchez (1964), op. cit., p.185.

116 ICJ Reports, 1973, p.20.

117 Ibid., p.63.

118 ICJ Reports 1972, p.3.

> "...[I]t is also necessary to bear in mind the exceptional importance of coastal fisheries to the Icelandic economy as expressly recognised by the Federal Republic in its note addressed to the Foreign Minister of Iceland dated 19 July 1961."

The Court further held:

> "From that point of view account must be taken of the need for the conservation of fish stocks in the Iceland area. This point is not disputed."[119]

2.2.4. The Canadian Arctic Waters Pollution Prevention Act of 1970 and the Canadian Claim over Hudson Bay

Hudson Bay is claimed by Canada as an historic bay. The US is reported to have protested at this claim, but it appears that the Canadian claim is well-established now with the lapse of time. In this context, Strohl writes that:

> "With its tremendous area and location it constitutes a real problem for anti-submarine defense. For this reason Canada may be expected to see Hudson Bay as being more intimately connected with her national security than in times past. If Hudson Bay remains a part of Canadian internal waters, then Canada can, by international law, forbid the entry of foreign warships including submarines".[120]

Such security factors appeared as well in the statement of the then Canadian Prime Minister, Mr. P. Trudeau. He underlined the fact that one of the duties of the Canadian Air Force was to make sure that the surveillance of the Canadian territory and coastlines, is effectively carried out. According to him, this surveillance should extend to the

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119 ICJ Reports, 1973, p.64.

120 Strohl, op. cit., p.250.

Arctic Waters north of the Canadian coast before the drawing of the straight baselines therein.[121] This statement could be compared to the statement of the Libyan Leader in which he maintains that the Gulf of Sirte is vital to Libya and hence is under its sovereignty.[122]

Later, the effect of the Canadian legislation was to create a 100 mile exclusion zone around Arctic Islands in the interests of preventing environmental damage to the specified areas of the Arctic. When the US protested against the relatively larger areas claimed to be within Canadian jurisdiction, Canada merely insisted that its "vital interests" were at stake. It may be maintained from the above that the protection of the Arctic environment was one element of Canada's "vital" interests in the area, which thereby justified a departure from the more traditional standards of the law.[123]

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[121] Pharand, D., Historic Waters in International Law with Special Reference to the Arctic, Vol.21 University of Toronto Law Journal (UTLJ) (1971), pp.1 and 13.

[122] See the Libyan Leader's interview in which he maintains that the Gulf of Sirte is a vital bay ('Diverse Reports' broadcasted on Channel 4 (UK) on Feb. 11th, 1987). See also his speech during the Non-Aligned Countries meeting of September 1989 (JANA News Daily Bulettin, Sept. 7th, 1989).

[123] See Beesley, J.A. and Bourne, C.B., Canadian Practice in International Law During 1970 as Reflected Mainly in Public Correspondance and Statements of the Department of External Relations, Vol.9 Canadian Yearbook of International Law (CYIL), (1971), pp.276-311 at pp.288-9. See also Pharand (1971), op. cit., p.8. For further comments, see the same writer (Pharand), The Law of the Sea of the Arctic with Special Reference to Canada, Monographies Juridiques N°7, Univ. of Ottawa Press, Ottawa, (1973), 367 pp. pp.112-114 and 233-243; and, Canada's Arctic Waters in International Law, Cambridge Univ. Press, Cambridge, 1988, pp.167-175.

2.2.5. The Italian Decree of 26th April, 1977

This had the effect of carrying straight baselines to be drawn along the coastline of the Italian Peninsula, including, the entrance of the Gulf of Taranto at 60 nautical miles in length and, therefore, far in excess of the 24 nautical mile limit imposed by Articles 7 and 10 of the TSC and the LOSC respectively. The Gulf of Taranto cannot be classified as an 'historic bay', because Italy only claimed sovereign rights over the Gulf after the entry into force of the 1977 Decree. The justification for the Italian decree is to be found more pertinently in considerations of national security and defence, together with the overall collective defence interests of NATO in preventing the entry of Warsaw Pact naval units into a potentially sensitive maritime zone.[124] The closing of the Gulf of Taranto has been accorded a considerable degree of acquiescence by third States (especially NATO States member) primarily because of the overriding and vital concern for security and other defence issues.[125]

2.2.6. Other State Practice

Vital interests have been invoked by almost all States which claimed sovereignty over bays to justify the drawing of

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[124] See Ronzitti (1984), op. cit., pp.275-296; see also Westerman (1984), op. cit., pp.297-309.

[125] See L.F.O. Doc., The Gulf of Sirte Study, 1986, op. cit., p.133.

closing lines and the exclusion of all foreign vessels. Examples include Argentina and Uruguay in relation to the estuary of the River Plate; Panama in relation to the Panamanian Gulf; the Soviet Union in relation to Peter the Great Bay and the US in relation to its creation of "Defensive Sea Areas" which closed a total of 14 bays to all foreign vessels.[126] Walvis Bay, in Namibia is considered as a vital bay for the Occupying Power: South Africa because "Namibia has become and will remain overwhelmingly dependent upon the port for its economic survival...[and] the political and economic issue must be noted".[127]

2.3. The Theory of Vital Bays in Tribunals' Decisions

The decisions of Tribunals normally reflect State practice and writers' opinions. Vital interests have been usually emphasised or at least mentioned by courts when giving their decisions in most of the cases which involved territorial and internal waters disputes for quite a long time. Only a few of the examples will be examined below.

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126 For a survey of State practice, see the UN Doc., A/CN. 143/1 op. cit.; Gidel, op. cit., pp.652-633; for the USSR, see Strohl, op. cit., pp.50-51 and pp.332-368; and for the US, see Simmonds, K.R., (ed.)., New Directions in the Law of the Sea: New Series, Looseleaf 3 Vols., 1983-., Oceana Pub., Dobbs Ferry, New York.

127 Partington, E.A., Walvis Bay: South Africa's Claim to Sovereignty, Vol.16 Denver Journal of International Law and Policy, (DJILP) (1988), pp.247-321 at p.264.

2.3.1. The North Atlantic Coast Fisheries Arbitration 1910

The concept of vital interests was clearly brought out by the PCA in this case, both by the majority of the Court and by Drago in his **Dissenting Opinion.**[128] The Court held that:

> "...[T]he geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity of defence, of commerce and of industry are all vitally concerned with the control of bays penetrating the national coast line.[129]

The Court further held that account must be taken of all the individual circumstances when interpreting the notion of bays. Such circumstances are according to the Court:

> "...[T]he possibility and necessity of its being defended by the state in whose territory it is indented; [and] the special value which it has for the industry of the inhabitants of its shores".[130]

The **Dissenting Opinion** of Drago was equally explicit when he asserted that there existed in the international law of the sea, an exclusive and particular class of bays over which, whatever their depth of penetration or width of the mouth, the sovereignty of a coastal State could be exercised, especially when this was required for the purpose of self-defence. He writes that:

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[128] Scott, op. cit., 1st series, (1916), pp.141-207.

[129] Ibid., p.183.

[130] Ibid., p.187.

> "It may be asserted that a certain class of bays, which might be properly called historic bays, such as Chesapeake Bay and Delaware Bay, in North America, and the great estuary of the River Plata in South America, form a class distinct and apart, and undoubtedly belong to the littoral country, whatever depth or penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances, such as geographical configuration, immemorial usage, and above all, the requirements of self-defence, justify such pretension. The right of Great Britain over the Bays of Conception, Chaleur and Miramichi are of this description".[131]

In effect, Drago postulates the existence of vital interests, without justifying his opinion on this basis, preferring instead to utilise the framework of "historic title". However, Drago's argument is an "eminently sound" opinion for describing the "criteria that should be applied in questions of historic bays".[132]

It should be noted, as already mentioned, that only nine years after the decision in the North Atlantic Coast Fisheries Arbitration, the Portuguese Representative to the Conference on the Codification of International Law could confidently assert that 'State claims to "vital" bays were justified by reference to the security and defence of the land territory and ports, and the well-being and even existence of the State'.[133]

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[131] Ibid., pp.199-200.

[132] Strohl, op. cit., p.298.

[133] L.O.N., Doc., C., 74 M. 39, 1919, V, 184.

2.3.2. The Gulf of Fonseca Case, 1917

The judgment of the Central American Court of Justice in this case contains express reference to the presence of "vital interests" in the dispute between the parties, and uses that concept to justify the decision. El Salvador brought Nicaragua before the Court, arguing that it (El Salvador) held 'proprietary rights in the Gulf of Fonseca and that the concession granted by Nicaragua to the US for the establishment of a naval base in the Gulf infringed those rights, and threatened its national security'.[134]

The Court held that the concession threatened the national security of El Salvador, and added that the fact that the Gulf was a "vital" bay meant that:

> "...[M]any interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian states and the absolute, indispensable necessity that those states should possess the Gulf as fully as required by...primordial interests and the interest of national defence".[135]

Of particular importance in the present context, are those features of the Gulf identified by the Court which, in its opinion, justified an application of the concept of "vital interests":

(i) A projected railway started by Honduras to carry goods to the Gulf, with supporting terminal and port facilities.

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[134] The Gulf of Fonseca Case (El Salvador v. Nicaragua), Vol.11 AJIL (1917), pp.674-730.

[135] Ibid., p.705.

(ii) A railway controlled by El Salvador commencing at the Gulf.

(iii) The establishment of a free port decreed by the Salvadorian Government on an island in the Gulf.

(iv) The Gulf is surrounded by various and extensive departments of the riparian countries. These are of great importance because they are destined to great commercial, industrial and agricultural development; their products must be exported by way of the Gulf of Fonseca, and through that Gulf must come increasing importations.

(v) The strategic situation of the Gulf and its islands is so advantageous that the riparian States can defend their great interests therein and provide for the defence of their independence and sovereignty.[136]

Each of these features is especially relevant to the 1973 Libyan Declaration, because Libya's present (and future) proposed development of the Gulf of Sirte involves those considerations specifically recognised by the Court in the Gulf of Fonseca Case. If interests of commerce, agriculture and national defence are necessary ingredients of the theory of "vital" interests, the logical corollary must be that Libya, by consistently emphasising its justification for the 1973 Declaration, should be allowed to claim sovereignty over a greater expanse of the Gulf of Sirte (in keeping with judicially approved standards) than is at present recognised

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[136] Ibid., pp.704-705.

under the traditional law of the sea, contained in the TSC and the LOSC.

2.3.3. The Fisheries Case, 1951

In its argument during that case, Norway maintained that the principle of "legitimate interests" can justify **per se** the right of the coastal State to delimit its territorial waters, in the absence of any clear positive prohibition of such action under international law. And the necessity to ensure the protection of these legitimate interests of the coastal State is a justification for this State to exercise authority over these territorial waters.[137]

Moreover, the Court considered that vital interests are factors for the justification of claims to parts of the seas contrary to the general rules of the law of the sea. But, the Court held that these factors are among other considerations to be taken into account and "provide courts with an adequate basis for their discussions". It held that:

> "Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts.
> Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain **economic interests** peculiar to the region, the reality and importance of which are clearly evidenced by long usage".[138]

The Court concluded that Norway had established rights

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[137] ICJ **Pleadings.**, 1951, Vol.1, p.373.

[138] ICJ Reports, 1951, p.133.

over the disputed areas. These rights, which were according to the Court:

> "...[F]ounded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the courts to have been kept within the bounds of what is moderate and reasonable".[139]

The decision of the Court prompted Fitzmaurice to suggest that States' interests may constitute the underlying basis of a historic title or special right not normally accorded by the law. He also suggests that legitimate interests may be the inspiration, motive power or force behind certain practices of States leading to the evolution of a customary norm of international law. Fitzmaurice writes that:

> "When the legitimacy of an act depends as a matter of law on its reasonableness, the existence of special interests such as economic ones may be a justificatory factor, or at any rate a factor to be taken into account. In the Fisheries Case, one of the criteria laid down by the Court for testing the legitimacy of the Norwegian fishery limits and of given base-lines was their reasonableness".[140]

Similarly, O'Connell writes that:

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[139] Ibid., p.142.

[140] Fitzmaurice (1953), op. cit., p.70. It should also be noted here that if "economic justification for expansion has been used more than any other by aggressive nations", as Hill asserted why should not the same economic justification be used by small nations to close areas of waters such as large bays adjacent to their territory which need also to be protected? The same writer is in favour of the protection of the interests of the coastal state. He writes:

> "As long as the nations feel insecure against attack... the strategic and economic claims must be heard".

Hill, N., Claims to Territory in International Law and Relations, OUP, Oxford, 1945, pp.5 and 168.

"...[T]he relevance of local economic interests in the delimitation of coastal jurisdiction which the I.C.J. recognized...has made it clear that the whole doctrine of maritime domain is suffused with the notion of vital interests".[141]

2.3.5. US Historic Bays Cases

The question of vital interests as a basis or justification to enclose bays or other areas of waters was also discussed by the US Supreme Court. In this context, in the United States v. California Case, the US Supreme Court found that the Federal Government and not the State of California had full dominion over submerged lands. The Court relied on the need for national powers "of dominion and regulation in the interest of [the nation's] revenues, its health, and the security of its people from wars waged on or too near its coasts".[142]

In the United States v. Louisiana Case, the same Court examined the issue of historic bays and it found that there were four factors to be taken into consideration in determining whether a body of water was an historic bay. According to the Court, these factors were:

"(1) the exercise of authority over the area by the claiming nation; (2) the continuity of this exercise of authority; (3) the acquiescence of foreign nations; and (4) the vital interests of the coastal nation including elements such as geographical configuration, economic interests and the requirements of self-defence."[143] (Emphasis added).

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141 O'Connell (1982), op. cit., p.437.

142 381 US 139, p.296.

143 470 US 93, (1985) p.74.

In a later passage, the Court emphasized the element of vital interests in the formation of historic title to bays. In the words of the Court: "There is a substantial agreement that a fourth factor to be taken into consideration is the vital interests of the coastal nation".[144]

The conclusion of the US Supreme Court is similar to that of the ICJ in the Fisheries Case. In both courts' views vital interests may be seen as one of the factors to be taken into account when considering the legal validity of a claim to historic title.

2.3.6. Evaluation of these Decisions

The element of vital interests of the State was further applied by the ICJ in the Continental Shelf (Libyan Arab Jamahiriya/Malta) Case, as relevant circumstances. The security element was established by the Court in that case.[145] Although it was invoked in relation to the continental shelf delimitation issue, it is also validly applied to the delimitation of historic bays because the security reason is present in both cases. The Court held that:

> "Security considerations are of course not unrelated to the concept of the Continental Shelf. They were referred to when this legal concept first emerged, particularly in the Truman proclamation".[146]

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[144] Ibid., at 102, p.81.

[145] See Evans, M.D., Relevant Circumstances and Maritime Delimitation, Clarendon Press, Oxford (1989), p.176.

[146] ICJ Reports, 1985, p.42.

The Court gave this opinion after it mentioned the Maltese argument with regard to this point. The latter contended that the "equitable consideration" of security and defence interests confirms the equidistance method of delimitation, which gives each party a comparable lateral control from its coasts.[147] The delimitation line decided by the Court in this case was further north of the closing line claimed by Libya in the Gulf of Sirte.

It can be maintained from the above that the various instances of State practice posited above establish that one common factor underlines the approach of the States in these maritime boundary situations, namely, that it is the **perceived national interest** (whether this be of a political, economic or military nature) which is the crucial and determining factor in any ultimate decision. These interests, which must necessarily be individualised and subjective, may be conceptually defined as "vital" interests. Bouchez categorises vital interests as those interests "to which such a great value is attached by a State that their realisation is seen as a necessity for the existence of a national community".[148]

The theory of vital interests, evidenced by State practice, also tends to confirm Bouchez's view that:

> "If it is possible to claim certain bays contrary to the general rules of international law by virtue of interests which have manifested themselves a long time ago, then it is unreasonable to dismiss such a claim when only recent interests are at issue. One could even assert that the present day interests of a state are of greater importance than

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[147] Id.

[148] Bouchez (1964), op. cit., p.297.

those which have manifested themselves a long time ago".[149]

This argument has particular relevance in the Libyan context because the interests claimed (economic, social and military) in an extension of sovereignty over the Gulf of Sirte are interests of a relatively recent origin which have acquired special significance because of the expanding needs of the Libyan State and the pressures caused by fiercely competitive international trade practices. The vital interests of a State cannot be absolutely and finally defined at one moment of time - these interests alter according to changed circumstances, and given the inadequacies of an objective international adjudicative system, it is necessarily within the domain of every State to decide what precisely its "vital interests" actually encompass. As O'Connell states, "history cannot be ossified".[150]

A comparison of the basis of the 1973 Libyan action is entirely consistent with the actions taken by other States where "vital" interests were seen to be paramount.

III. The Vital Interests of Libya in the Gulf of Sirte

As already seen the theory of vital bays has demonstrated the relevance of vital interests in the formation of historic title.[151] The uniqueness of the Gulf of Sirte from a

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[149] Ibid., p.298.

[150] O'Connell (1982), op. cit., Vol.1, p.425.

[151] Supra section 2.

geographical standpoint was also demonstrated.[152] It is now appropriate to turn to a study of the vital importance of the Sirte Basin region of Libya into which the Gulf of Sirte penetrates quite deeply and how this penetration creates a critical need for the protection of the Gulf of Sirte whose strategic position has become so evident to the security of Libya. Hence, the strategic implications of the geographical and security facts will be discussed. Then, the economic facts concerning the Gulf region will be examined.[153] In addition, it is relevant to assess whether this Gulf does or does not constitute an international maritime route.

3.1. The Strategic, Military and Security Considerations

It is maintained by some writers that coastal States must be allowed to appropriate adjacent sea-areas to their coasts so that they could protect themselves from outward attack. In this context, Drago in **Dissenting Opinion** in the **North Atlantic Coast Fisheries** Arbitration, wrote that:

> "The marginal strip of territorial waters and the enclosure of bays was founded on the necessity of the riparian State to protect itself from outward attack, by providing some thing in the nature of an insulating zone, which very reasonably should be extended with the accrued possibility of offense due to the wider range of modern ordonnance".[154]

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[152] See chapter 1, section 5, 5.1.2.

[153] However, these economic facts will only be briefly examined as this study is not concerned with economic analysis of the Gulf of Sirte area as such.

[154] Scott, 1st Series, op. cit., p.198.

The interests of national defence have exercised specific influences upon the development of the law of bays. In this regard, Strohl states that:

> "From the military point of view, a bay in a country's littoral usually commands special attention for one or more of these reasons:
>
> (a) It is usually in bays that ports are located. These and their facilities are at once important components in the country's military logistics system and prime targets for the enemy.
> (b) Bays and their ports serve as sheltered areas for naval repairs facilities and naval operations bases. Seaplanes nearly always operate from the sheltered waters of bays. Some large bays are even used for the conduct of naval training exercises.
> (c) The geological fold or the river system that created a bay in the first place, usually created in the landmass adjacent to the bay some sort of physical depression or valley which tends to assist in the egress of communications from the water's edge to the hinterland of the country concerned. For this reason and up to the present, at least, bays and their ports , facilities, if any, have been prime military action looking towards invasion and occupation of the interior."[155]

Bearing in mind the above opinion, it is relevant to underline the fact that the land region into which the Gulf of Sirte projects has become, since the early 1960s, the very heartland of Libya, because of the major concentration of oil reserves, the situation of the petrochemical industry and the key link it plays with communications within Libya, and to the African continent to the south, and from this industrial centre to the sea. Effectively, the welfare of the Libyan people depends upon this region lying to the south of the Gulf of Sirte. It is precisely because of its fundamental national importance that this region could become the prime target of

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[155] Strohl, op. cit., p.48.

attacks by hostile powers. If a warship were free to enter the Gulf,[156] it could proceed to within striking distance of Libya's heartland,[157] because this is the centre of the State's most crucial economic activity, upon which the economic stability of Libya rests.

This unified centre of vital national interests demands that the Gulf should fall within the complete sovereignty and jurisdiction of Libya. The 1973 Declaration itself stressed that complete surveillance over the Gulf was "crucial to the security" of Libya and "necessary to ensure the security and safety of the state".[158] The Libyan Foreign Office in its **Note Verbal** of October 9th, 1986 to the Soviet Embassy in Tripoli, explained, **inter alia** how the Gulf of Sirte is vital to Libya as it penetrates into the heart of Libya where there are economic interests such as the oil fields and oil ports.[159]

A denial by foreign States of the legitimacy of the Libyan Declaration would create a military situation of the following nature: first, without the required level of

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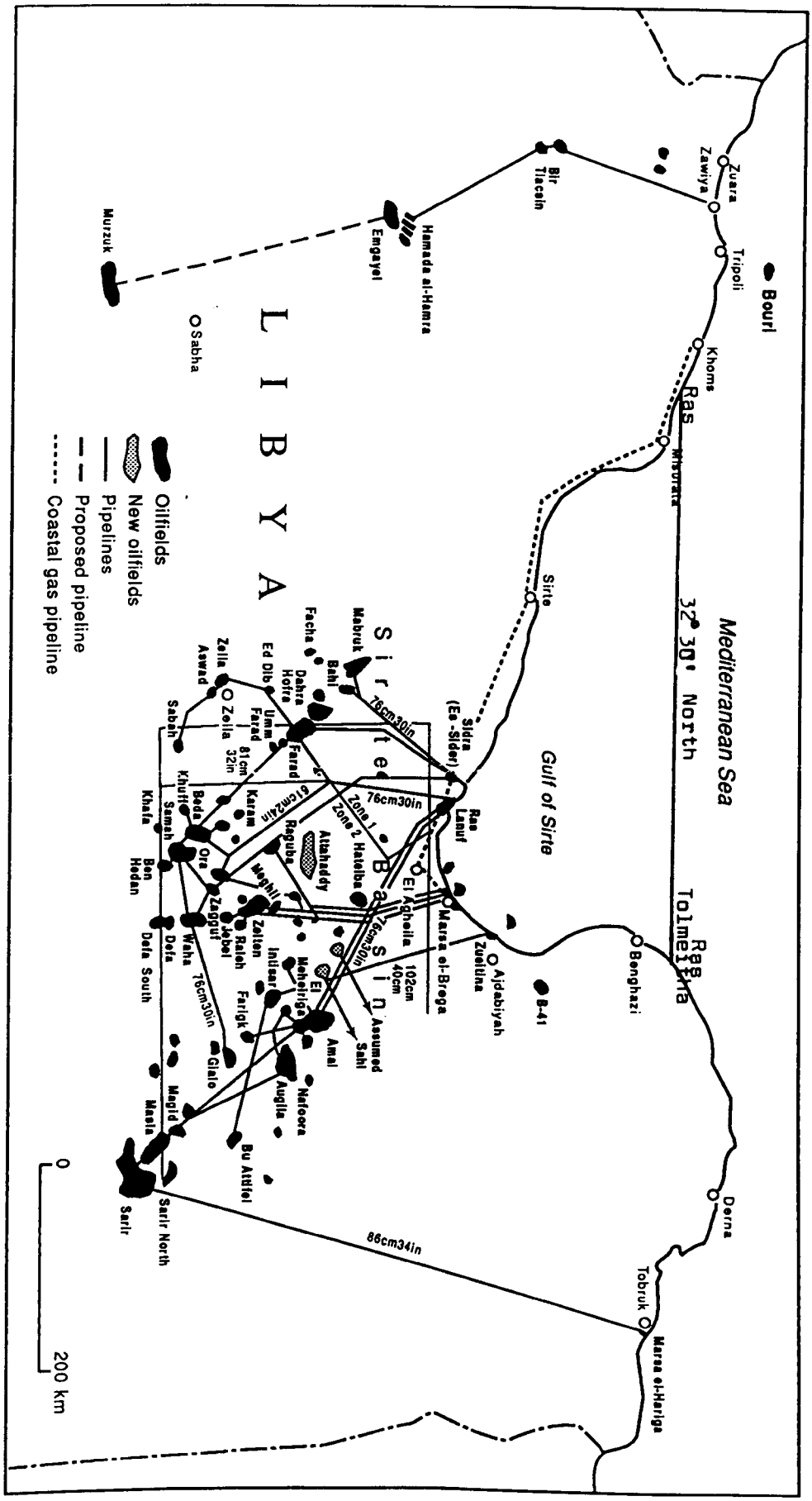
156 When, in 1986, the US warships entered the Gulf of Sirte, it was so easy for them to hit a military installation near the city of Sirte, which was meant to defend economic interests inside the Gulf hinterland. See also chapter 1, section 4.

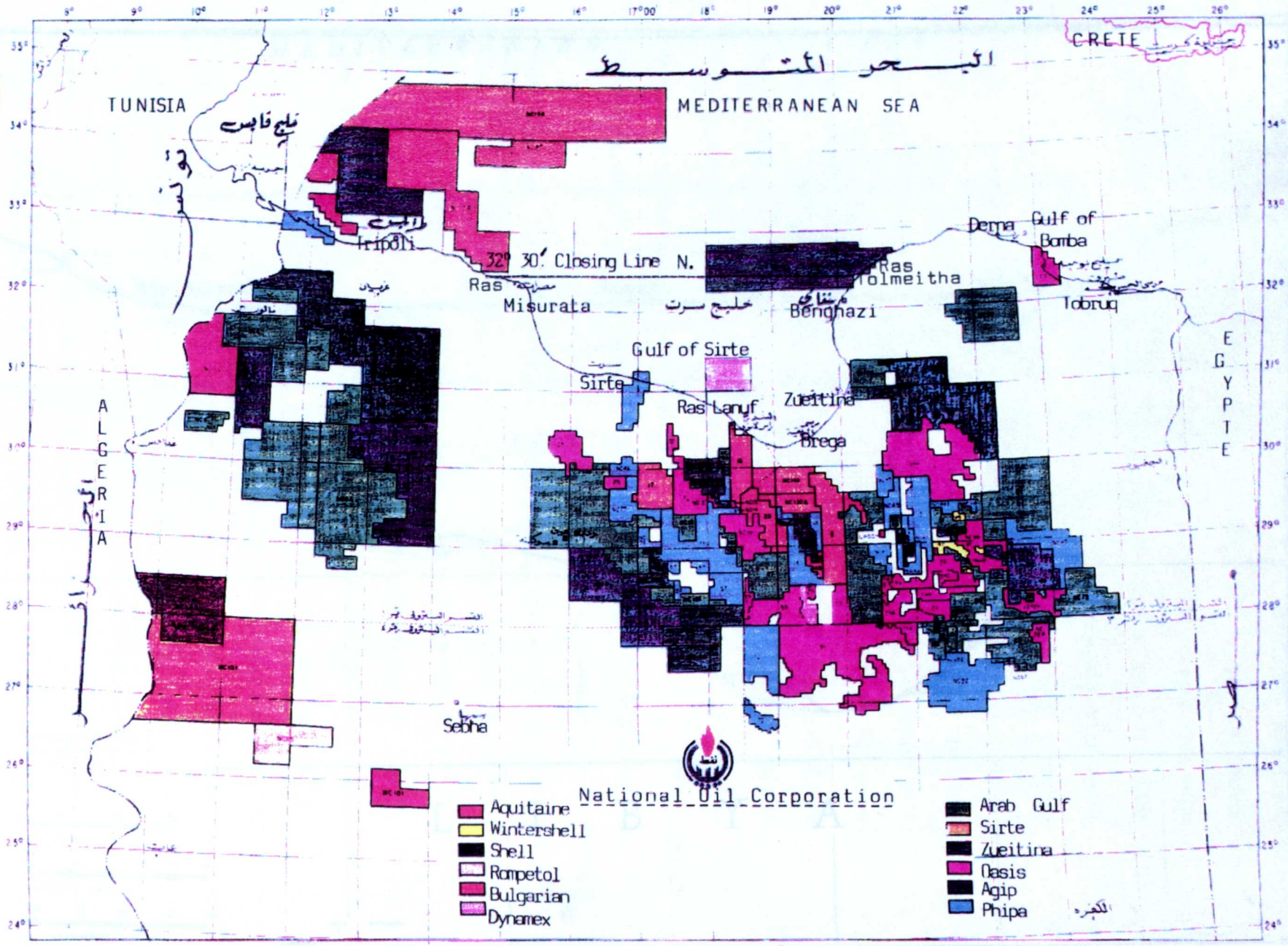
157 If the Gulf is not closed, then the following supposition could well be applied in this case: "a foreign war vessel might penetrate well within the body of the country while still remaining on the high seas" (Jessup op. cit., p.356). See also Maps No. 6, 7, and 9.

158 See the Official Gazette of Libya, Special Supp., No.5, Oct. 15th, 1973.

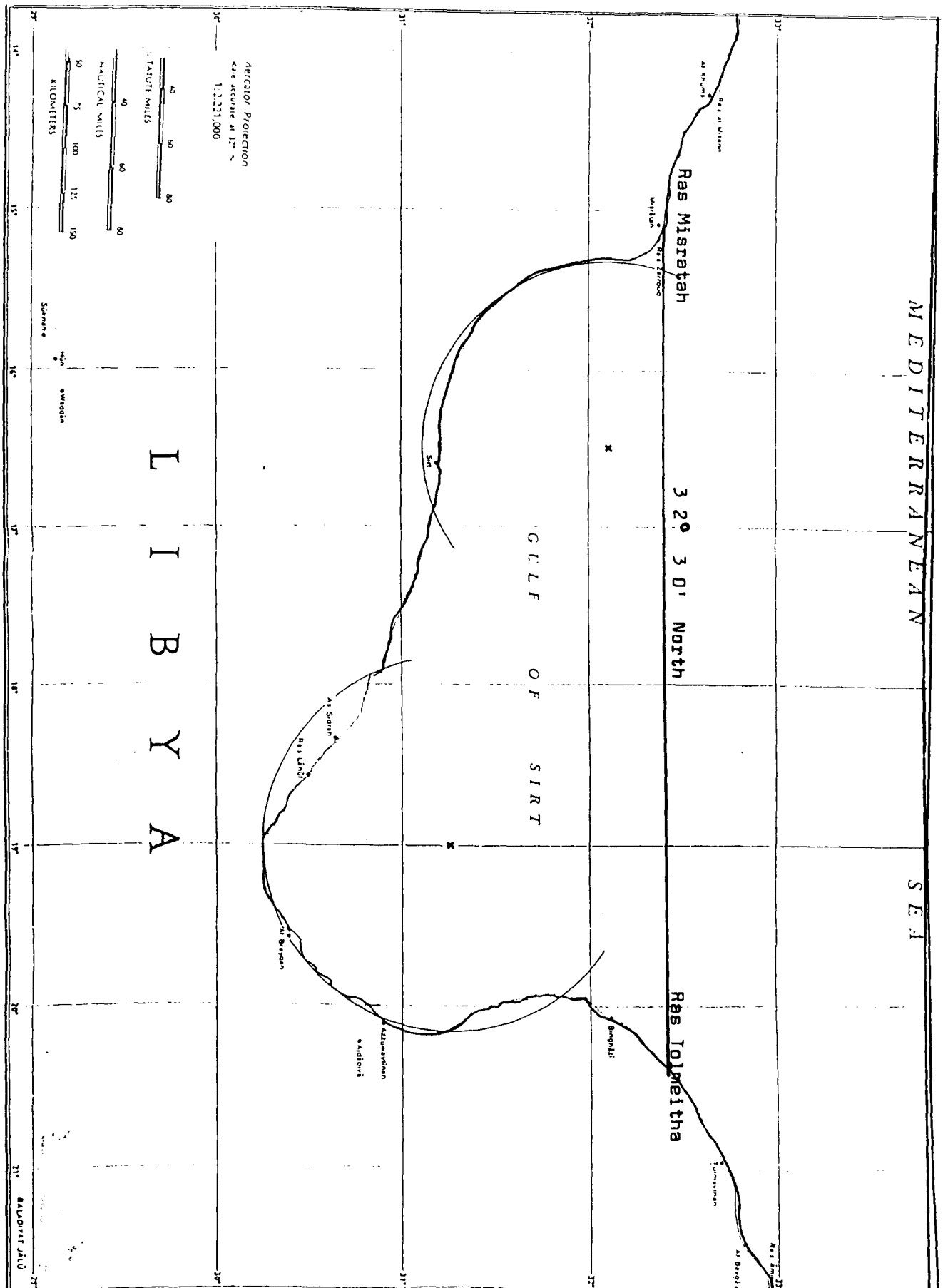
159 L.F.O. Doc., The Gulf of Sirte File, No. 222/250/7, 1986, op. cit., p.59.



Map No. 6. Oil Deposits and Pipelines.



Map No. 7. Oil Concessions.



Map No. 9. Arcs Showing the Vulnerability of Libya.

surveillance, a foreign, hostile use of armed force could destroy the Libyan oil fields, sever the vital road links between the east and west of the country; eliminate the essential water supply to the region on which the local population depends; and secondly, a combination of the above would destroy Libya as a viable economic State, carrying regression into large scale poverty.

In the Gulf, the intentions of aircraft or ships would not be capable of being ascertained in a sufficient space of time until they were in an attacking position. But the creation of a closing line, constituting a "coastal front", would alleviate the present difficulties of early-warning opportunities by establishing a reasonable warning period and possible discovery of intended targets.

A straight line of surveillance would possess particular advantages:

(1) The mere crossing of the line by foreign aircraft or ships would immediately alert Libya to the possible hostile intentions of that force. The principle behind such an early-warning system is universally accepted, and such systems have been deployed by Canada and the US across the North American continent since the early 1950s. If vessels can approach to within 12 miles of the coast, before their intentions become obvious, then possible counter-measures are very limited.

(2) Any line of closure of the Gulf of Sirte would reduce the coastline by some 135 nautical miles and would also make it more linear in configuration, a fact which renders defence easier. If a closing line was not

utilised, Benghazi could be attacked from the sea anywhere in an arc of 220 degrees (an example of this attack occurred in 1986 when the US sank a military boat just off Benghazi port), and similarly, the port of Misratah would be vulnerable over 200 degrees. A linear coastline would, however, reduce the arc of possible attack to under 180 degrees. In addition, the arc would only amount to approximately 170 degrees for Tripoli and Tobruk if the linear configuration was created.[160]

Given these considerations, it would seem both reasonable and equitable to allow a closing line to be drawn on which the economic survival of Libya depends.

The ICJ itself considered the inter-relationship between security considerations and maritime boundaries in the Continental Shelf (Libyan Arab Jamahiriya/Malta) Case, quoting part of the Truman Proclamation of 1945 as follows:

> "Self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilisation of... resources."[161]

A similar exposition of security underlies the equitable principle of "non-encroachment" discussed in Judge Jimenez de Arechaga's Separate Opinion in the Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) Case, where he refers to the:

> "...[I]mmediate and almost instinctive rejection by all coastal states of the possibility that foreign states...might appear in front of their coasts, outside their territorial sea, but at a short

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160 The Gulf of Sirte Study, op. cit., p.59. See also Map No.9.

161 ICJ Reports, 1985, p.42.

distance from their ports and coastal installations for that purpose."[162]

The importance of the Gulf of Sirte clearly lies in the strategic geographical position it occupies in relation to the centre of Libya's vital economic interests, which are centred upon the production of oil and the development of a petroleum industry and related industries.[163]

Another point to be underlined is that when Goldie stresses the strategic consideration which he considered as a vital element,[164] he asserts at the same time that the recognition of a State's right to the 200-mile EEZ "constitutes a far more generous recognition of the vital interests of the coastal State in a maritime region than the concept of historic bays".[165] With regard to "the issue of defence", he goes on to say that:

> "...[S]urely we cannot leave out of consideration the whole system of air traffic control and the authority over approaching aircraft".[166]

The system is known as American Defense Identification Zone (ADIZ) which reaches a distance of 500 miles in the US practice.[167] According to Goldie, every State in the world

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[162] Ibid., 1982, p.121.

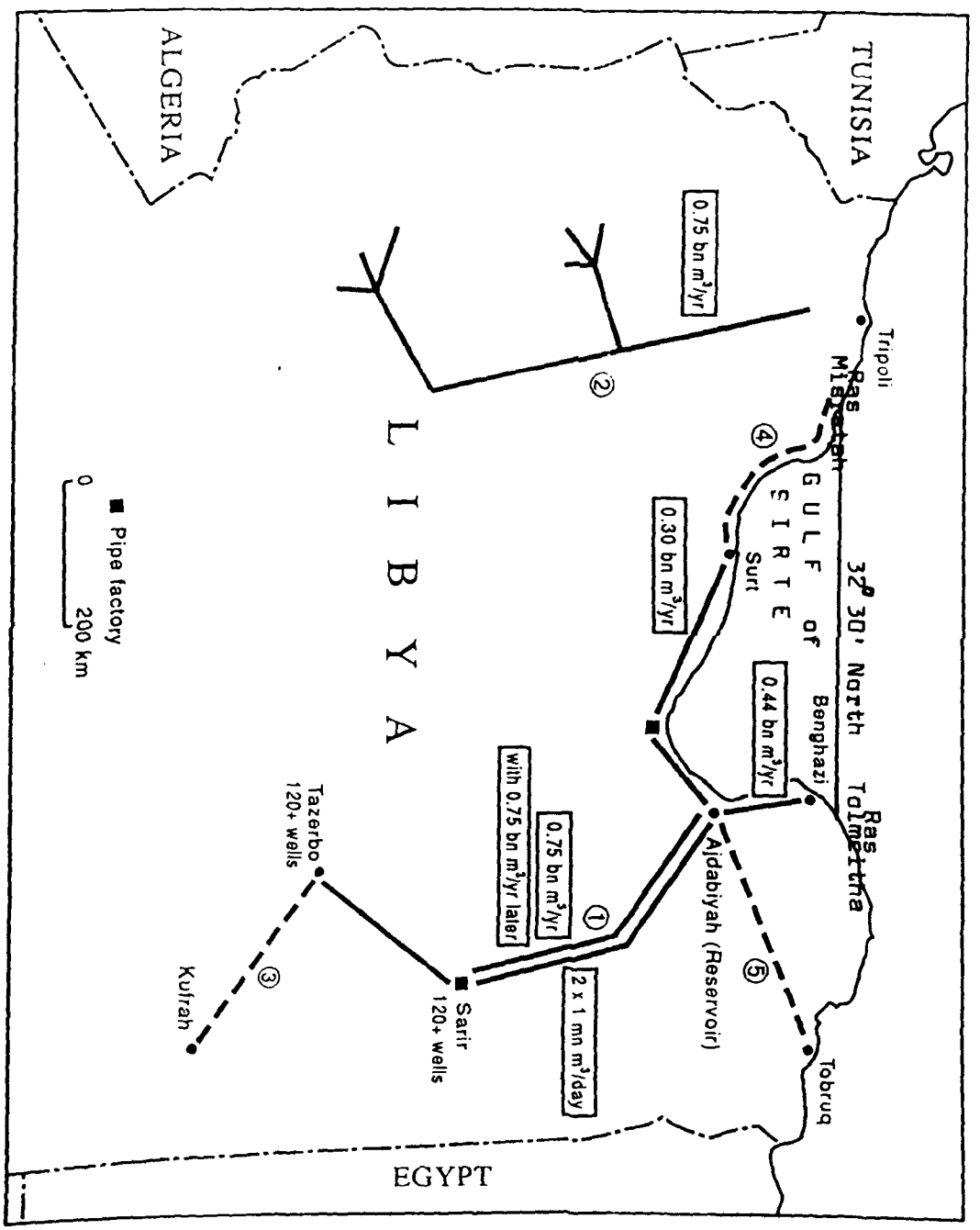
[163] See chapter 1, section 5, 5.1.2. about the geographical position and importance of the Gulf of Sirte. See also Maps No. 6 and 8.

[164] Goldie, op. cit., p.228.

[165] Id.

[166] Id.

[167] Ibid., p.299.



Map No. 8. The Great Man-made River (GMR).

has the right and duty to engage in air traffic control to maintain the safety of international air traffic when aircraft approach its shores in order to avoid air traffic congestion and the risk of having catastrophic accidents. He concludes that:

> "...[T]here are other and possibly more functional concepts available for the protection of vital interests without making a fiction of history or a distortion of the past".[168]

According to his argument, States can close bays on national defence and security grounds without claiming these bays as historic.

Libya's territorial integrity is currently challenged by several disputes over its boundary and national territory. Studies of the Libyan domestic air transport system since independence have, however, largely ignored the political role of air traffic control and the role of internal air services, and have centred instead on economic or short-term administrative aspects of the issue.[169]

The Libyan claim to the Gulf of Sirte, as part of its Government effort to assert national territorial integrity, and the protests made by a few States, in particular the US, transformed the Gulf into a zone of hostility which was closed to civil air traffic. The consequences of such a situation to internal flights (international flights do not take place over the Gulf for geographical reasons) which normally cross the Gulf of Sirte since it forms part of the shortest route

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[168] Id.

[169] Marghani, op. cit., pp.179-192.

between destinations within the economically significant northern half of the country, forced aircraft to use longer circular routes to avoid the Gulf. The diversion into a south-east orientation and then north-east on routes directed towards the Benghazi region, and the reverse pattern for routes from the eastern regions towards Tripoli to avoid the prohibited Gulf of Sirte zone, consumes additional flying time. The increases in operating costs are obvious.[170]

The conclusion which could be reached from the above consideration is that the Libyan claim in the Gulf of Sirte may be additionally supported by the fact that the Gulf of Sirte forms part of the shortest air route between the agglomerations of Tripoli and Benghazi.

3.2. Economic Considerations

According to Strohl, bays are important to a country's economy for two principal reasons: (i) 'the commerce entering and using the protected waters of the bay and the ports located therein', and (ii) 'the useable products that can be extracted from the marine life in the waters of the bay'.[171]

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[170] Ibid., p.184.

[171] Strohl, op. cit., p.25. He adds that:

> "The primary source of economic concern, lies with the marine products found in coastal waters, and the matter is sufficiently complex so as not to permit the simple rationalization that the coastal State should belong such of the adjoining natural bounty from ocean waters that its economy may require. The natural shelter provided by bays is important in the harvesting and processing marine products for one or more of the following reasons:

Economic considerations were indeed stressed by the ICJ in the Fisheries Case, when it held that:

> "In these barren regions, the inhabitants of the coastal zone (of Norway) derive their livelihood essentially from fishing, such as are the realities which must be borne in mind in appraising the reality of the...contention that the limits of the Norwegian fisheries zone...are contrary to international law".[172]

The Court went on to add:

> "The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of the sea which the general law would deny; it invokes history together with other factors, to justify the way in which it applies the general law. This conception of an historic title is in consonance with the Norwegian Government's understanding of the general rules of international law."[173]

The Court concluded after it found that the 'prolonged abstention was for a period of over sixty years which gave weight to the absence of protest. It held that:

> "Such rights, founded on the vital needs of the populations and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and

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(a) Fish or other marine products have a tendency to enter the relatively quieter waters of bays.
(b) Fishing can be conducted from small boats and for long periods without interruption in bays because of the more favorable weather conditions.
(c) In former times, bays were especially important to fishermen in that they provide sheltered land upon which to process and preserve the newly-harvested catch."

Ibid., p. 26.

[172] ICJ Reports, 1951, p.128.

[173] Ibid., p.133.

reasonable."[174]

What is of primary significance here is the tremendous extent to which the Sirte Basin, into which the Gulf of Sirte protrudes, has become the vital economic heartland of Libya, centred as it is, around the discovery and production of oil. The oil sector itself contributed nearly 60% of Libya's gross domestic product (GDP) in 1983.[175] Indeed, crude oil exports account for the vast majority of the international trade between the Sirte Basin, Gulf of Sirte region, and the rest of the world. The Gulf itself is the most important export entrepot in the country and in terms of both volume and value these exports greatly exceed those from other areas, including Tripoli and Benghazi.

Furthermore, it is expected that the region's population will increase to 393,000 by the year 2000, and that the demographic centre of gravity will continue to move towards the coast so that 86% of the total population will be concentrated in the coastal municipalities.[176] The petrochemical industry at Ras Lanuf and Brega will be the focal point of industrial development, likely to overshadow all other development.[177]

It should not be forgotten that Libya was one of the

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[174] Ibid., p.142.

[175] Gurdon, Ch., Economic Study of El-Khalij Region, unpublished Report, L.F.O., Doc., Oct., 1986, p.19.

[176] Secretariat of Municipalities, El-Khalij Region, Regional Plan 1980-2000, Draft Report, Speerplan/Finnamp, Tripoli (Dec. 1980), pp.10.6-10.12.

[177] Alan, G., 'Industrial Review: Libya', Arab Industry Review, Falcon Publishing, Bahrain (1985), p.273.

poorest countries in the world until the early 1960s when oil was discovered,[178] so when the current economic situation in Libya is considered, it is a period of only 20-30 years that is being looked at. Attention here will be focused primarily on oil and related industries but other economic activity such as fishing in the Gulf of Sirte and Sirte basin will be discussed briefly. It is particularly important to note that this area has become central to the economy of the country because of the discovery and production of oil.

3.2.1. Oil and Related Industries

All the main oil producing fields are onshore in the Sirte Basin, although new offshore fields such as the Bouri field are being developed. The year 1961 saw the start of oil production, which developed very quickly during the 1960s, reaching its peak of 3.32 million barils a day (b/d) in 1970.[179] Since that time production has gone down because Libya now has a conservation policy to maintain its oil reserves and conditions in the world oil market are not so favourable.

There are eight major petroleum operations in the Sirte Basin. The current order of production capacity in 1990 is as follows:

> **Waha** (520,000 b/d) which has now taken over the interests of the Oasis Oil Company, is the largest producer. It lifts oil from the Giola, Defa, Dahra and

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[178] Beaumont, Blake, Wagstaff, The Middle East: A Geographic Study, John Wiley, Chichester (1976), p.410.

[179] Libya's National Oil Corporation (LNOC) Pub., Tripoli (1986).

Bihi oilfields and exports it via the Es Sider terminal.

Ageco/Umm al-Jawabi (600,000 b/d) was formed to take over the Amoseas 100% interest in the Nafoora field, which is exploited via a link to the ex-Mobil Amal to Ras Lanuf pipeline.

Agip-NOC (240,000 b/d), which is 50% owned by Italy's Agip, produces crude from the Bou Attifel field which is evacuated via a spur to the ex-Occidental pipeline system.

Assuwaytine (90,000 b/d) runs the Intisar and Augula fields which Occidental developed. The company also runs the oilfields close to the Intiser-Azzuwaytina pipeline.

Sirt Oil Company (150,000 b/d) administers the Zelten, Riah and Jebel fields which Esso Libya ran until 1981. They are tied into Marsa el Brega pipeline system on the coast of the Gulf of Sirte.[180]

Ex-Mobil (82,000 b/d). Prior to its withdrawal from Libya in December 1982, Mobil operated the Amal, Hofra and Ora oilfields which are linked to the coast at Ras Lanuf.

Wintershell (15,000 b/d) still operates the small field in Concession 96 which is evacuated by spurs to the Ras Lanuf system.

Elf Aquitane Consortium (2,000 b/d) is made up of Elf Aquitaine 42%, Hispanoil 42% and Murphy 16%. It evacuates its small production by a 90 kilometres (km) spur to the Amal-Ras Lanuf system. In addition it also has a production sharing agreement with Wintershell and Austria's OMV in the Meheiriga field. According to the second quarter of 1989 figures production was about the same.[181]

The Libyan State-owned oil company (LNOC) signed a production sharing agreement with the British firm (LASMO) and the South Korean Petroleum Development Corporation (PEDCO) on October 11th, 1990. The Agreement is to cover the off-shore concession NC-173 (Blocks 1 and 2) the surface area of which

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[180] Ibid., 1990.

[181] Id.

amounts to 23,632 square Km.[182] The LNOC signed also a similar agreement with another a British company: the North African Petroleum Limited, it covers two blocks formerly owned by the Sirte Oil Company in the Western Sirte Basin.[183]

Thirty pipelines carry crude oil to four export terminals on the coast of the Gulf of Sirte while one line exists at Marsa Hariqa near Tobruk where there is a fifth terminal serving the eastern fields.

Natural gas is produced in Libya in the Zelten and Raguba fields and in the smaller fields which used to be run by Oasis and Amoseas. A 36 inch pipeline 175 km long, together with an adjoining 20-22 inch line 98 km long takes the gas to the coast of Sirte. Another huge and long pipeline (670 km) has been built. It started taking natural gas from the Beriga area in September 1989. It will take the gas to the industries along the coast of the Gulf including the Musrata Steel complex. The second stage will take the gas through the same pipeline to the far west of the country.[184] Estimates for the 1990s, made in 1990, projected reserves of gas at 600,000 million cubic metres (m3).[185]

Marsa Brega is one of the two large refineries on the coast of the Gulf. The other, at Ras Lanuf, is the base of the biggest oil-related industrial scheme in the country. The 220,000 b/d refinery was built first, commencing operation in

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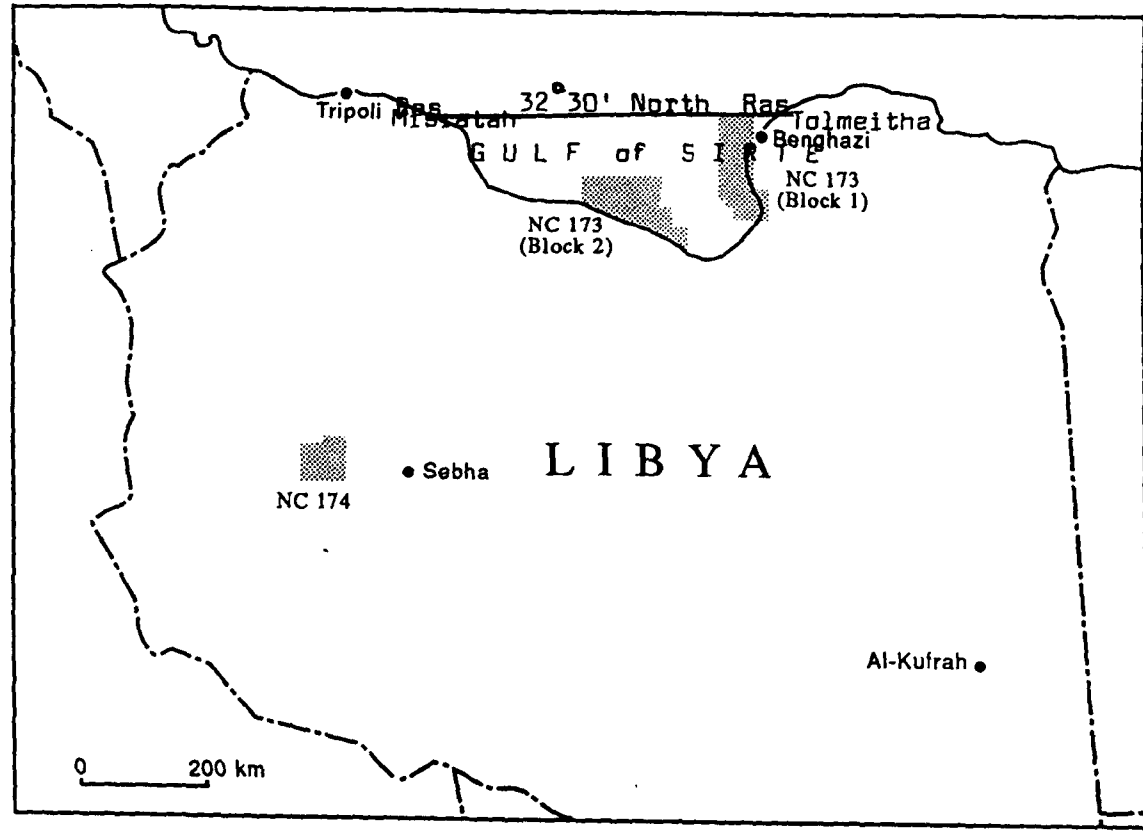
182 Middle East Economic Survey (MEES), Oct. 22nd, 1990. See also Map No.10.

183 Ibid., Jan. 21st, 1991.

184 JANA News Daily Bulletin, London, Sept. 12th, 1989.

185 LNOC, Tripoli, 1990; see also Economist Intelligence Unit (EIU), Country Profile: Libya 1986-87, London, p.23.

CONCESSION NC-173 (Blocks 1 and 2)
British firm (Lasmo) agreement
signed on 11/10/1990



Map No. 10. Petroleum Concessions to LASMO.

1985.[186] A 330,000 tonnes per year ethylene plant was built at the same time. The manufacture of high and low density polyethylene, polypropylene, ethylene glycol and butadiene is planned for the next phase of development and the refining is to be expanded to a capacity of 280,000 b/d. The Ras Lanuf Oil and Gas Processing Company (RASCO) is in charge of the whole complex.[187]

Besides being the site of an oil refinery and natural gas plant, Marsa Brega is to be a centre for urea-based fertiliser and ammonia production. The first fertiliser plant, a $90 million ammonia plant with a capacity of 2,000 tonnes a day (t/d) and 1,000 t/d methanol plant, were both opened in 1977. A second 1,000 t/d ammonia plant was opened in 1983 and a second 1,000 t/d methanol unit is under construction. Besides this, there are also three urea plants with a capacity of 4,500 t/d at Marsa Brega. Another major petrochemical complex is due to be built at Sirte but there has been a delay in the start of the work.[188] When the site is completed there are expected to be two 366,000 tonnes a year (t/y) ammonia units with several downstream production lines, including two 152,000 t/y urea plants, one 264,000 t/y ammonium nitrate unit, a 99,000 t/y ammonium sulphate unit and a 330,000 t/y phosphate fertiliser plant.[189]

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[186] See The Oil Industry in Great Jamahiriya, LNOC 1991, p.24. See also the new production figures, Vol.34 MEES, April 1991.

[187] LNOC (1991), op. cit. See also Alan, 'Industrial Review: Libya', op. cit., (1985), p.272.

[188] Id.

[189] Ibid., p.273.

The Ras Lanuf complex has a capacity of producing 961,000 t/y of petroleum products in addition to the refinery products. It will be completed by a further 6 units.[190]

The coastal towns of the area have enjoyed much of the investment in the development of the infrastructure needed to support the oil and petrochemical industry. Ras Lanuf and Brega are both new towns with projected populations of 84,000 and 40,000, respectively. They are very modern new towns with all the necessary amenities. 23,500 housing units were already available in the region in 1980, with 17,050 more required by 1985 and 35,200 by 2000 AD.[191] All the main settlements will be linked to the national electricity grid with power stations at Ras Lanuf and Brega to provide power for the new petrochemical industry. The rest of the region will be supplied by the 720 megawatts (MW) plant being built at Zueitina further along the coast. The sewerage and water disposal systems are in the process of being upgraded and improved in all the principal urban areas.[192]

Oil is of paramount importance to the Libyan economy as is shown by the fact that since the exportation of oil began in 1961, Libya has been transformed into a country with a GDP comparable to Egypt's, yet Egypt's population is over thirteen times larger than Libya's. The importance of oil is also

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190 These are the High density polyethylene, the Low density polyethylene, the Polypropolyn, the Butadiene extraction, the MIBE and mono-butane, and the Aromatic benzine units [LNOC (1991), op. cit., p.28].

191 Secretariat of Municipalities, op. cit., pp.11-28.

192 EIU, Quarterly Energy Review, Africa Annual Supplement 1983, London (1983), p.60.

illustrated in terms of per capita income; this may be better seen when a comparison between Libya and its western neighbours, Tunisia and Algeria is made.[193]

In fact, oil-related industries made a contribution of about 42% to Libya's GDP in 1989, while manufacturing contributed 6%, agriculture 2% and the service sector 50%.[194] When oil-related activities in the service sector are included the proportion is between 65% and 70%. In 1990, crude oil exports totalled $11,200 million or 99% of Libya's total exports.[195] The oil sector generates over 90% of Government revenue and has done so for more than ten years.

Crude oil exports account for the vast majority of the international trade between the Sirte Basin-Gulf of Sirte Region and the rest of the world. There are four export terminals on the Gulf of Sirte, exporting the bulk of the crude oil, and two smaller terminals near Tobruk and Zawiya. In 1989, Libya was producing an average of 1,145 million b/d of which 107,700 b/d or 9.41% was for domestic consumption. Thus, 1,037,300 b/d as 90.59% was available for export[196] and was exported primarily through the Gulf of Sirte export terminals. When considering these statistics, however, it should be remembered that both the volume and value of all exports was low at this time when compared with the previous decade and what may happen in the future. Between 1980 and

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193 EIU, Country Profile: Libya 1986-87, op. cit., p.10.

194 EIU, Country Report: Libya, No.3 (1986), London (1986), p.2.

195 EIU., Libya in the 1990s, London, 1991, p.17.

196 MEES, Vol.29, No.44, Aug. 11th, 1986.

1990, oil exports averaged almost 1.1 million b/d and earned average revenues of $11,625 million a year.[197]

Petroleum products and natural gas are exported from the Gulf of Sirte region as well as crude oil. In 1989, Libya exported 1.5 billion m3 of natural gas, a small volume of petroleum products.[198] The export terminals in the Gulf of Sirte deal with the exportation of all the natural gas and most of the petroleum products, thus making the Gulf the most important of the country for exports. Not even Tripoli or Benghazi come close to this area in terms of both volume and value of exports.

It has been estimated that the 1980 GDP of the Sirte Basin region was 6,416.48 million Libyan Dinars (LD) or $21,899.6 million at 1980 prices. The oil and gas sector contributed LD 6,383 million or 99/5%, agriculture contributed only LD 0.34 million, manufacturing LD 0.17 million and the other sectors LD 32.97 million[199] as shown in the following table:[200]

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197 Organisation of Petroleum Exportators Countries (OPEC)., Annual Statistical Review, 1990. In 1991 (Jan. to March), the crude oil exports by Libya was 1,550,000 b/d (Vol.34 MEES, No.27, April 8th, 1991).

198 Id.

199 Speerplan, El-Khalij Region: Regional Plan and Urban Planning: Summary Report, Tripoli (1980), p.2.3, (unpublished).

200 McLachlan, K.S., Forecast, Position and Outcome of Proposed Plans for Al-Khalij and Libya by the Year 2000, London (May 1980).

Table 1: Libyan Economic Sectors and the Gulf of Sirte Basin

Sector	Libya	(of which)	Sirte Basin	%
Oil and Gas	8,040		7,638.00	95.0
Agriculture	360		0.25	0.7
Manufacturing	1,090		0.35	0.3
Others	9,610		411.40	4.3
Total	19,100		8,050.00	42.2

If these figures are compared with the GDP statistics for 1980 it can be seen that petroleum accounted for LD 6,500 million or 71% of the GDP of LD 9,165 million. 95% of this came from the Gulf of Sirte region which brings out the importance of the oil industry there to the Libyan national economy. It is, therefore, possible to work out a fairly accurate estimate of the GDP of the Gulf of Sirte region; oil and gas contribute at least 95% of the GDP even though the industrial and agricultural base of the region has been expanding since 1980. The service sector too has grown but is not more than 1% or 2% of the GDP.[201]

The population of the Gulf of Sirte is expected to rise to an estimated 393,000 by the turn of the century, this being an annual increase of 4%. The coastal area is likely to continue to attract large numbers of people so that 86% of the total population will be in the coastal Baladiyats (i.e., municipalities). Most will live in the coastal town and Ras Lanuf should eventually house 84,000 people, to become the region's second largest city.[202] The production of industrial goods with a very high value added will boost the economic

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201 Gurdon, op. cit., p.22.

202 Secretariat of Municipalities, op. cit., pp.10.6-10.12.

development of the region, despite the natural disadvantages there. This industrial development will be based on the petrochemical industry at Ras Lanuf and Brega and will prove to be more important than any other activity. Thus, the next 9 years will see the whole region of the Sirte Basin and the coast around the Gulf of Sirte become the very nucleus of the country, as well as its industrial heartland; the petrochemical and fertiliser industries will be central to this development.

3.2.2. Other Industry and Agriculture in the Gulf of Sirte-Sirte Basin Region

Besides the oil-related industries already mentioned, other important industrial developments are taking place in the region. A huge iron and steel complex was constructed and officially opened on September 9th, 1989,[203] at Misratah on the western side of the Gulf of Sirte, below latitude 32° 30' North. This is Libya's largest industrial project not connected with oil. Over one million tonnes of iron and steel are expected to be produced from the first phase which is being built at a cost of 8.500 million. Production should increase to 5 million tonnes when the second phase is completed, and finally 7 million tonnes when the third phase is finished by 2005. As part of the first phase a $82 million harbour has been built to import iron ore as well as a 480 (MW) power station and a 3.500m a day desalination plant; this

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203 JANA News Daily Bulletin, London, Sept. 9th, 1989.

is in addition to the two 650,000 tonnes capacity steel plants.[204] Libya has extensive iron ore deposits of its own at Wadi Ash Shati, near Sebha in the southwest. When a 999 km railway line is built this ore can be brought to the iron and steel complex at Misratah and imports of ore will not be necessary.

Two large pipe-producing plants are being built by the Dong Ah Construction Industrial Company of South Korea at Marsa Brega on the coast and at Sarir in the desert interior where the pipeline linked to the Great Man-Made River (GMR) project ends.[205] These pipe producing plants are part of the Gulf of Sirte's new light industry development. There are five production lines between the two plants and each plant has a capacity of 600 metres of 4.0m diameter pipe.[206]

Agricultural development in the region is minimal owing to the poor soils, extreme heat and lack of water. Water there is in demand by industry which has a higher priority than farming and the labour force in the area is also engaged in industry rather than agriculture.

Because of the poor agricultural conditions it has become necessary to import up to 70% of the country's food supplies but a great deal is being invested in the improvement of this

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204 Alan, 'Industrial Review: Libya', op. cit., p.268.

205 See Map No.8.

206 Ibid., p.271; see also Gurdon, Ch., 'A Preliminary Assessment of the Distribution of Non-Hydrocarbon Minerals', in Buru, M.M., Ghanem, S.M., McLachlan, K.S. (eds.), Planning and Development in Modern Libya, Menas Press, Wisbech (1989), p.187; The Great Man-Made River. Libya's New Lifeline, in Economic Notebook, OPEC Bulletin (Nov./Dec. 1988), pp.33-38.

situation.[207] The biggest problem is to find sufficient water for the development of agriculture because by far the majority of the country is arid. It is only in the Jefara plan, west of the Gulf of Sirte, and in the coastal side of the Jabal Al Akhdar on the east that conditions are better. Attempts were made during the 1970s to make use of fossil water reserves in the Sahara in major irrigation projects at Kufra and Sarir. It is now intended to bring water form the Sahara north to the coastal farming area instead of developing irrigation schemes in the Sahara. This new agricultural project adds further national importance to the Sirte Basin region.

The GMR project as mentioned above, is to provide much of the irrigation for agricultural development in the region. This was begun in August 1984 and the first stage will be the building of a pipeline from the water wells at the Jalu and Tazirbu oasis to a holding tank at Ajdabiya on the coast of the Gulf of Sirte. In fact, this first stage was finished and water reached Ajdabiya in September 1989.[208] The pipeline then divides with one branch taking water to the Benghazi region for domestic and agricultural use and the other carrying irrigation water to Sirte; a further extension of this latter branch will eventually provide water for the Ksar Ahmed steel plant complex at Misratah. It is planned to make over 180,000 hectares of land around Sirte available for agriculture through irrigation; in addition the new water supply will aid the establishment of ranching on over 1.5

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[207] L.F.O., The Gulf of Sirte Study, op. cit., p.47.

[208] JANA News Daily Bulletin of Sept. 12th, 1989.

million hectares and dry farming on over 135,000 hectares. The irrigated land is to be divided into 37,000 farming units.[209]

The GMR is by far the largest and most expensive single project in Libya today. In fact, it is one of the most important projects in the whole of the Middle East. The overall cost of the three stages is expected to be $8,000 million with annual foreign exchange costs to Libya running at $500 million until the project is completed towards the end of the 1990s.

This project is of vital strategic importance to the country. When fully operational the GMR should deliver 5 million cubic metres of water per day[210] to the coast and should run for between 50 and 100 years. It would simply not be possible to sustain the massive industrial, agricultural and urban development around the Gulf of Sirte without it.

Apart from oil there are other mineral deposits in the region. Large amounts of natural salt are to be found at Maradah south of Ras Lanuf and it is thought that 1.6 million tons of potassium salts and 7.5 million tons of magnesium chloride could be extracted. A chemical plant is planned for Maradah and will produce 30,000 tones of magnesium, 100,000 tons of vinyl chloride monomer, 30-35,000 tons of sodium chloride, 20-25 tons of potassium chloride and 10,000 tons of gypsum. Most of what is produced will eventually be used by

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209 Gurdon, Economic Stydy of the El Khalij Region, op. cit., p.16.

210 Joffé, E.G.H., 'Libya', in Arab Agriculture 1986, Falcon Publishing, Bahrain (1986), p.50.

the petrochemical industries at Ras Lanuf.[211]

Natural sulphur, gypsum and baryte are other mineral deposits found in the area. There are also quarries for limestone and aggregate. These deposits are not yet much developed but could become important in the future for the industrial plants and new towns, as well as the GMR project. All these new developments need building materials which for the most part can be found within the region. Thus, it can be seen that all mineral deposits can make an important contribution to the natural resources of the Sirte Basin; they may not yet be fully exploited but will undoubtedly be in the future.

It should be clear from the discussion in the preceding pages that the whole Gulf of Sirte region has become Libya's industrial heart, the very nucleus of the country. Not only is the Gulf of Sirte the most important export depot but it is also the source of almost all of Libya's present oil and gas production on which the economy is now built and it contributes most of the country's exports as well. It is the economic and industrial hub from which the network of communications and transportation emanates.

The country has undergone a phenomenal change in so few years, involving, in particular, the complete relocation of its industrial centre which was formerly in the desert region. The critical strategic implications of this change and the effect of the geographical factors relating to the Gulf of Sirte will be discussed below.

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[211] Alan, 'Industrial Review: Libya', (1985), op. cit., pp.272-273.

3.2.3. Fishing in the Gulf of Sirte

Throughout Libya's history fishing has been important in the Gulf of Sirte.[212] The catch is by no means large by world standards but is nevertheless significant locally, and it is intended to increase the amount of fish harvested to supply the growing Libyan population.

There is a scientific explanation for the lack of a large fishing industry off the Libyan coast. Natural conditions do not favour fishing because there is only a small amount of phytoplankton (half of the level found along the Atlantic coast of Morocco for example).[213] These algae are the lowest stage of the food chain leading to the support of fish. They do not grow well along the southern coast of the Mediterranean because there is a general lack of biogenic run-off from rivers and the water masses do not get mixed and overturned which would normally bring nutrients to the surface of the sea for the plankton to feed on.

Strong surface currents do exist in the Mediterranean, showing a marked and distinctive clockwise circulation pattern in the Gulf of Sirte from east to west but they do not extend deep enough to cause the necessary upwelling of nutrients. On the other hand, the southerly ghibli wind blows dust from the Sahara and a considerable quantity is deposited over the Mediterranean over a year. The ghibli blows during the spring

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[212] The regulation of fishing by Italy during the time of Italian occupation of Libya has already been discussed in chapter 3, section 2, 2.3.1. See also Map No.2.

[213] Cooper, A.D. (ed.), The Times Atlas of the Oceans, Times Books, London (1983), pp.70-71.

and summer and sometimes in autumn. The dust is carried far out to sea, carrying with it the basic nutrients needed for the growth of phytoplankton, namely nitrogen, potash and salts. This is a compensating factor without which the Gulf of Sirte might be unable to support the growth of any algae and consequently the growth of fish supplies. Thus, the Gulf of Sirte is further linked to the African land to its south.[214] The following table indicates the relative fish catches from Mediterranean waters by the States bordering that sea:

Table 2: Fish Catches from Mediterranean Waters (in tonnes).[215]

	1972	1982	Rank
Albania	4000	4000	13
Algeria	28346	64500	4
Cyprus	1340	1556	14
Egypt	13129	11208	10
France	60154	57690	6
Gaza	4409	1179	17
Greece	53429	79062	3
Israel	3927	4072	12
Italy	348744	390414	1
Lebanon	1800	1400	16
Libya	2400	7425	11
Malta	1200	1197	15
Morocco	17230	33208	9
Spain	91400	163504	2
Syria	1100	923	18
Tunisia	26969	62853	5
Turkey (est.)	13966	46984	7
Yugoslavia	30544	40489	8

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[214] See Blake and Anderson, 'The Libyan Fishing Industry', op. cit.. See Instrupa (West Germany), Final Report on Results of the Test Fishing Programme, Gulf of Sirte, Libyan Arab Republic, Tannenwaldallec, F.R. Germany, (July 1975). In this Report, the prospects for commercial fisheries in the Gulf of Sirte were found to be good. See also the Secretary for Light Industry, Plan for Development of Marine Resources 1981-1985, Tripoli, Feb. 1980; and Sogreah, Study for a General Master Plan for the Development of the Fishing in the Libyan Arab Republic, Grenoble (1973).

[215] FAO, General Fisheries Council for the Mediterranean, Statistical Bulletin No.5, Nominal Catches 1972-1982, Rome (1984).

Whilst Libya comes 11th in the list as regards its Mediterranean catch, it should be noted that a considerable increase has occurred between 1972 and 1990. This is likely to increase still further not only in Libya but throughout the Mediterranean as the population of the area grows and incomes rise. Over-fishing will become a danger. However, foreign fishing vessels do not visit Libyan waters to any great extent.

Tuna was the main type of fish caught until the 1970s, but an increase in catches of all species has followed the implementation of plans to develop the Libyan fishing industry to its optimum level as part of Libya's economic diversification policy. International consultants carried out investigations into fishing on Libya's behalf and advised a substantial increase in the investment in fisheries. The 1973-75 and 1976-80 National Plans improved fishing ports and expanded fishing fleets by establishing a number of joint companies.[216] These developments have involved the Gulf of Sirte to some extent but most of the improvements to the fishing infrastructure have been along the Libyan coast to the east and west of the Gulf. The biggest additions to the catches have been from deep waters using ocean going vessels.

The studies carried out by the international consultants have resulted in plans for the development of fishing in the Gulf of Sirte too; these plans propose substantial investment in port infrastructure (quays, freezing plants etc.) and fishing vessels as well as an increase in the availability and

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[216] Ministry of Planning., The 1976-80 Socio-Economic Plan, Libyan Arab Republic, (1976), pp.233-255.

training of manpower. However, little is yet known about the marine ecology of the Gulf. None of Libya's offshore areas has been scientifically surveyed in detail and information about living resources does not amount to much. In fact, the Gulf of Sirte is one of the least studied of Libya's offshore regions. The only major survey so far which concentrated specifically on the Gulf was the one carried out by Instrupa of West Germany in 1975.[217] Commercial fishing in the Gulf of Sirte was found to have good prospects and inshore fishing of shrimps was suggested as viable as shrimps were found in considerable quantities along the western coast of the Gulf; smaller amounts were also noted all along the coast. The Norway lobster (scampi) was also thought to be potentially useful.

Thus, fishing in the Gulf of Sirte is being developed. In fact, a Libyan fishing and sponge company was established in 1976 by Law No.67. The company is established and located in the Gulf of Sirte.[218] Its purpose is to create a fishing industry in the Gulf but it is still a local industry, important only to the Libyan economy, although Libya started exporting fish on a large scale in 1989.[219] Foreign fishing vessels have no interest in it and no longer enter the area for sponge fishing either as this has declined.

Fishing is, then, another example of the development of the Gulf of Sirte-Sirte Basin region of Libya demonstrating

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[217] Instrupa (West Germany)., Final Report on Results of the Test Fishing Program, Gulf of Sirte, op. cit.

[218] The Official Gazette of Libya No. 25, (1979).

[219] JANA News Daily Bulettin, July 21st, 1989.

the close land-sea link which serves to emphasise just how important the Gulf of Sirte is to Libya's new industrial centre. However, it is not the fishing which is of vital importance to Libya, as it is to some other countries; it is the strategic geographical position which the Gulf occupies, with regard to the heartland of Libya's economic development. This development is based on the recent discovery and production of oil and the consequent development of a major world petroleum industry together with other related industries.

3.3. The Gulf of Sirte Is Not an International Maritime Highway

When the Libyan claim was made in 1973, the protesting States have sought to maintain that the closing of this Gulf would hamper the freedom of navigation of other States, alluding thereby that it would encroach on the flow of international navigation in the Mediterranean Sea which is a very frequented sea route.[220]

In contrast to such argument, the purpose here is to establish that the Gulf of Sirte is not widely used for navigation by other States despite the fact it is located in the Mediterranean Sea which constitutes one of the world's principal waterways.[221] It provides a direct route from the

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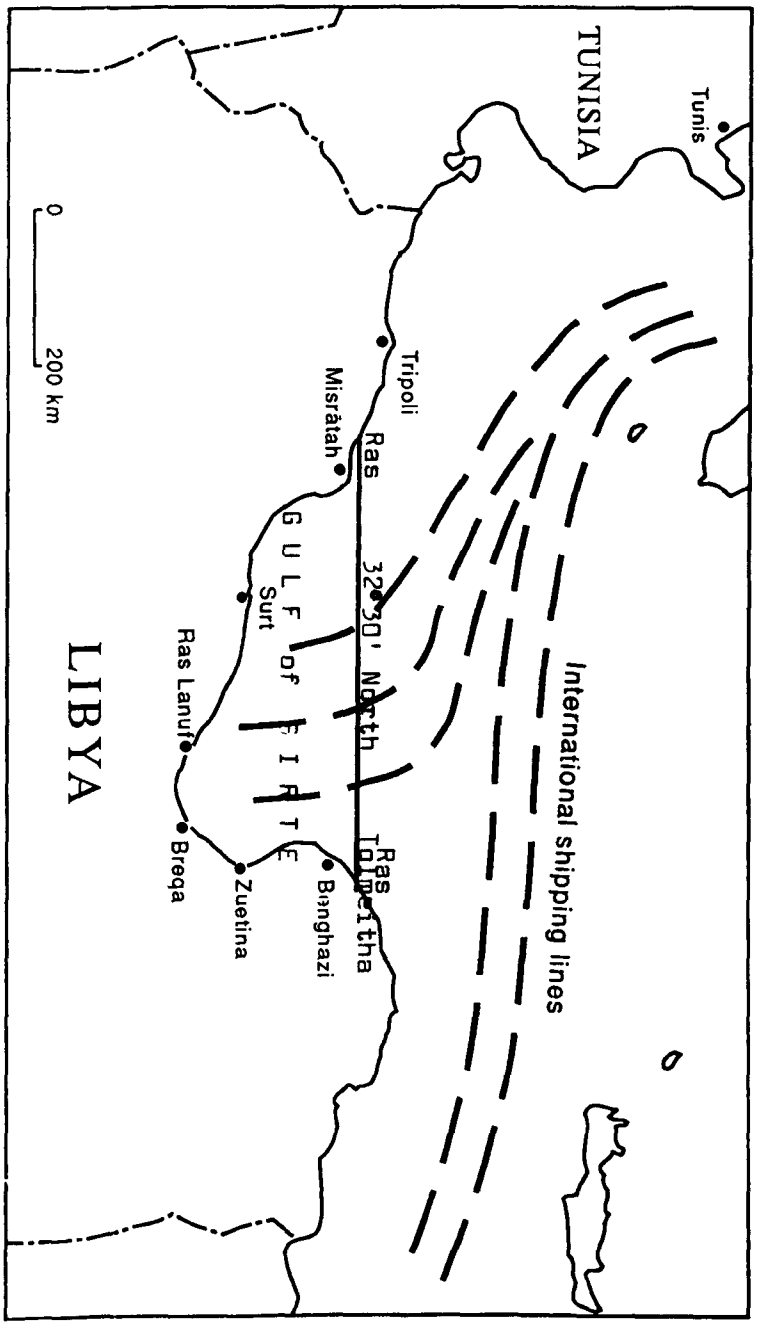
[220] See Map No.11.

[221] Couper, op. cit., p.36. This Atlas shows that some of the world's key container routes are in the Mediterranean. See Map No. 11.



Map No. 11. International Shipping Lines.

Atlantic by way of the Straits of Gibraltar to the Indian and Pacific Oceans, via the Suez Canal. The Gulf of Sirte lies south of this transoceanic communications route, its waters being of primarily local concern to Libya.[222] Shipping centred in the Gulf of Sirte is concerned largely with the export of Libyan oil and imports related to its production, although Benghazi does serve a much broader commercial purpose.[223]

Before the very first oil shipment from Libya left Ras Lanuf in September 1961, the Gulf of Sirte constituted little more than a backwater of the Mediterranean. To the present day, the Gulf is scarcely utilised by non-oil shipping, for two reasons. First, the closing line of the Gulf of Sirte lies some 150 nautical miles to the south of the major east-west international shipping lanes which traverse the Mediterranean.[224] Second, the sparsely populated desert

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[222] The situation in this respect has changed little from the past as illustrated by a 1925 map. (See Phillip, G. and Sheldrake, T.S., The Chambers of Commerce Atlas, George Philip and Son, London, (1925), pp.12-20). The only change has, of course, been the shipping of oil northwards from the terminals in the south of the Gulf of Sirte out to the world markets. See also Map No.11.

[223] According to the 1985 statistics, Libya has a merchant fleet of a total of 28 active ships. Eight of these ships appear to be specifically designed (by size and function) to operate in Libyan waters and between Libyan ports. See A Seatrade Guide, Arab Fishing 1985, City Press, London (1985), pp.109-113; and Lloyd's Register of Shipping, Statistical Tables 1984, Lloyd's Register, London (1985), pp.12-13, pp.36-37). Libya invested in coastal shipping because of the great distance between the east and west parts of the country. This coastal shipping passes across the Gulf of Sirte, creating a kind of artificial "corridor of Libyan territorial sea". See Anderson, E.W. and Blake, G.H., El Khalij Project No.6, unpublished, Dept. of Geography, Durham Univ., (1986), p.5.

[224] See Map No.11.

hinterland of the coastal zone around the Gulf has never generated sufficient or vigorous economic activity to justify commodity port building in the past.

Those Mediterranean States with much more complex coastlines and difficulties of communication by land and larger coastal populations (Turkey, Greece and Spain) make greater use of coastal shipping than Libya. Although small cargo vessels convey goods to the oil exporting terminals in the Gulf of Sirte (including supplies and other equipment for the oilfields), the total volume of goods carried is relatively limited. As a stark contrast to the vigorous competition between recently expanded and modernised container-shipping ports of Marseilles and in Malta and Cyprus, the ports of the Gulf of Sirte play no role in this maritime traffic.[225]

Libyan ships do, however, regularly ply across the mouth of the Gulf, especially between Tripoli and Benghazi. Libyan waters are relatively inactive, especially when compared to the complexity of ferry and other passenger services in the Mediterranean. The most intense concentration of ferry routes is in the more popular and restricted waters of the Aegean, Adriatic and Tyrrhenian Seas.

The important cargo route lying some 150 nautical miles north of the closing line of the Gulf of Sirte, and which was earlier mentioned, is of considerable importance to a large

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[225] Moreover, port facilities in the Gulf of Sirte for general cargo purposes are limited. However, Ras Lanuf does have port facilities which an Italian company began to use in a regular Ro/Ro service in 1985 (Seatrade Guide', Arab Fishing 1985, op. cit., pp.109-113). A "Ro/Ro" service is one providing Roll-on, Roll-off facilities.

number of countries beyond the Mediterranean world. Manufactured goods travel eastward from Europe and North America, whilst raw materials and foodstuffs travel westwards from countries to the south and east of Suez. Indeed, such is the volume of maritime traffic that between 50 and 150 vessels pass particular points on the route in the space of a single day. The route passes to the north of Malta, through the Sicily Channel, which in effect, illustrates the great distance separating these shipping lanes from the Gulf of Sirte.[226]

International civil aviation routes do not generally cross the Gulf of Sirte, but continue directly either to Tripoli or Benghazi. The airspace above the Gulf is not vital for international transportation by non-Libyan aircraft,[227] although overflying aircraft will enter the Libyan air-traffic zone, where they will be subject to the regulations governing Libyan airspace.

In confirmation of the relative isolation of the Gulf of Sirte, Commander Neutze of the US Navy's Judge Advocate General's Corps, wrote that the Gulf of Sirte had been selected for the Sixth Fleet's manoeuvres "because of its... isolation from the main traffic routes in the Mediterranean and consequent low shipping density".[228]

In this context, State practice, precedents and the majority of writers would favour the view that the Gulf of

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226 See Couper, op. cit., pp.164-165 and pp.176-177.

227 See Marghani, op. cit., pp.184 and 186.

228 Neutze, op. cit., p.30. See also Map No.11.

Sirte is geographically close enough to the Libyan coast to the extent that it is exclusively used by Libya and hence does not constitute an international maritime route. By analogy, it is important to refer to the North Atlantic Coast Fisheries Arbitration, the Court held that "the distance which is secluded from the highways of nations on the open sea" is to be taken into consideration when the status of a bay is to be "appreciated".[229]

Moreover, in the Stetson v. United States (The Alleganean) Case, the Court was called upon to decide the juridical status of Chesapeake Bay and found that the Bay constituted US internal waters and in the process, it used the geographical factor. It held, inter alia, that the bay:

> "...[I]s entirely encompassed about by... [US] territory... It cannot become an international commercial highway; it is not and cannot be made a roadway from one nation to another".[230]

The Court concluded that since the Bay "cannot become the pathway from one nation to another" it "must be held to be wholly within the territorial jurisdiction and authority of the US Government and no part of the high seas".[231]

Furthermore, the Court has, in the same case, held that other States could not have been injured if this bay

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229 Scott, op. cit., 1st Series (1916), p.187.

230 Moore, J.B., History and Digest of International Arbitrations, (1898), op. cit., Vol.4, pp.4332-4341 at p.4339.

231 Ibid., at p.4341.

(Chesapeake Bay) became part of the US internal waters.[232]

Further, the same argument was used in later cases such as in the United States v. Louisiana Case, when the US Supreme Court found that:

> "Mississippi Sound historically has been intracoastal waterway of commercial and strategic importance to the United States. Conversely, it has been of little significance to foreign nations".[233]

It added that:

> "...[F]urthermore...there is no reason for an oceangoing vessel to enter the Sound except to reach the Gulf ports. The historic importance of the Mississippi Sound to vital interests of the United States, and the corresponding insignificance of the Sound to the interests of foreign nations, lend support to the view that the Mississippi Sound constitutes inland waters".[234]

Therefore, it appears from the above that one of the main reasons used to support a claim to an historic title to a bay is that the bay in question "does not lead from the sea to the dominions of any foreign nation".[235]

Moreover, at the Eighth (1956) session of the First UNCLOS, Mr. Zourek of Czechoslovakia proposed an amendment

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232 Id., as will be seen later in infra note 255.

233 470 US 93 (1985), at 102, p.81.

234 Ibid., at p.103.

235 See the Attorney-General's Opinion as regards the juridical status of Delaware Bay, in connection with the naval incident of 1793 between the British ship The Grange and the French ship L'Embuscade; Moore, J.B., Digest of International Law, (1906), op. cit., Vol.1, pp.735-739.

which would have changed Paragraph 3 of the Draft Article relating to bays. The last part of this Paragraph stated that the waters of a bay belong to the coastal state "by reason of the distance separating the bay from international shipping laws on the high seas".[236]

Jessup maintained that "by force of geographical circumstance well defined bays are usually not used as maritime highways and nations in general are therefore the less inclined to question individual claims".[237] The Soviet writer Vyshnepolskii wrote that:

> "...[T]he Soviet Union will always defend the principle (of free navigation on the open seas)...But the specially Arctic Seas are not, either juridically or in fact, international highways of maritime navigation".[238]

In this context, Blum rightly writes that:

> "...[I]t becomes evident that one of the major considerations which permit a given bay to be turned into an historic bay is the fact that by its incorporation into the national domain of the littoral state no harm is done, or is likely to be done, to another state".[239]

He reached this conclusion after he submitted that

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[236] Vol.1 YILC (1956), p.197.

[237] Jessup, op. cit., p.355. The same view was given by Barclay, who asserted that:

> "Bays are generally not used for navigation between countries other than the coastal countries. Headlands keep them outside the open routes, separated from the high seas by a clearly defined line".
>
> Barclay, Vol.13, AIDI (1894-95), p.147.

[238] Vyshnepolskii, op. cit., p.43.

[239] Blum (1965), op. cit., p.270.

international practice makes a bay which is possessed by one State its historic bay if it is not used as an international highway.[240] Similarly, O'Connell supposes that a State may be seen to have established effective control over the large maritime areas which it claims as historic bays. He writes:

> "If the penetration [of a bay] is such as to withdraw the indentation from international traffic and the normal incidents of the regime of the high seas, the littoral State may be taken to have substantially effective control of the enclosed waters even though the closing line is extensive".[241]

In the case of the Gulf of Sirte, its closing line is located south of the international navigation route as it appears clearly from Map No.11.[242]

The conclusion is that freedom of navigation became relative in the areas which are considered vital for the coastal State. Freedom of navigation means the peaceful use of these areas, such as innocent passage. Both international conventional law and State practice allow Libya to claim a security zone as indeed it did.[243]

There is no legal reason why the Gulf of Sirte should not be claimed by Libya, especially when the Gulf is of no use to other nations. The Gulf of Sirte is situated south of the

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240 Id.

241 O'Connell, D.P., Problems of Australian Coastal Jurisdiction, Vol.34 BYIL 1958, pp.199-259 at p.234.

242 See Map No. 11 which shows the flow of international maritime navigation routes located north of the closing line of the Gulf of Sirte.

243 As seen in chapter 1, section 2, note 14; see also chapter 3, section 3, 3.2., notes 196-9; and chapter 5, section 3, 3.3.1.(C), note 189.

international highway. It is not used as an international route for commercial traffic.

Besides, other States would not be harmed by the closing of the Gulf of Sirte but Libya would be injured by not having it as its internal waters for the reasons established earlier.[244] The legal significance of the above facts is that the Gulf of Sirte could wholly fall under the sovereignty of Libya. According to State practice,[245] a State has the right to claim historic title or to close its bays even when they are large if they are away from international maritime routes. In addition, Libya is prepared to allow innocent passage (or transit passage) for foreign non-military ships in the Gulf of Sirte and the right of overflight to foreign civilians aircraft over this Gulf.[246]

IV. Assessment

The Norwegian Government denied during the **Fisheries** Case that any absolute or uniform rules existed on the subject of territorial waters delimitation, for this reason - according to Norway the presumption was in favour of the right of a coastal State to delimit its territorial waters in accordance with what it regarded as its vital interests. This argument is still valid because, as already shown,[247] there are, as

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244 As in the above notes 224-243.

245 As shown earlier in section 2, 2.2. and 2.3.

246 See Libyan Draft Law on Maritime Zones, op. cit.

247 See chapter 1, section 1, 1.2., and chapter 2, section 4.

yet, no established conventional rules with regard to historic bays. Therefore, the vital interests of a coastal State must be accepted as a ground on which a State might base its claim. But, these interests must truly exist and must be vital and necessary for the economic existence of the claimant State. Applying this opinion to the Libyan claim, it could also be maintained that Libya is, given its vital interests in the Gulf of Sirte, obliged to protect its interests and the only way to do so is indeed to lay a claim to this Gulf.

At the same time, it must be admitted, as Fitzmaurice points out, that the law of coastal waters is essentially a compromise between the local interests of the coastal State and the interests of other States in the free use and exploitation of the sea for all.[248] In other words, 'the rule of the law of the sea must fairly balance the interests of coastal States in controlling activities off their shores and the interests of maritime States'.[249] Bearing this in mind, and as it has been shown, foreign petroleum companies do exploit the resources in the Gulf of Sirte. Libya has indeed tried to maintain a careful balance between its own interests and those of the international community of States as this is illustrated by the granting of innocent passage for foreign ships in its Gulf which is regarded as internal waters.[250]

Moreover, Brierly maintains that "the legal system [of the international community] must find means of satisfying the

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248 Fitzmaurice (1953), op. cit., p.21.

249 The Panel on the Law of Ocean Uses, op. cit., p.347.

250 See Article 9 of the Libyan Bill on Maritime Zones, op. cit.

vital interests of the State so far as they are reasonable".[251] Again, at this level of the study, it is important to underline the fact throughout this chapter, that the Libyan interests have been proved to be not only vital to Libya but also reasonable, and presumably this explains why no foreign State (with the exception of the US) has tried to interfere practically with them.

By analogy, and in relation to the Gulf of Taranto, Ronzitti, in his support of the Italian claim to this gulf, asserts that:

> "The interests of third states which in this case [the Gulf of Taranto] are scarcely noticeable, should be weighed against those of the coastal state, which are much more substantial. The most important is the necessity of defence, more so than economic considerations. The former made it impossible to delay the enclosure of the Gulf [of Taranto]."[252]

By analogy, it may also be maintained that in the case of the Libyan claim, Libyan interests as already shown, by far outnumber those of the international community of States. This is particularly true insofar as the defence and security interests of Libya are concerned. Hence, the necessity to

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[251] Brierly, op. cit., p.54.

[252] Ronzitti (1984), op. cit., p.295. By a comparative approach, it is submitted that:

> "...[T]he special military-strategic interests of the Soviet Union in Barents Sea, as well as economic interests, were seen as 'special circumstances' that dictate in the Soviet view that this sea should be possessed by the Soviet Union".

Arnfinn Jorgensen-Dahl, The Soviet-Norwegian Maritime Disputes in the Arctic: Law and Politics, Vol.21 ODILJ 1991, pp.411-429, p.417.

close the Gulf of Sirte by drawing a closing line at its entrance.

Moreover, speaking about the conflict of interests of States and the role of international law, Mr. Muhtadi, the Jordanian Representative to the Second UNCLOS suggested that the:

> "...[B]asic issue was the conflict between the principle of the freedom of the seas and the principle of the right of the coastal state to extend its sovereignty over the coastal seas. The obvious way of reconciling divergent views was to seek a compromise, but experience had shown that no compromise was likely to be reached where the vital interests of the states concerned were involved."[253]

He proposed a solution to this problem in the form of 'an accepted practice in municipal law'. In support of his argument, he states that:

> "Two well-known principles of Islamic law were that it was better to avoid an injury than to incur a benefit, and that a lesser injury should be tolerated in order to prevent a great injury. Although analogies between municipal law and international law were not always valid, they might apply in the present case, since only by some such approach could the deadlock be broken. Consequently, where a coastal state laid claim to an extension of its territorial sea for purposes of security, that claim should take precedence over the claims of other states to treat such waters as the high seas for purposes of fishing and trade. Even if the interests of certain states would be injured if the breadth of the territorial sea were extended, greater injury would be inflicted on coastal states if the extension were not granted".[254]

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[253] UN Doc. A/CONF. 19/8 (Annexes and Final Act), UNCLOS II, OR, p.85.

[254] Id.

As a matter of fact, the Libyan claim was based on security considerations. Libyan interests in having the Gulf of Sirte enclosed is much more substantial and third States almost have no interest at all in having it an open sea. In what is known as the Stetson v. United States (The Allegean) Case, when the Court held that Chesapeake Bay was entirely under the jurisdiction of the US, the security considerations were emphasised by the Court. It found that the US defence interests were more important than other nations' interest such as the "belligerent operations between foreign nations within the shores of this bay". The Court further held that:

> "What injustice can be done to any other nation by the United States exercising sovereign control over these waters? What annoyance and what injury may not come to the United States through a failure to do so."[255]

The full and exclusive sovereignty over the Gulf of Sirte by Libya must not be seen as harmful to the interests of other States. But, Libya would incur and suffer injury if it did not enclose it.

The only possible interest of the international community in the Gulf of Sirte would be navigation. The Gulf, as already submitted, is in no way considered as a commercial highway for the international community. In any case, the Libyan Draft Law on Maritime Zones does provide for innocent passage in the

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255 Stetson v. United States (The Alleganean) Case, No.3993, Class 1, Second Court of Commissioners of Alabama Claims, Moore., International Arbitrations, op. cit., Vol.4, pp.4332-35, and 4338.

Gulf of Sirte for foreign ships as already underlined.[256]

The other aspect of navigation is the military use by foreign States of the Gulf. This military use is against the interests of Libya as proved in 1986 when US warships and aircraft violated Libyan sovereignty in the Gulf and attacked Libyan territory.[257]

In addition, if one accepts the right of the US to use the Gulf of Sirte for military manoeuvres, the question which would arise is whether Libya has more important and vital needs and interests in this Gulf and as a consequence to have it closed against foreign use and in particular military exercises by foreign States. The following argument of Brierly might be used in this regard. He writes:

> "Other countries also have interests comparable to those of the United States which they regard as vital and are in no circumstances willing to surrender."[258]

Since Libya declared that the Gulf of Sirte is its internal waters, it has been insisting on maintaining its sovereignty over it. Libya made it clear that it will never, under any circumstances, surrender its right over the Gulf. This has proved true by its practice. The Libyan Leader has, on several occasions, stated that Libya will defend its sovereignty over the Gulf by all means. The military confrontation against US military forces in the Gulf area,

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256 See chapter 5, section 3, 3.2.5. at note 131. See also supra note 8.

257 See chapter 1, section 4.

258 Brierly, op. cit., p.53.

especially in 1981 and 1986, must also be taken as proof of Libyan unwillingness to surrender its sovereignty over the Gulf of Sirte.[259]

The vital interests of coastal States were not only used in the absence of any real rules of international law related to such matters, but it may also be used even when there are some rules, especially if these rules do not make adequate provision for the matter, and do not properly accommodate the matter, its vital interests and, at the same time, the breaking of these rules brings no real harm to other nations. In this context, Brierly writes that:

> "...[O]n the whole it remains true that states in general regard some of their interests and policies as so 'vital' that they mean to remain free to assert them, if need be, whatever the law may say about them, and moreover to decide for themselves which among their national interests they will regard in this way".[260]

He goes on to add that:

> "...[T]here are interests which really are vital and they constitute a real problem, and that they neither can nor ought to be dismissed by demanding that States should submit them to a system of law which does not provide any guarantee that they will be safeguarded."[261]

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[259] As illustrated by the US-Libyan incidents which occurred in 1981, 1986 and 1989, see chapter 1, section 4. See also the speech of the Libyan Leader at the Non-Aligned Movement in Yugoslavia (Sept. 1989), JANA News Daily Bulettin Sept. 7th, 1989.

[260] Ibid., p.51.

[261] Ibid., p.55. Similarly, Acheson, one of the President Kennedy's Advisers believed that 'international law was irrelevant when a nation's vital interests were at stake' (Akehurst, M., Enforcement Action by Regional Agencies, Vol. BYIL 1967, p.175, p.199 at note 3). The same view was maintained by Nydell when he stated that:

> "...[I]nternational law must step aside when vital

Applying this view to the Libyan claim leads to the opinion that Libya could not possibly rely on the sole doctrine of historic bays or provisions on juridical bays (Articles 7 of the TSC and 10 of the LOSC) to defend its interests in the Gulf of Sirte. This would not have safeguarded its interests, hence Libya had to resort to the theory of vital bays and to define for itself its interests in the area.

As it appears from the above State practice, and in the absence of any generally agreed upon rules relating to bays, it might be submitted that "it seems doubtful the doctrine of 'vital bays' may be labelled as a radical and isolated Libyan doctrine".[262] In addition, it might also be asserted that the Libyan claim, if judged in a dynamic context as established above, "may not be qualified as a violation of international law".[263]

The general trend of international law is towards an evolution of its rules in favour of the coastal State. The vital interests of the coastal State will be widely accepted as a rule not only by small and newly independent States but

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interests are threatened".

Nydell, M.S., Tensions between International Law and Strategic Security, Vol.24 VJIL 1984, pp.459-92 at p.461. He also added that:

> "...[t]he regime of international law is, in fact, irrelevant to the decisions of States in matters of vital interest".

Ibid., p.462.

262 Francioni (1984), op. cit., p.323.

263 Ibid., p.324.

also by old States. It can even be predicted that principles of vital bays theory will be codified and accepted as conventional rules. History tells us that many rules were not accepted at the beginning, but later became an international practice and even some of these rules were codified. At the beginning, States protested against many other States' claims because it was seen as against the then existing rules.[264] Then, later, the same practice was accepted.

Among these claims, one could recall the 10-mile rule with regard to the width of bays as some States protested against it before the middle of this century. This became State practice and it later increased to a 24-mile closing line [Articles 7 (4) of the TSC and 10 (4) of the LOSC]. Another example was the EEZ rule which became a part of the LOSC when a 200-mile limit was accepted (Article 57) whereas a 100-mile limit of the same zone would have been seen as an exaggeration a decade before its codification.[265]

The law of bays was also influenced by the general trend. From State practice, the growing number of States' claims to historic bays means that the old concept of historic bays is evolving into a new concept whose crucial elements are the various demands of the coastal State, including vital needs of some bays to be closed for security and economic reasons.

The vital interests of Libya are currently being acquiesced in by other States because, as was shown above, one might remark just how important the Gulf of Sirte is to the

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[264] Such as the traditional three mile-limit.

[265] See supra notes 101-6.

economy and security of Libya. Its geographical position extending as it does into the heart of the region dividing the two major population centres of Libya - themselves located on the coast - means that it is of vital importance to the country. The land it is connected to has grown since the early 1960s into the very heartland of Libya - its major source of oil, the centre of its petrochemical industry and a key link in the communications between the two ports of Libya and between Libya and the rest of Africa to the south, as well as between the industrial centre and the sea. This is the part of Libya which would be the prime target if an enemy State wanted in any way to harm Libya. The economic health and welfare of the Libyan people depend on this very region.

It is perhaps surprising for a country as large as Libya to have only one main industrial and economic centre, but its unique geographical and geological factors make this the case, i.e. it is here that oil has been discovered while the rest of the country is relatively barren except along the narrow coastal strip between the Tunisian and Egyptian borders. Thus, if a warship were free to enter the Gulf of Sirte, it could succeed in coming within striking distance of Libya's heartland.

Finally, the vital interests theory was used to justify sea-areas claims other than closing of a bay. Thus, in the Preamble to the Bill ratifying the Decree of Annexation of Tripoli and Cyrenaica, Italy gave the following motives for its occupation of Libya:

> "Italy has always regarded the equilibrium of political influences in the Mediterranean as her

vital interests and has constantly held her possession of a free hand economically and politically in Tripoli and Cyrenaica to be essential thereto."[266] (Emphasis added).

How could Italy or other European countries make reservations or protest against the Libyan claim which considered the Gulf of Sirte as vital to her security and national economy when the same State or States used the argument of vital interests as essential to them when they occupied by force some parts of the world such as Libya ? Why did the developed countries not accept the argument of some developing countries, such as Libya, when it asserted its sovereignty over areas of waters deemed as vital to its national interest? Why did the same developed countries recognised the claims asserted by some other developed countries, such as the acquiescence of the Italian claim to the Gulf of Taranto which was based on security interests? The Italian occupation of Libya was recognised by some European States as valid at the time.

In this context, it is important to underline the fact that Sir Thomas Barclay proposed a Draft Recommendation which was to be offered by England to Italy and Turkey with regard to the dispute over the sovereignty of Libya. Article 5 of this Draft states that:

"Turkey shall agree to cede Tripolitania and Cyrenaica to Italy".[267]

France also recognised the Italian annexation of Libya

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[266] Vol.6 AJIL (1912), p.464.

[267] Ibid., pp.466-7.

which was seen as vital to the Italian people, but today France denies the fact that a part of Libya which is the Gulf of Sirte is vital to Libya,[268] hence a legitimate claim.

[268] As shown in chapter 5, section 3, 3.2.3.

CHAPTER SEVEN :

CONCLUSION

I. Introduction

Despite the fact that the question of historic bays is of great importance to the international law of the sea and indeed to international relations as the Gulf of Sirte issue has illustrated, the various attempts at codifying rules or/and definitions of historic and/or vital bays (including UNCLOS I to III) have not resulted in a conventional international law regime in this field. As a result, both the TSC and the LOSC are not helpful in this respect, because instead of providing definitions and rules on historic and/or vital bays, they have solely stipulated that historic bays are an exception to the general regime on bays and gulfs.

Three main considerations must be looked at in this conclusion: (i) the Gulf of Sirte as historic bay (section two), (ii) the Gulf of Sirte as vital bay (section three), and (iii) the proposals deduced from this study (section four).

II. The Gulf of Sirte as Historic Bay

After having studied the 1973 Declaration as an historic bay claim, it appears clearly that three main observations need to be made: (i) in the case of customary international law regarding historic bays, (ii) in the political background of the protests to the Libyan claim, and (iii) in the Mediterranean context.

2.1. Customary International Law on Historic Bays

In analysing the Libyan claim, it has been shown that the Gulf of Sirte does not meet the requirements of a juridical bay and that it could not be closed by the use of a system of straight baselines. Thus, the only remaining means by which a closing may be drawn legally across the mouth of the Gulf is by using the historic bays doctrine. And in the absence of conventional international law regulating historic or vital bays, recourse to customary international law, State practice and even the new trends emerging in this field is necessary to justify such a claim.

Recapilating the three traditional criteria, i.e., the immemorial usage, the effective exercise of authority and the international acquiescence criteria, it has been demonstrated that insofar as the first criterion is concerned, strong evidence can be deduced to show that Libya satisfies this requirement. Although it is difficult for a developing State to prove that it has an historical and continuous claim over a bay or gulf because it was under colonial occupation, it is nevertheless clear that Libya has since the 17th century (i.e., the Qaramanli Dynasty) exercised some form of control over sea-areas adjacent to its coasts and beyond the traditional three-mile limit (territorial sea) including the Gulf of Sirte. This control was initially limited to fishing resources as illustrated by fishing laws and regulations underlined earlier, but with the lapse of time, it expanded and became in the 1970s a formal sovereign historic bay claim over the Gulf of Sirte.

As regards the second criterion, there is no doubt that Libya has made every possible effort to exercise, in an effective manner, its authority over the Gulf of Sirte as acknowledged by several writers (Spinnato) and even by some States (Italy). Such exercise plays an important role in the consolidation of the Libyan claim and renders it susceptible of being accepted by the international community of States. This constitutes the strongest aspect in the Libyan claim.

As to the international acquiescence criterion, in contrast to the above, few States have either protested at or registered their reservations to the 1973 Declaration. The remaining of the international community has abstained except for two States (Syria and Burkina-Fasso) which have explicitly recognised the Libyan claim.

2.2. Political Considerations to the Protests at the Libyan Claim

Among the States which reacted to the 1973 Declaration, some of them may be barred from making protests as they have made similar claims; even States such as the US and the USSR have also claimed historic bays, this may cast doubt on the **bona fide** of their protests at the Libyan claim.

Besides, an element of a double standard could be detected as some States (among them the NATO States) have remained notably silent **vis-à-vis** the Italian historic bay claim over the Gulf of Taranto, which is a very similar claim to the claim of Libya and which has hardly any historical basis.

Of the fourteen States, a certain number have been motivated to protest or to reserve their positions for reasons relating to the delimitation of their continental shelf with Libya, and not for reasons of respect for international law. This is particularly true of Greece, Italy, Malta and Tunisia.

Yet, the strongest protest is that the one made by the US which has been repeated on the occasion of incidents involving the US and Libyan forces in the vicinity of the Gulf of Sirte. Nevertheless, it is important to point out that such protest was, it is submitted, motivated more by political considerations than by legal reasons. And it is relevant to underline the fact that every time the political relationship between Libya and the US worsens, the US sends its forces into the Gulf of Sirte to exercise its alleged freedom of navigation. This was the case notably in 1981 and 1986.

2.3. The Gulf of Sirte Claim Within the Mediterranean Context

It is important to underline the fact that some reservations and protests made by some Mediterranean States such as Greece, Italy, Malta and Tunisia should be viewed within the regional context, i.e., the Mediterranean region. In this context, as has been shown, many writers maintain that a regional State practice is emerging in the Mediterranean region insofar as historic and vital bays are concerned. In other words, such practice constitutes an international custom as this practice is generally accepted by Mediterranean States and consequently shows some evidence of international custom insofar as historic and vital bays are concerned. Hence,

historic and vital bays in the Mediterranean have been claimed for political, geographic, economic, military, security and strategic reasons, and in these cases, the element of international acquiescence plays a secondary role. As a result, protests and reservations made, for example by Italy and Tunisia, can be invalidated as these two States have made similar claims over bays and gulfs adjacent to their respective coasts.

In the absence of conventional international rules on historic and/or vital bays, the Mediterranean State practice, which is emerging, could be considered as substitute to customary international law, and thus, constitutes a source of regional international law. Such a regional practice favours the economic, geographic, strategic, security and military factors of the historic bays claims made by Mediterranean States, and by the same token, reduces the importance of the more traditional criteria, such as international acquiescence. It follows, that protests by States outside the Mediterranean Sea would not invalidate an historic bay claim made by a Mediterranean State when all States in this region have accepted it.

III. The Gulf of Sirte as Vital Bay

It is important to review although briefly the reasons why Libya could claim the Gulf of Sirte as a vital bay (i). In addition, and as a corollary, it is relevant to find out on one hand, whether this Libyan vital claim could really harm the interests of the international community of States (ii),

and on the other hand, whether Libya has, by offering the right of innocent passage to foreign ships in the Gulf of Sirte, watered down significant protests (iii).

3.1. Necessity of Resorting to the Vital Bay Concept

In the absence of conventional international law rules on historic bays, and because according to some view as seen in this study, customary international law on historic bays cannot safeguard the Libyan claim over the Gulf of Sirte as an historic bay, Libya could resort to another alternative, i.e., the vital bays concept; is, in any event another formulation of the historic bays doctrine. Another reason for Libya to resort to such a concept is that it needs to remedy the potential lack of international acquiescence prior to the 1973 Declaration as later maintained by the protesting States.

Hence, the vital interests of Libya could be argued to be a ground upon which it could base its claim. But, it must be underlined that these Libyan vital interests must be genuine, must truly exist, and must be vital and necessary to the economic existence and security of Libya.

As to the contention whether or not the Gulf of Sirte constitutes a vital bay, it is important to stress the fact that genuine Libyan vital interests of all sorts (economic, geographic, strategic, security and defence) do exist in relation to this claim. It is also relevant to point out the fact that when such vital interests exist, they usually constitute a justification for a vital bay claim, as State practice has shown.

3.2. Libyan Vital Interests Versus Interests of the International Community of States

This thesis has sought to show that Libyan-perceived national interests have been the real motivation for the Libyan claim over the Gulf of Sirte. Consequently, implementing the 1973 Declaration is seen as a necessity for the realisation of Libyan vital interests, and Libya has shown that it is prepared to go to a great length, including armed confrontation, in order to exercise its sovereignty over the Gulf of Sirte. It has been alleged by some writers that Libyan vital interests seem not to contradict those of the international of States as to the former's are in the nature of a sovereignty claim whereas the latter's are of a more general and international aspect. In fact, such interests do by far outnumber the interests of the international community. In weighing the interests of the international community of States, which are mainly of navigation usage, Libya has, by claiming the Gulf of Sirte, decided to keep a balance between its own vital interests and the interests of the international community.

3.3. Innocent Passage for Foreign Ships in the Gulf of Sirte

Besides, Libya made a compromise between its own vital interests and the interests of the international community of States at large by offering a right of innocent passage for foreign ships through the waters of the Gulf of Sirte which it regards as Libyan internal waters. Thus, the only interest

that foreign States have in this Gulf is safeguarded. Similarly, Libyan vital interests are well protected by the Libyan claim over the said Gulf. The fact that Libya has enclosed the Gulf of Sirte is in no way harmful to the interests of foreign States. Consequently, the Libyan claim fits easily within the category of vital bays claims.

IV. Proposals

As already seen, the historical development of the concept of historic bays has demonstrated that there is still a need to provide for a new conventional regime comprising new rules and definitions for historic and vital bays. In this context, it should be stressed that the new norms of the law of the sea must be formulated so as to achieve a balance between the legitimate of coastal States and of the international community. The proper balance could be achieved only when each State recognises that, at a given point, its interests must not contradict those of the international community.

The new legal regime of bays should accord with the interests of the majority of States which are developing countries. These countries need to claim large areas of sea to increase, develop their economies and to safeguard their security. The norms related to the law of bays which should be incorporated in the law of the sea must both reflect the existing rules and represent a progressive development of it. They would reflect the interests of States which sought to define a more just international economic order, and one that

is more in accordance with the needs of economic, security and social development.

Rules of international law should be established to protect the interests of weak and small nations especially when these new rules of international law are not prejudicial to the vital interests of the international community.

The underlying conclusion is that a new regime for historic and vital bays should be codified and incorporated in the LOSC as part of the updating process. Like the archipelagic regime, such a regime should safeguard the right of innocent passage for foreign ships in claimed historic and vital bays which are essential to international navigation routes, and it should above all protect the sovereignty and the vital interests of the coastal State over its claimed bays and gulfs. This will greatly help to avoid the confusion and the abuse of interpretation resulting from the absence of clear definitions and rules on historic and vital bays.

In this context, and in contrast with past State practice regarding historic bays, developing States should substantially contribute at the codification of this new regime so that the new international law of the sea must consist of rules universally agreed upon by the international community of States in its entirety. Hence, the new world order would also include a new juridical dimension.

In so doing, reference to some Third World fora resolutions, such as the Recommendations of the African Seminar and the **Blue Papers**, to the existing State practice, to the new trends in this field, and to the new doctrine emerging in the area of historic and vital bays must be made.

Meanwhile, Libya should proceed with its proposed legislation and regulation to make the regime in the Gulf of Sirte a flexible one, i.e., by accommodating the right of innocent passage for foreign ships. This will greatly enhance the prospect of rendering the Libyan claim more acceptable to the protesting States, and will keep it within the new trends emerging in the international law of the sea.

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