

**SOME REMARKS ON THE LEGAL STATUS OF BAYS ACCORDING  
TO CONVENTIONS ON LAW OF THE SEA  
CONCLUDED UNDER THE AUSPICES OF THE UNITED NATIONS**

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**1. Introduction**

International law has always recognized the special position of bays, according to which certain kinds of bay were deemed to constitute part of a State's internal waters because of their close connection with the coast. Notably, it may be noted that even Grotius decided to exclude bays from his concept of freedom of the seas together with inland seas, straits, and "...as large a sea as can be sighted from land". Moreover in *De Iure Belli et Pacis* (1625), he added that a bay may be occupied by the state owning "...the land of its both sides unless the bay is so large in relation to the surrounding land mass that it cannot be considered a part of it"<sup>1</sup>. An important role in the evolution of legal rules governing bays was also played by John Selden's concept, as presented in *Mare Clausum* (1618) which, in contrast to Grotius's *Mare Liberum* (1609), stated that coastal states were allowed to possess and control the seas.

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<sup>1</sup> See, G. Westerman, *The Juridical Bay*, Oxford 1987, at p. 45.

Different theories existed as regards the maximum size of bay constituting part of the territory of a coastal state, such as for instance the double cannon-shot rule<sup>2</sup>, the double territorial sea limit, the 10 miles limit rule or the headland to headland theory<sup>3</sup>. Nevertheless, none of these became generally accepted as a rule of customary international law. In the late XIX century, some private codification efforts were undertaken. For example, during its meeting in Paris in 1894, the Institute of International Law adopted a definition of a bay which prescribed a maximum width of 12 nautical miles. One year later, the International Law Association in Brussels decided to set this distance as 10 nm<sup>4</sup>. However, in the 1910 *North Atlantic Coast Fisheries case*, for instance, the Arbitral Tribunal did not consider the ten-mile formula to constitute a ‘principle of international law’<sup>5</sup>. The Arbitral Tribunal stated that it was unable to understand the term ‘bay’: “...in other than its geographical sense, by which a bay is to be considered as an indentation of a coast bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally.”<sup>6</sup>

The delimitation of bays (including historic bays) also featured as a discussion issue at the 1930 Hague Codification Conference, during which no successful codification of the matter was undertaken. However a draft article on bays was proposed in a report of the Sub-Committee No II of the Second Committee considering rules related to territorial sea issues. This report stated that:

[I]n the case of bays the coast of which belongs to a single State, the belt of territorial waters shall be measured from a straight line drawn across

<sup>2</sup> This rule was presented in 1702 by Cornelius van Bynkershoek in his *De Dominio Maris*. As regards the maritime belt, he then stated that “...on the whole it seems a better rule that the control of the land (over the sea) extends as far as cannon will carry: for that is as far as we seem to have both command and possession”. See, *Ibidem*, at pp. 49–50. On cannon shot rule see also M. Wesley Clark, Jr., *Historic bays and waters. A Regime of Recent Beginnings and Continued Usage*, New York–London–Rome 1994, at pp. 16–17.

<sup>3</sup> D.P. O’Connell, ed. I.A. Shearer, *The International Law of the Sea*, Vol. I, Oxford 1984, at p. 381.

<sup>4</sup> M. Wesley Clark, Jr., *op. cit.*, at pp. 28–29.

<sup>5</sup> See, Y. Tanaka, *The International Law of the Sea*, Cambridge University Press 2012, (loc. 4084).

<sup>6</sup> See, G. Westerman, *op. cit.*, at p. 6.

the opening of the bay. If the opening of the bay is more than ten miles wide, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed ten miles<sup>7</sup>.

The ten mile rule was referred to again in 1951 in the *Anglo-Norwegian Fisheries Case*. The United Kingdom stressed that the 10 mile rule could be regarded as a rule of international law but the International Court of Justice<sup>8</sup> rejected this submission and stated that:

[a]lthough 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 these 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<sup>9</sup>.

Accordingly some conventional rules of a multilateral character were swiftly needed. The codification effort was undertaken once again within the United Nations by the International Law Commission<sup>10</sup> and finally led to the 1958 Geneva Codification Conference.

## 2. The convention rules on bays

Nowadays, the rules determining the international legal position of bays are included in two conventions on the law of the sea concluded within the United Nations, namely the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone<sup>11</sup> (art. 7) and the 1982 United Nations Convention on the Law of the Sea, opened for signature on

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<sup>7</sup> League of Nations Conference for the Codification of International Law 1930. Edited with an Introduction by S. Rosenne, Vol. 3, at p. 131.

<sup>8</sup> Hereinafter called "ICJ".

<sup>9</sup> Fisheries case (United Kingdom v. Norway), Judgment of 18.12.1951, ICJ Reports 1951, at p. 131.

<sup>10</sup> Hereinafter called "ILC".

<sup>11</sup> Hereinafter called "1958 Geneva Convention". United Nations, *Treaty Series*, Vol. 516, p. 205.

10.12.1982 at Montego Bay, Jamaica<sup>12</sup> (art. 10). The aforementioned articles specify the criteria for defining the term ‘bay’ for the purposes of these conventions on the law of the sea. Such bays are, in legal terminology, usually referred to as juridical bays. This term is intended to distinguish a bay, in the legal sense, from other sea areas which are bays by virtue of their geographical description<sup>13</sup>.

The legal status of bays is regulated in articles 7 and 10 of the 1958 Geneva Convention and UNCLOS respectively. These articles possess almost identical wording, with the only slight deviation being found between art.10 § 6 of UNCLOS<sup>14</sup>, which states that the provisions of this article “do not” apply to “so-called ‘historic’ bays”, and art.7 § 6 of the 1958 Geneva Convention, which states that the provisions “shall not” apply in such circumstances<sup>15</sup>. The second difference relates to the cross-reference there prescribed which concerns art. 7 instead of art. 4. However this change does not seem to have any legal importance<sup>16</sup>.

D.R. Rothwell and T. Stephens rightly claim that both UN conventions explicitly or implicitly recognize five types of bays<sup>17</sup>, being:

- historic bays;
- bays enclosed within internal waters as a result of drawing straight baselines system;
- bays claimed to form a part of internal waters by more than one state;
- the juridical bays (with their entrances not larger than 24 nm)

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<sup>12</sup> Hereinafter called “UNCLOS”. United Nations, *Treaty Series*, Vol. 1833, at p. 3.

<sup>13</sup> This term is *inter alia* used by G. Westerman *The Juridical Bay*. See G. Westerman, *op. cit.* See also, J.N. Moore, M.H. Nordquist, S.N. Nandan, S. Rosenne, *United Nations Convention on the Law of the Sea 1982. A Commentary*, Vol. II., Leiden 2003, at p. 117.

<sup>14</sup> Art. 10 § 6 of UNCLOS – “The foregoing provisions do not apply to so-called «historic» bays, or in any case where the system of straight baselines provided for in article 7 is applied”.

<sup>15</sup> Art. 7 § 6 of 1958 Geneva Convention – “The foregoing provisions shall not apply to so-called «historic» bays, or in any case where the system of straight baselines provided for in article 4 is applied”.

<sup>16</sup> For this reason and for the sake of simplicity, the aforementioned conventions on the law of the sea concluded within the auspices of the United Nations will hereinafter be jointly referred to as the “UN conventions”.

<sup>17</sup> D.R. Rothwell, T. Stephens, *The International Law of the Sea*, Oxford and Portland, Oregon 2010, at p. 46.

- and last but not least there are bays which also “...meet the criteria for recognition as a juridical bay with natural entrance points greater than 24 nm<sup>18</sup>.”

The first category of bays, historic bays, are merely mentioned in the aforementioned provisions, with no attempt to offer any definition of such bays. The second type concerns indentations which may form part of internal State waters if the straight baseline system is applied (on the basis of art.4 of the 1958 Geneva Convention and art.7 of UNCLOS). The status of such bays is discussed later in this article.

### **3. Bays with more than one littoral state**

The third category considers bays with more than one littoral state; such bays are expressly excluded from the scope of application of the aforementioned articles<sup>19</sup>. The conventions seem not to accord any special treatment to such geographical bays. On one view, in these situations the territorial sea should be measured from the low water baseline along the coast. G. Westerman deems this provision to be a codified version of a customary rule of international law. She stresses that it is an unequivocal statement which “...is necessary in order to prevent large bodies of water such as the Mediterranean or Baltic seas from technically becoming juridical bays under Article 7<sup>20</sup>”. It must also be added that G. Westerman notices that there is “...one judicial exception to this rule” regarding the Gulf of Fonseca<sup>21</sup>. This bay was adjudged, almost a hundred years ago by the Central American Court of Justice, to be co-owned by El-Salvador, Nicaragua and Honduras. However, it should be noticed that the special status of The Gulf of Fonseca was strongly connected with the historical rights of the littoral states as successors to the Crown of Castile, which indicates that this gulf was formerly bordered by a single state.

It is worth noticing that another view exists, according to which in such situations coastal states are entitled to draw a closing line on the

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<sup>18</sup> D.R. Rothwell, T. Stephens, *op. cit.*, at p. 46.

<sup>19</sup> “§ 1. This article relates only to bays the coasts of which belong to a single State”.

<sup>20</sup> G. Westerman, *op. cit.*, at p. 79.

<sup>21</sup> *Ibidem*.

basis of agreement. Y. Tanaka recalls an example of such an agreement signed in 1988 between Tanzania and Mozambique, pursuant to which the parties resolved to close “...the Rovuma Bay, by drawing a straight line linking two cross-border points”<sup>22</sup>.

#### 4. Juridical bays

Let us now concentrate on the final two categories of bays, juridical bays, which are distinguished on the basis of whether or not the maximum mouth width exceeds 24 nm.

The conventions’ definitions of juridical bays belonging to the internal waters of a single coastal state are included in first four paragraph of the aforementioned articles of the 1958 Geneva Convention and UNCLOS<sup>23</sup>. Firstly, according to § 1 of both articles, these provisions relate only to bays having a single littoral state. The remaining three paragraphs then determine the geographical and geometrical criteria identifying a bay<sup>24</sup>. A slightly different view is presented by R.R. Churchill and A.V. Lowe who state that, in order to constitute a bay in a legal sense, an indentation must comply with a subjective description and fulfil an objective geometric test laid down by the convention<sup>25</sup>. Conversely, G.S. Westerman considers that the definition of a bay is embodied solely in § 2 and the first sentence thereof merely “sets out the *geographical* criteria which must be met in order to enclose an indentation as a juridical bay” whilst the second sentence “contains a *mathematical* formula to be used as a check to be sure that the geographical requirements are met and to define with

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<sup>22</sup> Y. Tanaka, *op. cit.*, loc. 4215.

<sup>23</sup> “§ 2. For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. 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.”

<sup>24</sup> See Y. Tanaka, *op. cit.*, loc. 4098.

<sup>25</sup> R.R. Churchill, A.V. Lowe, *The Law of the Sea*, 3<sup>rd</sup> ed., Manchester University Press 1999, at pp. 41–42.

more certainty those indentations which are truly inland and not mere curvatures of the coast”<sup>26</sup>.

Geographical (or subjective description) criteria are embodied in the first sentence of this paragraph, stipulating that “a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast”. The additional rule regarding measurement of the indentation area may be found in the following paragraph which stipulates that: “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 mark of its natural entrance points”.

The geographical criteria are comprehensively discussed by G. Westerman, who states that this paragraph designates “two separate geographical criteria, which may or may not be related<sup>27</sup>”. According to the first criterion, a bay should be a well-marked indentation, whereas the second criterion considers the proportion between the depth of inland penetration and the width of a bay entrance. This proportion should obviously indicate that an indentation contains landlocked waters and not merely a curvature of the coast.

As regards the criterion of a “well-marked indentation”, G. Westerman presents some suggestions regarding its meaning. According to the first of these, an indentation should be marked on large-scale charts officially recognized by the coastal state. An alternative possibility is that “...because several hydrographers, including Boggs, Beazley, and Alexander, took an active role in the drafting process, the term “well-marked” must, therefore, have been used in the familiar hydrographic sense of being conspicuously marked with a lighthouse, entranceway, or other navigational aid”<sup>28</sup>. However, none of these suggestions enjoys sufficient support within the convention itself. Accordingly, G. Westerman considers that a well-marked indentation means a kind of “...geographical obviousness. i.e. the existence of a coastal indentation lying behind identifiable entrance points

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<sup>26</sup> G. Westerman, *op. cit.*, at p. 79.

<sup>27</sup> *Ibidem*, at p. 81.

<sup>28</sup> *Ibidem*, at p. 84.

and having the general configuration of a bay, which is sufficient to put mariner on notice”<sup>29</sup>.

It should be pointed out that the natural entrance points requirement is not always easy to fulfill, since such points are sometimes difficult to identify, especially if the bay possesses a few possible entrances. Sometimes bays have “...a number of such points and others possess smoothly curved entrances on which no single point is distinguishable”<sup>30</sup>. The truth is that the UN conventions offer no clue as regards how to identify such natural entrance points. Therefore, this issue has been left over to State practice. For example, natural entrance points represented a disputed issue in the *Post Office v. Estuary Radio* (1968) case heard by the English Court of Appeal, which was required to decide whether the Thames estuary constituted a bay in the legal sense. Estuary Radio claimed that the natural entrance points were Orfordness and the North Foreland and that, consequently, the Thames estuary did not constitute a bay since it failed the semi-circle test, discussed later. Conversely, the Post Office submitted that the baseline closing the bay should be drawn between the Naze and Foreness as its natural entrance points. R.R. Churchill and A.V. Lowe are of the view that, although the court “...accepted the Post Office’s contention, neither set of points seems very obviously to be the ‘natural entrance points’ of the estuary”<sup>31</sup>. They also add that other difficulties may occur in cases where “...rivers running into a bay, or other subsidiary features such as lagoons, should be taken into account in calculating the area of water within the bay”<sup>32</sup>.

According to the second geographic criterion, the indentation should consist of “landlocked waters”. This term also lacks any unambiguous definition and leaves room for different suggestions. It is worth noticing that M.P. Strohl presents the view that the term “landlocked” even requires that a bay’s depth inland should be at least equal to the width of its mouth<sup>33</sup>. However, in concurrence with G. S. Westerman, it is submitted that such an interpretation should be rejected by virtue of

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<sup>29</sup> *Ibidem*, at p. 85.

<sup>30</sup> J.N. Moore, M.H. Nordquist, S.N. Nandan, S. Rosenne, *op. cit.*, at p. 117.

<sup>31</sup> R.R. Churchill, A.V. Lowe, *op. cit.*, at p. 42.

<sup>32</sup> *Ibidem*.

<sup>33</sup> M.P. Strohl, *The International Law of Bays*, The Hague 1963, at pp. 56–57.



State practice. Westerman simply recalls that several earlier attempts to define this term on the basis of precise width-depth ratios were expressly rejected not only at the Hague Codification Conference but subsequently by the International Court of Justice and the International Law Commission during its preparatory works on the law of the sea in the 1950's<sup>34</sup>. Accordingly, such a broad interpretation of this term appears unjustified. The most reasonable explanation is perhaps the simplest one, meaning stating that this requirement describes a configuration wherein the waters of a bay are surrounded by land on all sides but one<sup>35</sup>.

The geometrical criteria (mathematical formula) laid down in the second sentence of paragraph 2 considers the semi-circle test. This provision states that: "an indentation shall not [...] 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". It's worth noticing that the semi-circle requirement was not embodied in the first draft article on bays presented by J.P.A. Francois – the ILC's Special Rapporteur in 1952. The text of this draft article was identical to that presented at the Hague Codification Conference in 1930 and included in the report of Sub-Committee No II of the Conference Second Committee<sup>36</sup>. This choice seems natural, especially if we take account of the fact that J.P.A. Francois was also Rapporteur of the Second Committee during its works at the Hague Conference in 1930.

The semi-circle test was introduced by J.P.A. Francois, the ILC Special Rapporteur in the Supplement to his 2<sup>nd</sup> report on the regime of territorial sea in 1953<sup>37</sup>. This requirement was presented for the first time during the works of the ILC by the international group of technological experts convened at the Hague in April 1953 to discuss certain geographical factors peculiar to bays. According to the then proposed definition: "A bay is a bay in the juridical sense if its area is

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<sup>34</sup> G. Westerman, *op. cit.*, at p. 87.

<sup>35</sup> J.N. Moore, M.H. Nordquist, S.N. Nandan, S. Rosenne, *op. cit.*, at p.117. See also, *inter alia*, Y. Tanaka, *op. cit.*, loc. 4110.

<sup>36</sup> The text is also available in ILC Yearbook. See, 'ILC Yearbook' 1952, Vol. I, p. 188.

<sup>37</sup> Art. 6.1. Une baie est une baie *juridique* lorsque sa superficie est egale ou superieure a la superficie du demicercle ayant comme diametre la ligne tiree entre les points limitant l'entree de la baie. (Sont exceptees les baies historiques, ainsi libellees sur les cartes.). See, 'ILC Yearbook' 1953, Vol. II, at p. 76.

as large as, or larger than, that of a semi-circle drawn on the entrance of that bay. Historic bays are excepted; they should be indicated as such on the maps<sup>38</sup>. The text proposed by the Special Rapporteur at the fifth session of ILC in 1953 almost entirely followed the wording of 1953 expert's proposal. Therefore it should be remembered that the commented requirement was not embodied in the first version of this article submitted in the previous year.

Hence, according to the discussed UN conventions, an indentation must pass a semi-circle test in order to be classified as a juridical bay. Furthermore, its area should be measured starting from the baseline drawn between the natural entrance points of an indentation and further along the coast according to a low-water mark. If an indentation has more than one entrance [because of the presence of islands] 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 (§ 3<sup>39</sup>).

The last condition is laid down in paragraph 4 of the said articles and considers the maximum distance between the low-water marks of the natural entrance points of a bay, which should not exceed 24 nautical miles<sup>40</sup>. This requirement also has a long and interesting drafting history. By way of indication of such history, mention may be made of the first report presented by J.P.A. Francois in 1952 on the topic of bays, which contained an extremely short article permitting a single littoral state to draw a baseline across the mouth of the bay not exceeding 10 nm. The 10 mile limit was also upheld in the 1953 expert's proposal, which also

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<sup>38</sup> M.P. Strohl, *op. cit.*, at p. 219.

<sup>39</sup> "§ 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 mark 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".

<sup>40</sup> "§ 4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters".

contained the explanation according to which such a baseline distance is equal to "...twice the range of vision to the horizon in clear weather, from the eye of a mariner at a height of 5 meters being the internationally accepted height for hydrographical purposes"<sup>41</sup>. The entrance limit was subsequently increased to 25 miles<sup>42</sup> in ILC drafts adopted in 1955, before being lowered to 15 miles in the following year<sup>43</sup> and finally set at 24 nm by the aforementioned UN conventions.

When all of these requirements are fulfilled, a closing line may be drawn between two low-water marks at the mouth of the bay, and the waters enclosed thereby shall be considered as internal waters of the coastal state.

In summary, as regards the above mentioned requirements, it should be stressed that both geographical and geometrical characteristics must be present in order for a particular stretch of water to be categorized as a juridical bay. It is insufficient for a bay to pass the semi-circle test if the geographical requirements are unfulfilled. For example, the United States Supreme Court rejected the argument raised by Louisiana claiming "...that an indentation which satisfies the semicircle test *ipso facto* qualifies as a bay under the Convention" and pointed out that "such a construction would fly in the face of Article 7(2), which plainly treats the semi-circle test as a minimum requirement"<sup>44</sup>. In this case the Supreme Court concurred with the submissions made by the United States "...that the area within the East Bay, which is shaped as an equilateral triangle, did not constitute a bay because there was no 'well-marked indentation with identifiable headlands which enclosed landlocked' waters, nor even the slightest curvature of the coast at either entrance point selected by Louisiana"<sup>45</sup>. Accordingly, it appears that this bay (being the perfect example of a so-called V-shaped bay) was too wide open to be landlocked. All of the requisite requirements should be treated as one composite whole to form a juridical bay.

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<sup>41</sup> M.P. Strohl, *op. cit.*, at p. 219.

<sup>42</sup> 'ILC Yearbook' 1955, Vol. I, at p. 213 [79].

<sup>43</sup> 'ILC Yearbook' 1956, Vol. II, at p. 269.

<sup>44</sup> *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11,54 (1969), See: G. Westerman, *op. cit.*, at p. 95.

<sup>45</sup> D.P. O'Connell, ed. I.A. Shearer, *op. cit.*, Vol. I, Oxford 1982, at p. 394.

## **5. Bays fulfilling the criteria for juridical bays and having entrances wider than 24 nautical miles**

The fifth category of bays (according to the Rothwell and Stephens classification) regards those bays which meet the geographic and geometric criteria for recognition as a juridical bay but have a distance between their natural entrance points which is greater than 24 nautical miles. The status of such bays is regulated by paragraph 5 of the aforementioned articles<sup>46</sup>. In such cases “a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length”. States are entitled to include certain parts of these areas as their internal waters, provided that the shape of the bay fulfills the geographic and geometric conditions laid down in § § 2 and 3, including the semi-circle test.

Pursuant to these regulations, only certain parts of a bay whose closing line exceeds 24 nautical miles may be recognized as a State’s internal waters, even if it otherwise complies with the applicable juridical bay criteria.

An interesting point is that, according to the UN conventions, there is one more category of bay which was not highlighted by D.R. Rothwell and T. Stephens. These authors rightly claim that, apart from the five types of bay explicitly or implicitly recognized by the UN conventions on the law of the sea, there are parts of coast traditionally referred to as a bay but not officially recognized as juridical bays because they are mere curvatures of the coast. However, in fact there remains one more category of bays, namely those with closing lines shorter than 24 nm which fulfill the geographical bay requirements but do not fulfil the semi-circle test. An example of this is a “v” shaped bay deeply indented into the coast and having an area which is insufficiently large to pass the semi-circle test. In fact, the exclusion of such bays does not seem to be justified by

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<sup>46</sup> “§ 5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length”.

any interest of the community of states and, therefore, should be viewed as a regrettable drafting omission which is, unfortunately, unlikely to be remedied<sup>47</sup>.

## 6. The straight baselines system

According to Y. Tanaka:

[s]traight baselines can be defined as: a system of straight lines joining specified or discrete points on the low-water line, usually known as straight baseline turning points, which may be used only in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity<sup>48</sup>.

The law concerning the straight baselines system has developed in the context of claims raised by Norway on the basis of its 1935 decree delimiting straight baselines north to 66°28.8' N. This coastal zone is over 1,500 kilometers in length and lies north of the Arctic Circle. As stated by the ICJ in 1951 in the Fisheries Case (*United Kingdom v. Norway*), it includes "...the coast of the mainland of Norway and all the islands, islets, rocks and reefs, known by the name of the «skjærgaard» (literally, rock rampart), together with all Norwegian interna1 and territorial waters"<sup>49</sup>. The court stated that "...the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities "...where a coast is deeply indented and cut into as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the «skjærgaard» along the western sector of the coast here in question".

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<sup>47</sup> This situation was spotted by D.P. O'Connell who compares two types of indentations, namely "...shallow bays attenuated on either side or one side of the headlands whose area is as large as that of the semi - circle"; and "...a deep V-shaped bay whose depth is greater than that of the diameter, but whose area is less than that of semi-circle". He wonders "...why the one bay should be a bay and the other not" and adds that this situation "...defies scientific enquiry". See, D.P. O'Connell, ed. I.A. Shearer, *op. cit.*, Vol. I, Oxford 1982, at p. 393.

<sup>48</sup> Y. Tanaka, *op. cit.*, loc. 3894.

<sup>49</sup> Fisheries case, *op. cit.*, at p. 127.

In such cases “...the base-line becomes independent of the low-water mark, and can only be determined by means of a geometrical construction”<sup>50</sup>.

The ICJ found the Norwegian claim to be in conformity with international law and specified three criteria which must be fulfilled when drawing the straight baseline system, namely:

- the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast,
- certain sea areas lying within these lines have to be sufficiently closely linked to the land domain to be subject to the regime of internal waters; and last but not least
- there should be an evidence of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage<sup>51</sup>.

The provisions on the straight baselines system included in both UN conventions adhere to the language used in this ICJ judgment, sometimes almost verbatim.

The rules on straight baselines are set forth by article 4 of 1958 Geneva Convention and article 7 of UNCLOS. The wording of these articles differs to a greater degree than in the case of bays, but the essence of this institution remains predominantly the same.

According to paragraph 1 of both articles, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured. The remaining part of the article concerns the geographical and economic conditions which should be met to establish this method. As regards the geographical conditions, it is noted that this system may be applied in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity. According to geographical requirement states that baselines must not depart to any

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<sup>50</sup> The court stressed that “...such a coast, viewed as a whole, calls for the application of a different method” than the low-water mark “...that is, the method of base-lines which, within reasonable limits, may depart from the physical line of the coast” [*Ibidem*, at pp. 128–129]. Therefore, the view presented by R.R. Churchill and A.V. Lowe seems unjustified when arguing that the ICJ “...suggested that straight baselines were simply a special application of the low-water mark principle of constructing the baseline”. See R.R. Churchill, A.V. Lowe, *op. cit.*, at p. 35.

<sup>51</sup> Fisheries case, *op. cit.*, at p. 133.

appreciable extent from the general direction of the coast, and that the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters (art. 4 § 2 of 1958 Geneva Convention<sup>52</sup>). Both conventions also provide a solution for the extremely thorny issue of so-called low-tide elevations, meaning naturally-formed areas of land that are surrounded by and above water at low tide but submerged at high tide<sup>53</sup>. According to art. 4 § 3 of 1958 Geneva Convention, in such a case baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them. In this regard, it is worth noticing that UNCLOS provides a solution which seems to facilitate the requirements on low-tide elevation points. Apart from repeating the conditions about lighthouses or similar installations built on low-tide emerging rocks, art. 7 § 4 stipulates that straight baselines may also be drawn using the low-tide elevations in instances where the drawing of such baselines has received general international recognition.

As concerns the economic conditions to be taken into consideration, both conventions allow account to be taken of economic interests peculiar to the region concerned in determining particular baselines, provided that the reality and importance of such interests are clearly evidenced by long usage<sup>54</sup>. In applying the straight baselines system, states are also obliged to respect the justified interests of their neighbors. As provided by UNCLOS art. 7 § 6, the system may not be applied in such a manner as to sever the territorial sea of another State from the high seas or an exclusive economic zone.

The final condition laid down in the conventions obliges states to clearly indicate straight baselines on charts, to which due publicity must

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<sup>52</sup> Exactly the same conditions are provided by the UNCLOS art. 7 § 3. But UNCLOS provides also some new requirements upon which states are entitled to move the projected baselines even further seaward. These rules are provided in the art. 7 § 2 according to which: “Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention”.

<sup>53</sup> As defined in the art. 11§ 1 of 1958 Geneva Convention and UNCLOS art. 13 § 1.

<sup>54</sup> According to art. 4 § 4 of 1958 Geneva Convention and UNCLOS art. 7 § 5.

be given (art. 4 § 6 of 1958 Geneva Convention). The straight baselines system must be publicized for navigational purposes. Nevertheless it should be noted that, in accordance with both conventions, the right of innocent passage is supposed to exist on those waters which were enclosed as internal waters upon the straight baseline system when such areas were previously considered as part of the territorial sea or of the high seas (art. 5 § 2 of 1958 Geneva Convention)<sup>55</sup>.

The publicity requirement has been upheld in the UNCLOS and now possesses even greater scope, since it encompasses not only bays enclosed under the straight baseline system but also juridical bays as defined in accordance with art. 10. According to UNCLOS art. 16, such baselines for measuring the breadth of the territorial sea or the limits derived therefrom should be indicated on charts of a scale or scales adequate for ascertaining their position or, alternatively, a list of geographical co-ordinates of points which specify the geodetic datum. Moreover, the coastal state is obliged to give due publicity to such charts or lists of geographical co-ordinates and to deposit a copy of each such chart or list with the Secretary-General of the United Nations<sup>56</sup>.

The straight baseline system also affects the position of bays. The ICJ indicated that the Norwegian coast indentations often penetrate for great distances inland, citing the example of the Porsangerfjord which has a depth of 75 nm inland<sup>57</sup>. It must also be stressed that the longest baseline upheld by the court in this case was 44 nm long<sup>58</sup>, which makes that particular baseline almost twice the length of the maximum permissible length of a juridical bay's closing-line, as stated in the UN conventions (which did not exist at the time of this judgment).

It must be remembered that all of the requirements to be fulfilled by juridical bays do not apply to bays which are either traditionally recognized as part of a State's coastal territory (historic bays) or are recognized as internal waters on the basis of the straight baselines

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<sup>55</sup> Whereas UNCLOS art. 8 § 2 stipulates: "Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters Areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters".

<sup>56</sup> UNCLOS art. 16 § 2.

<sup>57</sup> Fisheries case, *op. cit.*, at p. 127.

<sup>58</sup> R.R. Churchill, A.V. Lowe, *op. cit.*, at p. 37.



system. In this regard, Y. Tanaka draws attention to the fact that “...legally speaking, the closing line across the mouth of a bay and the straight baseline are regulated by two different rules”. He also voices concern about the possibility that § 6 “...can be used as an escape device to avoid rules regulating bays and to draw straight baselines across minor curvatures which are not strictly bays<sup>59</sup>”. In the opinion of this author, it should also be added that such an “escape device” may also be used in the case of larger indentations, especially since the provisions governing the straight baselines system provide no limits regarding the length of such baselines. This is precisely the case as regards Myanmar, which established a straight baseline through the Gulf of Martaban, being 222 nm long and enclosing a body of internal water which is comparable in size to Denmark<sup>60</sup>.

R.R. Churchill and A.V. Lowe estimated in 1999 that some 55–65<sup>61</sup> states had drawn straight baselines along their coast and about two-thirds of these “...depart from the rules of international law in one way or another”. They specify about ten varieties of breaches of the norms governing straight baselines, such as: drawing baselines along coasts which are not deeply indented; using low-tide elevations as basepoints even where no lighthouses or other similar installations had been built on them; drawing baselines which depart from the general direction of the coast<sup>62</sup>; or drawing baselines along islands which do not form a fringe in the immediate vicinity of the coast<sup>63</sup>. They also quoted J.R.V. Prescott, who

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<sup>59</sup> Y. Tanaka, *op. cit.*, loc. 4098.

<sup>60</sup> R.R. Churchill, A.V. Lowe, *op. cit.*, at p. 39.

<sup>61</sup> This number was constantly growing and by 2007 there was 90 states which provided for the system of straight baselines in their national legislation. See D.R. Rothwell, T. Stephens, *op. cit.*, at p. 50.

<sup>62</sup> However it has to be stressed that there is no objective test governing the drawing of baselines in conformity with the general direction of the coast. For example, in the case of Norwegian baseline system, which is regarded as a standard model, the angle of deviation of straight baselines from the general direction of the coast was never more than 15°. While according to R.R. Churchill and A.V. Lowe some of the Ecuadorian and Myanmar baselines are drawn at an angle of 60°, therefore serious departing from the rules of a straight baseline system delimitation. See, R.R. Churchill, A.V. Lowe, *op. cit.*, at p. 39.

<sup>63</sup> For example Vietnam used a small islet of Hon Hai, located 74 miles from the coast, as a basepoint and drew the straight baselines northwards and southwestwards

concluded that such breaches were so numerous that “it would now be possible to draw a straight baseline along any section of coast in the world and cite an existing straight baseline as a precedent”<sup>64</sup>. Y. Tanaka rightly points out that, on innumerable occasions, states have drawn straight baselines too indiscriminately, since the rules governing their delimitation are “...so abstract that the application of the rules to particular coast is to a large extent subject to the discretion of coastal States”<sup>65</sup>.

Nevertheless, it must be added that such discretionary conduct of coastal states often gives rise to objections at an international level. The Vietnam claim<sup>66</sup>, for instance, was objected to by France, Singapore, Thailand and USA<sup>67</sup> and, moreover, the USA as a maritime power also protested against straight baselines drawn by another 26 states<sup>68</sup>. Abuses are also sometimes highlighted by courts, as happened in an ICJ case between Qatar and Bahrain, where the court stated that a number of islands along the Bahrain coast did not form a fringe of islands but that, given their small number, rather constituted a “cluster of islands” or an “island system”<sup>69</sup>. Bahrain’s claim to be entitled to draw straight baselines was denied. Moreover, the ICJ observed that “...the method of straight baselines, which is an exception to the normal rules for the determination of baselines, [...] must be applied restrictively”<sup>70</sup>.

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to another islets (Hon Doi and Bay Canh) located about 161 miles from Hon Hai. See *Ibidem*.

<sup>64</sup> J.R.V. Prescott, *Straight and archipelagic baselines* [in:] G. Blake (ed.), ‘Maritime Boundaries and Ocean Resources’ (London, Croom Helm), 1987, at pp. 38–51. See *Ibidem*, pp. 39–40.

<sup>65</sup> Y. Tanaka, *op. cit.*, loc. 3986.

<sup>66</sup> See, *supra note* 62.

<sup>67</sup> R.R. Churchill, A.V. Lowe, *op. cit.*, at p. 40.

<sup>68</sup> See, J.A. Roach, R.W. Smith, *United States Responses to Excessive Maritime Claims*, 2<sup>nd</sup> ed., The Hague 1997, at pp. 18–19.

<sup>69</sup> Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, ICJ Judgment of 16.3.2001, ICJ Reports 2001, at p. 103, para 214.

<sup>70</sup> As regards the conditions to be fulfilled in determination of the baselines, the Court stated that “...they are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity”. See, Maritime Delimitation and Territorial Questions between Qatar and Bahrain, *op. cit.*, at p. 103, para 212.

## 7. Historic bays

The final category of bays mentioned in the UN conventions on the law of the sea regards historic bays. The rules on historic bays allow coastal states to claim even vast bodies of water as constituting part of their internal waters, provided they are able to prove that they possess historical title thereto.

This term is not unfamiliar to the 1958 Geneva Convention and UNCLOS and is embodied in paragraph 6 of the article dedicated to bays. These particular paragraphs slightly differ, since art. 10 § 6 of UNCLOS states that the provisions of this article “do not”, instead of “shall not” (as in art. 7 § 6 of the 1958 Geneva Convention) apply to “so-called ‘historic’ bays”. These differences do not appear to be of much importance. However, in this author’s opinion, it might be said that the wording of UNCLOS formulated in the present tense (“do not”) more clearly indicates that there also exist other methods of delimiting internal waters which are applicable to bays. Moreover, these methods are only partly laid down in the aforementioned conventions (as in the case of the straight baselines system), whereas they contain no provisions considering the position of so-called “historic” bays. Therefore the parties to the said conventions in fact do seem to admit that there exist some other bodies of sea which constitute part of the internal waters of a state whilst the legal position of such bays is not regulated by the conventions. Moreover, signatories of the UN conventions also seem to agree to refer to some unspecified rules (probably based on customary international law) for determining the status of such bays.

It’s also worth noticing that, in the opinion of some writers, the exception embodied in the aforementioned paragraph excludes not only the conventions’ regulations regarding the delimitation of bays having a maximum length of closing line, but also the definition of a bay itself. It also seems to exclude the semi-circle test. It means that certain sea areas may be included as part of the internal waters of a state on the basis of historical title, regardless of their configuration, since the conventions’ definition of a bay does not apply to historic bays<sup>71</sup>. G. Westerman stresses

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<sup>71</sup> See W. Góralczyk, *Szerokość morza terytorialnego i jego delimitacja* [*The Width of Territorial Sea and its Delimitation*], Warszawa 1964, at p. 151.

that, according to paragraph six, none of the foregoing provisions of this article “even the configuration requirements of paragraph two, are to be applied to historic bays, and the burden will fall to the coastal state to justify a claim of historic use”<sup>72</sup>. Y.Z. Blum states that “it may reasonably be argued that a “historic bay” does not necessarily have to fit the semicircular area criterion laid down for a “bay” in these Conventions”<sup>73</sup>. The same opinion is presented by M.P. Strohl who also places emphasis on the fact that the onus of proving historic title lies on the claimant state. He also stresses that “in a world of legally equal and sovereign States, there appears no orderly or simple machinery for establishing such proof and no agreed upon criteria against which the proof can be measured”<sup>74</sup>.

It’s also worth noticing that the interpretation of the term “historic bay” in the light of UNCLOS, proposed by American Branch of the International Law Association in 2003<sup>75</sup>, stipulates that such bays need not fulfill the requirements prescribed in UNCLOS art. 10§ 2. G.K. Walker and J.E. Noyes conceded that “...this definition appears to follow the United States position”<sup>76</sup>. If so, historic bays apparently need pass neither the geographic nor the geometric criteria, including the semi-circle requirement.

The issue of historic bays was discussed by international law scholars long before codification efforts were undertaken within the United Nations. Coastal states claimed their historic rights to adjacent bays by recalling the execution of their sovereign rights over such areas from at least the beginning of the XIX century. However, the term: “historic bay” need not refer to such antiquity. The term is said<sup>77</sup> to have been used for the first time by L.M. Drago in his dissent in North Atlantic Coast

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<sup>72</sup> G. Westerman, *op. cit.*, at pp. 177–178.

<sup>73</sup> Y.Z. Blum, *The Gulf of Sidra Incident*, “The American Journal of International Law” 1986, Vol. 80, at p. 671.

<sup>74</sup> M.P. Strohl, *op. cit.*, at p. 252.

<sup>75</sup> According to this view, the term ‘historic bay’ “...means a bay over which a coastal State has publicly claimed and exercised jurisdiction, and this jurisdiction has been accepted by other States. Historic bays need not meet requirements prescribed in the definition of ‘bay’ in the Convention, Article 10(2)”. See D.R. Rothwell, T. Stephens, *op. cit.*, at p. 49.

<sup>76</sup> *Ibidem*.

<sup>77</sup> See: M.P. Strohl: *op. cit.*, at p. 269.

Fisheries Arbitration of 1910. He stated that "...it may be safely asserted that a certain class of bays, which might be properly called the historic bays such as Chesapeake Bay and Delaware Bay in North America and the great estuary of the River Plate in South America, form a class distinct and apart and undoubtedly belong to the littoral country, whatever be their depth of penetration and the width of their 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-defense, justify such a pretension"<sup>78</sup>. L.M. Drago went on to describe the four elements of a justifiable claim to a historic bay. Executing sovereignty over such waters is the first and seemingly most important factor presenting the determination of a coastal state. The remaining elements concern geographical configuration, immemorial usage and the requirements of self-defense.

Historic bays are widely commented upon by G.C. Gidel in his book: *Le droit international public de la mer* from 1934. This book is often quoted because of the author's reference to historic bays as a "safety valve"<sup>79</sup>. G.C. Gidel treated the historic bays exception to the general rules on delimiting bays as indispensable for their existence. It was an exception of that kind which made codification possible, because states which had traditionally exercised their sovereign powers over adjacent specific sea zones would simply be uninterested in any new regulation which sought to deprive them of such territories.

The paragraph of the 1958 Geneva Convention establishing the historic bays exception was not created at the Geneva Conference in 1958 but may be found in earlier works of the International Law Commission. The historic bays clause appeared for the first time in the addendum to the second report on the territorial sea prepared by Special Rapporteur of the ILC – J.P.A. Francois. The first paragraph of the proposed article while defining the term of bay in juridical sense also stated: "Historic bays are excepted; they shall be indicated as such on the maps"<sup>80</sup>. The clause regarding historic bays also remained in the final text of the ILC

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<sup>78</sup> See: <http://www.haguejusticeportal.net/eCache/DEF/5/241.html>.

<sup>79</sup> G.C. Gidel, *Le droit international public de la mer*, Paris 1934, at p. 651.

<sup>80</sup> See: *Juridical Regime of Historic Waters, Including Historic bays* (A/CN.4/143) Study prepared by the Secretariat, 'ILC Yearbook' 1962, Vol. II, at p. 2 [4].

draft articles, completed at the eight session of the Commission in 1956, although the ILC commentary on this article seems to be surprisingly brief simply and states merely that “paragraph 4 states that the foregoing provisions shall not apply to «historic» bays”.

Prior to the 1958 Geneva Conference, yet another document regarding the position of historic bays was prepared and circulated as a preparatory document of the Conference. It was a memorandum on the subject of historic bays prepared by the UN Secretariat, which included a list of allegedly historic bays<sup>81</sup>. According to its provisions, the list includes bays which “are regarded as historic or are claimed as such by the states concerned”<sup>82</sup>. So, it may be argued that the list includes not merely bays having a settled legal status based on historic criteria, but also bays which are merely alleged to be historic by interested states. Moreover, a UN Memorandum stipulates that the bays included on the list are cited merely in an illustrative capacity, meaning that the list is not conclusive in character. However, the absence of certain bays from the UN Memorandum list, namely the Italian Gulf of Taranto and Libya’s Gulf of Sidra<sup>83</sup>, is sometimes referred to as proof of their failure to qualify as historic bays. The following bays were recognized in this document as historic (*i.a.*<sup>84</sup>):

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<sup>81</sup> *Historic bays*, Memorandum by the Secretariat of United Nations (A/CONF.13/1), ‘Official Records of the United Nations Conference on the Law of the Sea’ 1958, United Nations publication, Sales No.: 58.V.4, Vol. I: Preparatory Document (hereinafter called “UN Memorandum”).

<sup>82</sup> UN Memorandum.

<sup>83</sup> See: T. Kamiński, *The Status of Historic bays in International Law. Libya’s Claim to the Gulf of Sidra*, ‘Studia Iuridica, Essays in International and European Law’ 2012, Vol. 54, at pp. 73–89.

<sup>84</sup> The entire list of historic bays is much longer and, aside from the bays mentioned in the text also include: Bay of Cancale (or Granville Bay) located in the north-western part of France, Bay of El-Arab (Egyptian Government withdrew this claim in 1990.), Sea of Azov (then entirely within the territory of USSR), Bay of Chaleur (between the Provinces of Quebec and New Brunswick in Canada), Miramichi Bay (in Canada), Bays of Laholm and Skelderviken (adjacent to Sweden), The Zuyder See (in Holland), Varangerfjord (in Norway), the bays formed by the estuaries of the Rivers Tagus and Sado (at coast of Portugal), The River Plate estuary (in Argentina), 16 bays along the Australian coast, a three bays in Dominican Republic, some bays along the coast of French dependent territories in Africa, Gulf of Tunis and Gulf of Gabes (in Tunisia), some historic bays in USSR (Kara Sea, Laptev Sea, East Siberian Sea and Chukchi Sea),

- Chesapeake Bay. This bay is 12 miles wide at the entrance and about 200 miles long, having a maximum width of 20 miles. The status of the bay was determined in 1885 by the Second Court of Commissioners of Alabama Claims. It was the case of the “Alleganean”, a vessel which had been sunk by the Confederate forces in the waters of the bay. According to the court’s judgment, the bay “was entirely within the territorial jurisdiction of the United States”<sup>85</sup>.
- Conception Bay, located in Newfoundland, having an entrance width of 20 miles, an average width of 15 miles and a maximum depth of 40 miles. Great Britain claims that the bay is entirely within its jurisdiction. This claim was upheld in 1877 by the Privy Council (in *Direct United States Cable Co v. the Anglo-American Telegraph Co.* case)<sup>86</sup>.
- Delaware Bay is a mere 10 miles wide at the entrance and 40 miles long. In 1793, during the war between Great Britain and France, a British vessel named Grange was captured by the French frigate L’Embuscade on the bay’s waters, whereupon it was settled that this area is located within the territory of the United States and that, accordingly, the capture of the ship took place on neutral territory<sup>87</sup>.
- Hudson Bay. A very large bay which is about 600 miles in breadth and 1,000 miles long. The closing line of the bay is approximately 50 miles long. Canada claims it to be part of its territory<sup>88</sup>.
- Vestfjord. This bay is about 100 kilometers wide at the entrance and reaches about 170 kilometers long inland. Its waters form part of

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Bristol Channel (In United Kingdom) and Monterey Bay and Long Island Sound (in USA). The report also include the Gulf of Fonseca which is surrounded by the territories of three Latin American States (Nicaragua, Honduras and El Salvador) as historic bay which coasts does not belong to a single state. See: UN Memorandum, at pp. 3–10.

<sup>85</sup> *Ibidem*, at p. 4 [16].

<sup>86</sup> In 1910 the North Atlantic Coast Fisheries Arbitral Tribunal “refrained from expressing any opinion on Conception Bay” simply referring to 1877 decision and indicating that this decision was acquiesced by the United States. *Ibidem*, at pp. 4–5 [20–21].

<sup>87</sup> *Ibidem*, at pp. 5–6 [22–23].

<sup>88</sup> *Ibidem*, at p. 6 [27–28].

Norwegian territory. The historic argument dates back to 1868 when a French vessel “Les Quatre Freres” was seized there<sup>89</sup>.

International law scholars have also created lists of bays which, in their opinion, deserve the title of historic bays<sup>90</sup>, but the UN Memorandum is always cited as being the only document of fundamental character. It is worth noticing that T. Scovazzi, in his “Atlas of Straight Baselines”, characters two more bays in the Mediterranean as historic bays, namely the Gulf of Taranto (on the Italian coast) and the Gulf of Sidra (adjacent to Libya’s territory and approximately 270 miles wide at its entrance)<sup>91</sup>. Both of these examples are extremely controversial in nature.

At the Conference, the question of historic bays was discussed in the First Committee and it is noteworthy that J.P.A. Francois (acting as an expert of the UN Secretariat) advised the participating states to avoid any attempt to define the term ‘historic bay’. The conference might “merely use the term “historic bays” and leave it to be construed, in case of dispute, by the Court”<sup>92</sup>. The Japanese delegation disagreed and was in favor of including a definition of historic bays in the text of the convention; indeed, it proposed a new wording of article 7, paragraph 4. According to this proposition:

The foregoing provisions shall not apply to historic bays. The term ‘historic bays’ means those bays over which 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<sup>93</sup>.

However Japan withdrew its amendment of art. 7 § 4 because the First Committee ultimately decided not to deal with the matter of historic bays “considering that the International law Commission has not provided for the regime of the historic waters including historic

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<sup>89</sup> *Ibidem*, at pp. 7–8 [35–41].

<sup>90</sup> See, *inter alia*, L.J. Bouchez, *The Regime of Bays In International Law*, Leyden 1964, at pp. 216–237.

<sup>91</sup> T. Scovazzi, G. Francalanci, D. Romano, & S. Mongardini, *Atlas of Straight Baselines*, Guiffre Editore, 2<sup>nd</sup> ed., 1989. See, C.R. Symmons, *Historic Waters in the Law of the Sea. A Model Re-Appraisal*, Leiden/Boston 2008, at p. 303.

<sup>92</sup> ‘ILC Yearbook’ 1962, Vol. II, at p. 3 [11].

<sup>93</sup> *Ibidem*, at p. 3 [13].



bays” and, instead, adopted a resolution recommending that the General Assembly “make appropriate arrangements for the study of the juridical regime of historic waters including historic bays”<sup>94</sup>. The same resolution was later on adopted as a resolution of the UN Conference on the Law of the Sea. It also requested, as did the First Committee, that the General Assembly communicate “the results of such study to all States Members of the United Nations”<sup>95</sup>. As a final result of this resolution, the Study on the Juridical Regime of Historic Waters, Including Historic bays was prepared by the UN Secretariat in 1962 (hereinafter called “the UN Study”)<sup>96</sup>. This document still remains the broadest official study on the matter at an international level. The conclusions of the UN Study indicate that:

[i]n determining whether or not a title to “historic waters” exists, there are three factors which have to be taken into consideration, namely,

The authority exercised over the area by the State claiming it as “historic waters”;

The continuity of such exercise of authority;

The attitude of foreign states<sup>97</sup>.

The historic bays issue resurfaced in the course of the Third United Nations Conference on the Law of the Sea during the works of the Second Committee, mostly at the Conference’s 2<sup>nd</sup> session in Caracas in 1974. The topic was raised in connection with certain new claims to historic waters. Tonga’s claim, based on historic rights to the rectangle drawn on the Pacific with an area of approximately 150,000 square miles, represents the best example of States seeking to enlarge their territories on historical grounds<sup>98</sup>. Later, at the 3<sup>rd</sup> Conference Session in Geneva in 1975, a mere two meetings were held on this topic by each of the working groups, namely the informal consultative group on historic bays and the smaller working party. However, greatest mention should be made of the draft

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<sup>94</sup> *Ibidem*, at p. 4 [19].

<sup>95</sup> *Ibidem*, at p. 4 [22].

<sup>96</sup> Juridical Regime of Historic Waters, Including Historic bays (A/CN.4/143) Study prepared by the Secretariat, *ibidem*, at pp. 1–26.

<sup>97</sup> *Ibidem*, at p. 25 [185].

<sup>98</sup> See: Statement of Mr. Tupou (Tonga), II UNCLOS III Official Records, at 107.

article on the status of historic bays submitted to the Second Committee by the Colombian government during the following year. It consisted of 4 paragraphs. It must be noticed that the proposed article expressly stipulated that historic bays may be surrounded by the territory of more than one state. According to its first paragraph, which contained the definition of a historic bay, such a claim must be unambiguously asserted by the relevant state(s), which must also demonstrate sole possession of the waters of the bay executed

[c]ontinuously, peaceably and for a long time, by means of act 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<sup>99</sup>.

The remaining paragraphs provided *inter alia* an obligation not to assert claims to historic bays whose areas were under the established sovereignty, sovereign rights or jurisdiction of other states (§ 4). As regards bays whose coasts belong to more than one state, they were supposed to be recognized as historic bays only if an agreement to that effect existed between the relevant coastal states (§ 2). L.F.E. Goldie presented the very likely view that such a restrictive proposal was connected with Venezuela's claim to the Gulf of Venezuela and that this requirement was drafted "...for the sole purpose of ensuring difficulty for Venezuela in establishing her historic title to the bay and guaranteeing the Colombia's consent would have to be bargained for"<sup>100</sup>. This author draws attention to the fact that this requirement was in direct contradiction with the decision of the Central American Court of Justice in the *Gulf of Fonseca* case adjudged in 1917, according to which this gulf was declared a historic bay jointly owned by the three coastal

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<sup>99</sup> See, L.F.E. Goldie, *Historic bays in International Law – an Impressionistic Overview*, 'Syracuse Journal of International Law and Commerce' 1984, Vol. 11, No. 3, at p. 265.

<sup>100</sup> § 3 of the Colombian draft article also provided for notification and publication requirements which appeared to be based on a similar rationale. It stated: "The coastal State or States shall notify the International Hydrographic Organization of the agreement or agreements referred to in the foregoing paragraph and shall mark them on large scale charts prepared by the States concerned. Until such notification is supplied, the regime of historic bay shall not apply to the said bay". See *ibidem*, at p. 266.

states (namely: Honduras, El Salvador and Nicaragua) “...as *res communis*, despite Nicaragua’s individual attempt to part with, and dispose of, its share”<sup>101</sup>. Nevertheless, it remains worth noticing that the three Gulf of Fonseca littoral states were successors of the state which solely executed the sovereign power all around the gulf<sup>102</sup> and, therefore, this case may be viewed as an exception to the general rule.

However, the topic of historic bays was not ultimately included amongst the “core issues” in the Organization of Work of the UN Conference agreed upon in 1978<sup>103</sup>, which meant that it fell outside the scope of issues upon which the Conference resolved to concentrate its efforts. Accordingly, the Colombian draft article unfortunately remains the only attempt of states participating at the Conference to define this issue. Therefore, the UN Study still remains the most comprehensive report on this subject.

Of greater interest is the fact that this report also deals with the issue of so-called vital bays or vital waters, where the right of the littoral state may be based not only on the argument of long usage but may also be founded on “other «particular circumstances» such as geographical configuration, requirements of self-defence or other vital interest of coastal state.”<sup>104</sup> The most interesting issue is that this idea also derives from the aforementioned dissenting opinion of L.M. Drago, which mentions the self-defence factor. There is no-doubt that the vital interest factor is very significant one but, it should rather be read just as L.M. Drago stated, namely as one of arguments justifying and strengthening the claim based on historic title. A similar point of view seems to be presented by the authors of the UN Study, who wrote that giving the parties to the convention “the right to claim «vital bays» would come near to destroying the usefulness of any provision in the convention regarding the definition

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<sup>101</sup> *Ibidem*, at p. 267.

<sup>102</sup> They were the successors of the Federal Republic of the Center of America preceded by the Crown of Castille as a sovereign power over the bay area from 1552 to 1821, *ibidem*.

<sup>103</sup> U.N.Doc. A/CONF. 62/62 (1978), reprinted in ‘VI Third United nations Conference on the law of the Sea Official Records’ 173 (1978) [hereinafter cited as VI UNCLOS III Official Records (1978)].

<sup>104</sup> UN Study, ‘ILC Yearbook’ 1962, Vol. II, at p. 19 [134].

or delimitation of bays”<sup>105</sup>. L.J. Bouchez, in turn, found two main reasons making it “...impossible for a State to claim sovereignty over bays contrary to the general rules of international law merely by pointing to its vital interests”<sup>106</sup>. Namely these were: “(1) the great uncertainty connected with the whole concept of vital interests, and (2) the impossibility of realizing claims based on vital interests so long as compulsory jurisdiction of an international authority is lacking”<sup>107</sup>. However C.R. Symmons, in a recent book dealing with this subject, also presents the view that there is no separate category of “vital interest” and postulates that it may only be used to strengthen historic title. Conversely, he also notices that “...the whole concept of ‘vital’ waters is now an anachronism anyway”<sup>108</sup>. This interesting conclusion was also presented by D.P. O’Connell and I.A. Shearer, who stressed that the notion of vital interest “...has as yet no status in international law” but, since the *Anglo-Norwegian Fisheries* case, it has an important role to play in evaluating long usage in the process of delimiting maritime domain<sup>109</sup>.

Considering the legal position of historic bays, we should also bear in mind the judgment delivered by the International Court of Justice in 1982 in the *Continental Shelf* case (*Tunisia v. Libya*), which stated that the matter of historic bays “...continues to be governed by general international law which does not provide for a single «régime» for «historic waters» or «historic bays», but only for a particular régime for each of the concrete, recognized cases of «historic waters» or «historic bays»”<sup>110</sup>. However although, as the ICJ correctly identifies, no single regime exists for historic waters in customary international law, the particular regimes of each concrete bay at least have to be confronted with the general rules concerning claims to historic bays or waters presented in the UN Study.

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<sup>105</sup> *Ibidem*, at p. 20 [140].

<sup>106</sup> See L. J. Bouchez, *op. cit.*, at p. 300.

<sup>107</sup> *Ibidem*.

<sup>108</sup> See, C.R. Symmons, *op. cit.*, at p. 256.

<sup>109</sup> D.P. O’Connell, *op. cit.*, at p. 438.

<sup>110</sup> *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, ICJ Judgment of 24.2.1982, ICJ Reports 1982, at p. 74, para 100.

## **8. UN conventions' rules on bays as an expression of codification and progressive development of international law**

The draft articles of the 1958 Geneva Convention were prepared by the International Law Commission, the UN body established in 1947 by the UN General Assembly for the codification and promotion of the progressive development of international law. Article 15 of the Statute distinguishes (“for convenience”) between these two terms by stating that progressive development means “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States”, while codification should be understood as meaning: “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine”<sup>111</sup>.

Taking into account the relatively small number of state parties to the 1958 Geneva Convention (currently numbering 52)<sup>112</sup>, we may be almost certain that this document, in general, possesses binding force only as regards those states. However, the situation might be different in specific cases when particular articles of the convention seem to codify rules of customary international law. Accordingly, it is important to ascertain whether the 1958 Geneva Convention rules governing bays constitute a codification of customary international law or, rather, create new rules on this issue.

In this regard, we should also remember the almost identical wording of the second of the discussed articles (UNCLOS art. 10). It was probably this striking resemblance between the commented articles (which was upheld despite the fact that a quarter of century has passed

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<sup>111</sup> Statute of the International Law Commission, adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981. See: [http://untreaty.un.org/ilc/texts/instruments/english/statute/statute\\_e.pdf](http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf).

<sup>112</sup> [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-1&chapter=21&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-1&chapter=21&lang=en).

between the adoption of both texts) that led the International Court of Justice in 1992 to declare that these "...provisions on bays might be found to express general customary law"<sup>113</sup>.

However, this thesis appears to have lacked common approval, at least during the 1990's, and this author submits that it was stated far too soon. First of all, it was presented at a time when the UNCLOS was not yet in force. The Court's thesis should, therefore, be examined primarily on the basis of the 1958 Geneva Convention and upon the practice of the UNCLOS signatories. In this regard, it must be pointed out that art. 7 of the 1958 Geneva Convention was recognized in scholarly writings on law of the sea as a development, as opposed to a codification, of international law. Such opinion was presented *inter alia* by K. Wolfke, who described art.7 of 1958 Geneva Convention as a mostly new provision which underwent profound changes at the Geneva Conference itself<sup>114</sup>. This is especially true when we recall the Conference's decision to change the permissible bay entrance size, which was set by the final ILC draft at 15 nautical miles. This opinion was, apparently, also shared by D.P. O'Connell and I.A. Shearer, whose monograph published in 1984 stresses that both of the UN Conventions' articles constitute merely "...a piece of legislation and not a codification"<sup>115</sup>. Even R.R. Churchill and A.V. Lowe, whilst quoting the 1992 ICJ thesis, comment that these provisions "...are obviously a great improvement on previous customary international law"<sup>116</sup>.

Besides, it must be stressed that the ICJ thesis itself was not formulated in unequivocal terms, in the sense that it was not categorically expressed, since the ICJ used the soft attribute and stated that the provisions on bays just "might" be found to express customary rules of international law. Therefore, in this author's opinion, this should not be treated as a statement of the existence of customary rules but rather as an expression of *opinio iuris* made as new rules of general character

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<sup>113</sup> Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening), ICJ Judgement of 11.9.1992, ICJ Reports 1992, p. 241, para 383.

<sup>114</sup> K. Wolfke, *Rozwój i kodyfikacja prawa międzynarodowego [The Development and Codification of International Law]*, Wrocław 1972, at p. 29.

<sup>115</sup> D.P. O'Connell, ed. I.A. Shearer, *op. cit.*, at p. 390.

<sup>116</sup> R.R. Churchill, A.V. Lowe, *op. cit.*, at p. 42.

emerge. The UN conventions' articles on bays should not be regarded then as a symptom of the codification of international law but, rather, as an expression of both ILC tasks, including the progressive development of such rules.

It must be noticed that the first of aforementioned conventions had 41 signatories and entered into force in 1964, whereas the second had 157 signatories and entered into force in 1994. At the present moment, they have 52 and 166<sup>117</sup> state signatories respectively. Accordingly, it appears that UNCLOS is a legally binding document for more than 80% of the UN's current members. Furthermore, three of the five permanent UN Security Council Members are parties to the 1958 Geneva Convention, namely the Russian Federation, the USA and the United Kingdom. The UNCLOS is legally binding upon four of the Security Council permanent members (namely China, France, the Russian Federation and the United Kingdom). Accordingly, although the United States is the only Security Council power not formally bound by UNCLOS, it remains a party to the 1958 Geneva Convention, whose articles governing the legal position of bays are almost identical. Thus, the passage of time, the broad acceptance of UNCLOS and the observance of provisions on bays even by states which are not a party to this convention, may be deemed to constitute proof that the 1992 ICJ statement conforms with the practice of states.

## Conclusion

Without doubt, the rules on bays embodied in both of the commented UN conventions on the law of the sea appear to offer the most comprehensive approach to the legal status of bays in international law, despite their non-applicability to historic bays and bays with more than one littoral state. Furthermore, the establishment of "bay criteria" broadly accepted by states represents an extremely significant outcome of the UN codification program, notwithstanding the existence of doubts as regards the customary character of the rules set forth.

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<sup>117</sup> [http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en](http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en).