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Historic Bays: Memorandum by the Secretariat of the United Nations

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HISTORIC BAYS

MEMORANDUM BY THE SECRETARIAT OF THE UNITED NATIONS

(Preparatory document No. 1)

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Introduction

I. Object of the present study

1. This study is intended for the United Nations Conference on the Law of the Sea, to be held in pursuance of General Assembly resolution 1105 (XI) of 21 February 1957.¹

¹ Official Records of the General Assembly, Eleventh Session, Supplement No. 17 (A/3572), p. 54.

2. By the terms of that resolution, the General Assembly has referred to the Conference, as the basis for its proceedings, the draft articles concerning the law of the sea adopted by the International Law Commission at its eighth session. The Commission's draft article 7 deals with bays and reads as follows :

“ 1. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute

more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle drawn on the mouth of that indentation. If a bay has more than one mouth, this semi-circle shall be drawn on a line as long as the sum total of the length of the different mouths. Islands within a bay shall be included as if they were part of the water area of the bay.

"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 fifteen miles measured from the low-water line.

"3. Where the mouth of a bay exceeds fifteen miles, a closing line of such length shall be drawn within the bay. When different lines of such length can be drawn that line shall be chosen which encloses the maximum water area within the bay.

"4. The foregoing provisions shall not apply to so-called 'historic' bays or in any cases where the straight baseline system provided for in article 5 is applied."²

3. As will be gathered from the provisions above, the Commission excluded the so-called "historic" bays from the scope of its general rules concerning ordinary bays. The question of this class of bays was, therefore, reserved by the Commission.

4. The object of this memorandum, prepared by the Secretariat of the United Nations, is to provide the Conference with material relating to "historic bays".

5. Part I describes the practice of States by reference to a few examples of bays which are considered to be historic or are claimed as such by the States concerned. Part I then proceeds to cite the various draft codifications which established the theory of "historic bays", and the opinions of learned authors and of Governments on this theory. Part II discusses the theory itself, inquiring into the legal status of the waters of bays regarded as historic bays, and setting forth the factors which have been relied on for the purpose of claiming bays as historic. The final section is intended to show that the theory does not apply to bays only but is more general in scope.

II. Definition of the subject

A. Bays and gulfs

6. Dictionaries differentiate between the terms "bay" and "gulf", applying the former to a small indentation of the coast and the latter to a much larger indentation; in other words, a bay would be a small gulf. The distinction is not, however, reflected in geography. A cursory glance at an atlas will show that certain maritime areas are designated as bays although they are of considerable size, while other relatively much smaller areas are described as gulfs. For example, despite its name, Hudson Bay is vast, whereas the Gulf of St. Tropez is not more than four kilometres across at its entrance.

7. This paper deals with both bays and gulfs, geographical terms being immaterial to the subject. The pages which follow contain numerous references to

penetrations of the sea inland, variously designated as bays and as gulfs without regard to their size. The usage of geographical nomenclature will be respected. In cases, however, where the text is not concerned with specific penetrations, the word "bay" will be used to denote both bays and gulfs.

B. "Historic bays" and "historic waters"

8. As indicated in part II of this paper, the theory of historic bays is of general scope. Historic rights are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies of water. There is a growing tendency to describe these areas as "historic waters", not as "historic bays". The present memorandum will leave out of account historic waters which are not also bays. It will, however, deal with certain maritime areas which, though not bays *stricto sensu*, are of particular interest in this context by reason of their special position or by reason of the discussion or decisions to which they have given rise.³

III. Origin and justification of the theory of historic bays

9. The origin of this theory is traceable to the efforts made in the nineteenth century to determine, in bays, the baseline of the territorial sea. In view of the intimate relationship between bays and their surrounding land formations and in the light of the provisions of municipal law and of conventions governing the subject, proposals were made the object of which was to advance the starting line of the territorial sea towards the opening of bays. The intention was that, in bays, the territorial sea should not be measured from the shore—the method proposed in the case of more or less straight coasts—but should, rather, be reckoned as from a line drawn further to seaward. On this point agreement was virtually unanimous, though the exact location of the line from which the territorial sea was to be reckoned continued to be the subject of controversy. According to various proposals put forward, the territorial sea was to be measured from a straight line drawn across the bay at a point at which its two coasts were a specified distance apart (six miles, ten miles, twelve miles, etc.); the waters lying to landward of that line would be part of the internal waters of the coastal State.

10. This attempt to restrict, in respect of bays, the maritime area claimable by the coastal State as part of its internal waters conflicted with existing situations. There were bays of considerable size the waters of which

² *Ibid.*, Supplement No. 9 (A/3159) p. 15.

³ A case in point is that of the maritime areas created by the application of the "straight baselines" method which, as regards the Norwegian coast, was approved by the International Court of Justice in the Anglo-Norwegian Fisheries case (see *infra*, especially paras. 50-72) and which is the subject of article 5 of the draft articles concerning the law of the sea adopted by the International Law Commission at its eighth session (see *infra*, especially paras. 104-108).

were wholly the property of the coastal States concerned—the territorial sea being accordingly reckoned, in these cases, from the opening of the bay in question towards the sea. Hence, for the purposes of codification, the choice lay between two possible courses, viz. allowing for these cases by means of an exception to the general rule to be formulated; and ignoring them by making the rule apply to all bays, regardless of their *de facto* status. The second course was felt to be arbitrary, and capable, if applied in practice, of causing international difficulties. Most of the draft codifications which dealt with bays endorsed the first solution. There remained, however, and there still remains, the question which bays are covered by the exception. The mere fact that a State claims the ownership of a bay which is not already territorial by virtue of the general rule does not *per se* ensure acceptance of the claim. The claim would have to be substantiated by reference to a specific criterion. And, according to the theory as originally conceived, this criterion was to be essentially historic. The modern view, however, has gone beyond this conception. According to one school of thought (which is more particularly discussed elsewhere in this paper), the proprietary title may be founded either on considerations connected with history or else on considerations of necessity, in which latter case the historical element might be lacking altogether.

PART I

The practice of States; draft international codifications of the rules relating to bays; opinions of learned authors

I. THE PRACTICE OF STATES : SOME EXAMPLES OF HISTORIC BAYS

11. The undermentioned bays, which are cited for the purpose of illustration, are regarded as historic bays or are claimed as such by the States concerned. They are grouped under two headings, namely, bays the coasts of which belong to a single State, and bays the coasts of which belong to two or more States.

A. Bays the coasts of which belong to a single State

Sea of Azov

12. The Sea of Azov is ten miles across at its entrance. It is situated entirely within the southern part of the territory of the Union of Soviet Socialist Republics and extends a considerable distance inland, its dimensions being approximately 230 by 110 miles. De Cussy⁴ mentions the Sea of Azov among the gulfs

⁴ *Phases et causes célèbres du Droit maritime des Nations*, 1856, pp. 97-98: In addition to the Sea of Azov the writer mentions "among the gulfs... which may be regarded as part of the territorial sea, subject to the jurisdiction and control of the State by virtue of the right of self-preservation inherent in its independence" the Sea of Marmara, the Zuyder Zee and the Dollart, the Gulfs of Bothnia and Finland, the Gulf of St. Lawrence in North America, part of the Gulf of Mexico (to the extent indicated in respect of each of the coastal States of that Gulf), the innermost part of the Adriatic Gulf in the vicinity of Venice, Trieste, Rijeka (Fiume), etc., the Gulf of Naples, Salerno, Taranto, Cagliari, Thérmai (Salonica), Coron, Lepanto, etc.

"which may be regarded as part of the territorial sea". P. C. Jessup⁵ states that this contention "seems reasonable and any such Russian claim would not be contested". A. N. Nikolaev regards the Sea of Azov as part of the "internal waters of the USSR" (see *infra*, para. 92). Gidel⁶ is of the opinion that certain maritime areas—of which the Sea of Azov is one—should not be treated as falling within the category of historic waters "because, pursuant to the rules of the ordinary international law of the sea, these areas are in any case internal waters" (see *infra*, paras. 32-34).

Bay of Cancale (or Granville Bay)

13. This bay (in the north-western part of France) is about seventeen miles across at its entrance. In its reply to the inquiries advanced to Governments by the Preparatory Committee of the Conference on the Codification of International Law, 1930, the French Government stated that "Granville Bay is recognized to consist of territorial waters by the Fisheries Convention of 2 August 1839, concluded with Great Britain (article 1) and by article 2 of the Fisheries Regulations concluded on 24 May 1843 with Great Britain."⁷ Gidel⁸ states that "the waters of Granville Bay are recognized as French [territorial waters], even though the bay is about seventeen miles across at its entrance". According to Jessup,⁹ the bay "seems to be claimed by France without objection. This may be due to the practical appropriation of the bay through the exploitation of its oyster fisheries over a long period. By treaties of 1839 and 1867 Great Britain recognized the exclusive French fisheries in those waters".

Bay of Chaleur

14. This bay (between the Provinces of Quebec and New Brunswick in Canada) does not exceed twelve miles in width; it is about 100 miles long. Its entrance into the Gulf of St. Lawrence is sixteen miles across. In its decision concerning the status of the bay, given in the case of *Mowat v. McFee* (1880), the Supreme Court of Canada held that the Bay of Chaleur was included in its entirety "within the present boundaries of the Provinces of Quebec and New Brunswick, and within the Dominion of Canada".¹⁰

15. "The arbitral award in the North Atlantic Fisheries case, 1910, upheld the British contention concerning the Bay of Chaleur".¹¹ In that award, the tribunal appointed by the Permanent Court of Arbitration recommended that the limit of the bay should be constituted by "the line from the light at Birch Point on Miscou Island to Macquereau Point

⁵ *The Law of Territorial Waters and Maritime Jurisdiction*, 1927, p. 383.

⁶ *Droit international public de la Mer*, 1930-1934, vol. III, p. 663.

⁷ Ser. L.o.N.P. 1929, v. 2, p. 160.

⁸ *Op. cit.*, p. 657.

⁹ *Op. cit.*, pp. 385-386.

¹⁰ Reports of the Supreme Court of Canada, vol. 5 (1880), p. 66.

¹¹ Gidel, *op. cit.*, p. 659.

light".¹² The recommendation was accepted by Great Britain and the United States by the Treaty¹³ of 20 July 1912 (article 2).¹⁴

Chesapeake Bay

16. This bay is twelve miles across at its entrance ; it is nowhere more than twenty miles wide and is about 200 miles long. Its status was considered in 1885 by the Second Court of Commissioners of Alabama Claims in the case of the "Alleganean", a vessel which had been sunk by Confederate forces in the waters of the bay. The Court held¹⁵ that Chesapeake Bay was entirely within the territorial jurisdiction of the United States.

17. After citing the case-law of the English courts concerning the Bristol Channel and Conception Bay, and the opinions of certain writers on the status of bays, the Court proceeded :

"We must now examine the local circumstance touching the status of Chesapeake Bay, and then determine whether those should be held to be the open ocean or jurisdictional waters of the United States in the light of these authorities.

"The headlands are about twelve miles apart, and the bay is probably nowhere more than twenty miles in width. The length may be 200 miles. To call it a bay is almost a misnomer. It is more a mighty river than an arm or inlet of the ocean. It is entirely encompassed about by our own territory, and all of its numerous branches and feeders have their rise and their progress wholly in and through our own soil. It cannot become an international commercial highway ; it is not and cannot be made a roadway from one nation to another.

"The second charter of King James I to the Virginia Company in the year 1609 granted : 'All those lands, countries, and territories situate, lying, and being in that part of America called Virginia, from the point of land called Cape or Point Comfort, all along the seacoast to the northward 200 miles, and all along the seacoast to the southward 200 miles, and all that space and circuit of land lying from the seacoast of the precinct aforesaid up into the land throughout from sea to sea, west and northwest, together with all the soils, grounds, havens, ports, . . . rivers, waters, fishings, etc.'

"This language would seem to place Chesapeake Bay within the boundary lines of Virginia. A line running north (as near as may be) from Point Comfort along the seacoast crosses the mouth of the bay from Cape Henry to Cape Charles.

"By the King James Charter to Lord Baltimore in 1632, erecting the territory of Maryland, the southern boundary line is made to cross Chesapeake Bay from Smiths Point, at the mouth of the Potomac River, to Watkin's Point, on the eastern shore, which apparently places a portion of this bay within the territory of Maryland. Had this not been intended, the boundary would presumably have followed the shore line around the bay.

¹² Scott, *Hague Court Reports, First Series*, 1916, p. 189. Gidel, *op. cit.*, p. 659, explains this delimitation as follows : "This bay was considered British as far as a line sixteen miles long drawn between the two lights at Birch Point towards Miscou Island (Marquereau Point light)."

¹³ *Treaties and Conventions between the United States and other Powers*, 1910-23, vol. III, p. 2632.

¹⁴ Higgins and Colombos : *The International law of the Sea*, London, 1943, p. 119.

¹⁵ Moore, J. B., *A History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, 1898) vol. 4, pp. 4338-4341.

"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 still continue to do so.

"The legislation of Congress has assumed Chesapeake Bay to be within the territorial limits of the United States. The acts of 31 July 1789, ch. 5 ; 4 August 1790, ch. 35 ; and 2 March 1799, ch. 128, section 11, establishing revenue districts, provided that 'the authority of the officers of the district (Norfolk to Portsmouth) shall extend over all the waters, shores, bays, harbours, and inlets comprehended within a line drawn from Cape Henry to the mouth of James River'. By section 549, Rev. Stat. U.S., the eastern judicial district for Virginia embraces the 'residue of the State' not included in the western district. The boundaries of the State include all of Chesapeake Bay south of a line running from Smiths Point to Watkins Point, and hence the eastern district must embrace so much of the bay."

18. Referring to the decision of 1793 in respect of Delaware Bay (see *infra*, para. 22) the Court noted :

"If it be said that the mere claims of a nation to jurisdiction over adjacent waters are to be accepted with some degree of hesitation, then the action in reference to the *Grange* is of much weight, for there the claim made by the United States was promptly acquiesced in by two great foreign Powers, when passions were excited, and when such acquiescence was greatly against the immediate interest of one of the combatants, as well as against the general interest of both.

"It will hardly be said that Delaware Bay is any the less an inland sea than Chesapeake Bay. Its configuration is not such as to make it so, and the distance from Cape May to Cape Henlopen is apparently as great as that between Cape Henry and Cape Charles."

19. After stressing that the question to be adjudicated was "of very considerable national importance", the Court concluded :

"Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it ; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned ; that it cannot become the pathway from one nation to another ; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig "*Grange*" and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the 'high seas' within the meaning of the term used in section 5 of the act of 5 June 1872."

Conception Bay

20. This bay (in Newfoundland) is twenty miles across at its entrance, has an average width of fifteen miles and is some forty miles long. It has been claimed by Great Britain as being entirely within its jurisdiction, a claim which was upheld in 1877 by the Privy Council in the case *Direct United States Cable Co v. The Anglo-American Telegraph Co*.¹⁶ The Privy Council said :

¹⁶ Higgins and Colombos, *op. cit.*, p. 116.

"Passing from the common law of England to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbours, estuaries and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'bay' for this purpose.

"It seems generally agreed that, where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory; and, with this idea, most of the writers on the subject refer to defensibility from the shore as the test of occupation: some suggesting, therefore, a width of one cannon-shot from shore to shore, or three miles; some, a cannon-shot from each shore, or six miles; some, an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland; but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Regina v. Cunningham* was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his Commentaries, though by no means giving the weight of his authority to this claim, gives some reason for not considering it altogether unreasonable.

"It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts, and it has never, that they can find, been made the ground of judicial determination. If it were necessary in this case to lay down a rule, the difficulty of the task would not deter their Lordships from attempting to fulfil it. But in their opinion it is not necessary to do so. It seems to them that, in point of fact, 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 every important. And, moreover (which in a British tribunal is conclusive), the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."¹⁷

21. In its award, rendered on 7 September 1910, the North Atlantic Coast Fisheries Arbitral Tribunal refrained from expressing any opinion on Conception Bay,¹⁸ on the grounds that that bay had been provided for by the above-mentioned decision of the Privy Council, in which decision the United States had acquiesced.¹⁹

Delaware Bay

22. The status of Delaware Bay, which is ten miles across at its entrance and forty miles long from its entrance to the mouth of the Delaware River, was determined in connexion with the case of the British vessel *Grange*, captured in 1793 in the waters of the bay by the French frigate *L'Embuscade*. The incident

occurred while Great Britain and France were at war, the United States being neutral. The Attorney-General, E. Randolph, consulted, rendered an opinion (from which extracts are given below) to the effect that the vessel *Grange* had been captured in neutral territory:

"The essential facts are:

"That the river Delaware takes its rise within the limits of the United States;

"That, in the whole of its descent to the Atlantic Ocean, it is covered on each side by the territory of the United States;

"That, from tide water to the distance of about sixty miles from the Atlantic Ocean, it is called the *river* Delaware;

"That, at this distance from the sea, it widens and assumes the name of the *Bay* of Delaware, which it retains to the mouth;

"That its mouth is formed by the capes Henlopen and May; the former belonging to the State of Delaware, in property and jurisdiction, the latter to the State of New Jersey;

"That the Delaware does not lead from the sea to the dominions of any foreign nation;

"That, from the establishment of the British provinces on the banks of the Delaware to the American Revolution, it was deemed the peculiar navigation of the British Empire;

"That, by the Treaty of Paris, on 3 September 1783, his Britannic Majesty relinquished, with the privity of France, the sovereignty of those provinces, as well as of the other provinces and colonies;

"And that the *Grange* was arrested in the Delaware *within the capes*, before she had reached the sea, after her departure from the port of Philadelphia.

"...the corner stone of our claim is, that the United States are proprietors of the lands on both sides of the Delaware, from its head to its entrance into the sea.

"...These remarks may be enforced by asking, What nation can be injured in its rights by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has, ever before, exacted a community of right in it, as if it were a main sea; under the former and present governments, the exclusive jurisdiction has been asserted; by the very first collection law of the United States, passed in 1789, the county of Cape May, which includes Cape May itself, and all the waters thereof, theretofore within the jurisdiction of the State of New Jersey, are comprehended in the district of Bridgetown. The whole of the State of Delaware, reaching to Cape Henlopen, is made one district. Nay, unless these positions can be maintained, the bay of Chesapeake, which, in the same law, is so fully assumed to be within the United States, and which, for the length of the Virginia territory, is subject to the process of several counties to any extent, will become a rendezvous to all the world, without any possible control from the United States. Nor will the evil stop here. It will require but another short link in the process of reasoning, to disappropriate the mouths of some of our most important rivers. If, as Vattel inclines to think in the 294th section of his first book, the Romans were free to appropriate the Mediterranean, merely because they secured, by one single stroke, the immense range of their coast, how much stronger must the vindication of the United States be, should they adopt maxims for prohibiting foreigners from gaining, without permission, access into the heart of their country.

"This inquiry might be enlarged by a minute discussion of the practice of foreign nations, in such circumstances. But I pass it by; because the United States, in the commencement

¹⁷ Quoted by Phillimore, *International Law*, vol. I (1879), pp. 289-290.

¹⁸ Scott, *op. cit.*, p. 190.

¹⁹ Higgins and Colombos, *op. cit.*, p. 116, quoting de Martens, *Nouveau Recueil Général*, 3rd ed. (1911), vol. 4, pp. 89-129.

of their career, ought not to be precipitate in declaring their approbation of any usages (the precise facts concerning which we may not thoroughly understand) until those usages shall have grown into principles, and are incorporated into the law of nations; and because no usage has ever been accepted, which shakes the foregoing principles.

"The conclusion then is, that the *Grange* has been seized on neutral ground. If this be admitted, the duty arising from the illegal act is restitution."²⁰

23. France consented to release the *Grange*. "Great Britain, by requesting the restoration of its captured vessel, recognized that Delaware Bay was within the jurisdiction of the United States and France, by returning the British vessel, tacitly accepted the declaration of territoriality made by the United States."²¹

Bay of El-Arab

24. This bay (in northern Egypt), which is only eighteen miles in depth, is seventy-five miles wide at its opening into the sea. In its reply to questionnaire No. 2 (1926) of the Committee of Experts for the Progressive Codification of International Law, the Egyptian Government stated that "the extent of Egyptian territorial waters was fixed at three miles by the Decree-Laws of 21 April 1926 on Fishing and Sponge-fishing, except in the Bay of El-Arab, the whole of which, according to the Decree-Law on Sponge-fishing, is included in the territorial sea."²²

25. Articles 1(b) and 4(a) of the Egyptian Decree of 15 January 1951²³ provide that the inland waters of Egypt include the waters of all bays along the Egyptian coasts, without specifying any limit.

26. The British Government protested, through diplomatic channels, against this Decree, stating that it was unable to accept it as being in conformity with the rules of international law. In its note of protest, the British Government pointed out that no historic bay "is situated in Egypt."²⁴

Hudson Bay

27. The dimensions of this bay are considerable; its breadth is about 600 miles and its length about 1,000 miles. The Canadian writer, V. Kenneth Johnston²⁵ gives the following information concerning the status of Hudson Bay:

"In 1906... notwithstanding the assumption of the world as to the status of Hudson Bay, the Government of Canada placed on its statute books a statute declaring the waters of Hudson Bay to be territorial waters of Canada (R.S.C. 1927, cap. 73, sec. 9, sub-sec. 10; Statutes of Canada, 1906, cap. 45, sec. 9 (12)). That statute is still in force in Canada without,

so far as is known, any protest having been made by any foreign Government. This statute has been and presumably still is being actively enforced in Canada and in Hudson Bay as part of Canada. The Government of Canada, therefore, has appropriated and continues to appropriate Hudson Bay and presumably Hudson Strait as Canadian national waters...."

The writer maintains that, in accordance with the rules of international law, Canada has, in respect of that bay, a title based on occupation and on the acquiescence of other States in that occupation.

28. Higgins and Colombos²⁶ state that:

"...The British claim has not, so far, been expressly admitted by the United States."

And they add:

"The Treaty of 20 July 1912, which was concluded for the purpose of carrying out the award of the Tribunal in the North Atlantic Fisheries Arbitration of 1910, provides 'that it is understood that the award does not cover Hudson Bay', thus reserving all existing British rights to the bay."²⁷

Miramichi Bay

29. "Miramichi Bay is situated in New Brunswick, and has a headland width of 14.5 miles. By a New Brunswick Statute of 1799²⁸ this bay was treated as being within the adjoining county of Northumberland, and subsequent amending acts have confirmed this claim."²⁹

"In no single instance has the jurisdiction of Great Britain over these bays been challenged by any other Power than the United States, and the objection of the United States has been limited to the sole question of the extent of the fishing liberties given by the Treaty of 1818."³⁰

Bays of Laholm and Skelderviken

30. In its reply to questionnaire No. 2 (1926) of the Committee of Experts for the Progressive Codification of International Law, the Swedish Government stated:

"According to Swedish law, the whole area of any bay which indents the coast to an appreciable extent is in every case to be regarded as territorial water, and the exterior territorial waters are measured from a line drawn across the bay between the two extreme points where the bay merges into the general coast-line. During the Great War, therefore, the Swedish Government always maintained that the Bays of Laholm and Skelderviken, on the south-west coast of Sweden, were entirely Swedish territorial waters.

"In the case of the Bay of Laholm the Swedish argument was singularly strengthened by the provisions of a fisheries convention concluded between Sweden and Denmark. The rule has also been adopted by Swedish jurisprudence."³¹

²⁰ *Op. cit.*, p. 117.

²⁷ For Hudson Bay, see also Balch "Is Hudson Bay a closed or open sea?" in *American Journal of International Law*, vol. 6 (1912), p. 409; P. C. Jessup, *op. cit.*, pp. 411-12; Pitt-Cobbett, *Cases in International Law*, vol. I (1947), p. 162.

²⁸ 39 Geo. III, 5.

²⁹ 50 Geo. III, c. 5; 4 Geo. IV; c. 23; 9 and 10 Geo. IV, c. 3; 4 Wm. IV, c. 31.

³⁰ From the extract from the British case in the arbitration concerning the North Atlantic coast fisheries, 1909-1910, annexed to the Norwegian Counter-Memorial submitted to the International Court of Justice in the 1951 Anglo-Norwegian Fisheries case (vol. II, p. 271).

³¹ Ser. L.O.N.P. 1927, v. 1, p. 232.

²⁰ Moore, *op cit.*, vol. I (1906), pp. 735-739.

²¹ Fauchille, *Traité de droit international public*, vol. I (1925), p. 381.

²² Ser. L.O.N.P. 1927, v. 1, p. 257.

²³ *Revue égyptienne de droit international*, vol. 6 (1950), p. 175.

²⁴ *Ibid.*, vol. 7 (1951), p. 91.

²⁵ "Canada's title to Hudson Bay and Hudson Strait", in *British Year Book of International Law*, 1934, p. 2.

31. The position of Sweden in regard to the bays along its coasts, and in particular to Laholm Bay, is set forth by Mr. Eliel Löfgren, then legal adviser to the Ministry of Foreign Affairs, in an opinion given on 11 February 1925 in connexion with the capture on 19 January 1925 by the Swedish authorities of the German trawler *Heinrich Augustin*, found trawling at a place situated 1.4 distance minutes outside the closing line of Laholm Bay.³²

The Zuyder Zee

32. "The Zuyder Zee in Holland lies in two portions, which may be designated the inner and outer. The latter would probably not be considered a closed sea were it not for a fringe of islands which almost completely enclose it save for narrow passages; the body of water thus enclosed is about forty miles long by twenty wide. From this area a narrow passage about nine miles wide leads into the inner portion, which is about forty-five miles long by thirty-five wide.

"These bodies of water are claimed by the Netherlands and, judging by the testimony of the writers, this claim has never been called into question..."³³

33. Fauchille³⁴ states:

"The Zuyder Zee, which is claimed by the Netherlands as its property and from the extremity of which the territorial sea extends, in the general view, to its classic distance, seems to us to be indeed a special sea, governed by the rules relating to bays, because (1) this sea is enclosed by a continuous fringe of islands, separated from each other by narrow passages; (2) it is comparable to a lake, for like a lake it freezes over, whereas the sea resists freezing. The Netherlands claim in respect of the Zuyder Zee has therefore been generally accepted."

34. The Netherlands title to this sea can be based not only on a historic right proper but also on ordinary international law. A. Chrétien,³⁵ who does not admit the theory of historic bays (see *infra*, para. 92) concedes nevertheless that certain small bays, among others the Zuyder Zee, should be regarded as subject to the full and absolute sovereignty of the coastal State. Gidel³⁶ mentions the Zuyder Zee among the maritime areas which are sometimes designated as historic "but which should not be treated as falling within that category [of historic waters] because pursuant to the rules of the ordinary international law of the seas these areas are in any case internal waters".

Norwegian bays and fjords

35. In its reply to questionnaire No. 2 (1926) of the Committee of Experts for the Progressive Codification of International Law, the Norwegian Government stated:

"...The Norwegian bays and fjords have always been regarded and claimed by Norway as forming part of the territory of the Kingdom. This attitude is the necessary result of history, of local conditions along the very indented Norwegian coasts with their remarkable geographical peculiarities, and of the capital importance of a rational exploitation of the fjords and coastal archipelagos (*skjaergaard*) from the point of view of living conditions for the coastal population, and national economy. By fjords we mean not only those sea areas which are bounded on both sides by the continental coast-line, but also areas bounded by a continuous series of islands or a coastal archipelago (*skjaergaard*). Norwegian law has always held from most ancient times that these bays and fjords are in their entirety an integral part of Norwegian territorial waters, even should the breadth at the seaward end exceed the more or less arbitrary maxima breadths which certain countries, with a less characteristic coastline, have recently established for special purposes in view of their own needs and for very dissimilar reasons."³⁷

36. These claims were formulated more strongly in the Fisheries Case between the United Kingdom and Norway, decided by the International Court of Justice in its judgement given on 18 December 1951.³⁸ It will be noted that at the end of his oral reply the Agent of the United Kingdom Government stated:

"...Norway is entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fall within the conception of a bay... whether the proper closing line of the indentation is more or less than ten sea miles long" (Conclusion No. 5).³⁹

37. In its judgement in that case, the Court concluded that the Svaerholthavet basin had geographically the character of a bay. As to the LoppHAVet basin, however, the Court, while not recognizing it as having the character of a bay, agreed that the historic rights claimed by Norway in respect of it were sufficient justification for the line drawn by that country (*infra*, para. 69-72).

38. The Vestfjord,⁴⁰ about 100 kilometres across at its entrance and 170 kilometres long, was the subject of a diplomatic dispute when, in 1868, the French vessel *Les Quatre Frères* was seized by the Norwegian authorities in the waters of the fjord. The French Government having protested, the Minister of the Interior of Norway wrote a memorandum to the Norwegian Minister of Foreign Affairs in which the following passage occurs:

"The fisheries in a gulf which is considered to form part of the territorial sea of Norway have been regarded as the exclusive property of this country; it would certainly not be consistent with the principles of international law if it should be possible to produce sudden changes in a legal situation which is based on the tacit knowledge of several centuries."

39. J. Mochot,⁴¹ who quotes this passage from the

³² The text of the opinion is reproduced in P. C. Jessup, *op. cit.*, 413-24; also in *Fisheries Case (United Kingdom v. Norway)*, Judgement [I.C.J.] of 18 December 1951, vol. II, Annex 43, pp. 753-61.

³³ P. C. Jessup, *op. cit.*, p. 438.

³⁴ "Le droit de l'Etat sur la Mer territoriale" in *Revue générale de Droit international public*, vol. V (1893), p. 266.

³⁵ *Principes de Droit international public*, part I, Paris, 1893, p. 102.

³⁶ *Op. cit.*, p. 663.

³⁷ Ser. L.O.N.P. 1927, v. 1, p. 174.

³⁸ See especially the Norwegian Counter-Memorial, I.C.J., *Fisheries Case (United Kingdom v. Norway)* Judgement of 18 December 1951, vol. I, pp. 214-574.

³⁹ *Ibid.*, I.C.J. Reports, 1951, p. 121.

⁴⁰ In its judgement in the Fisheries Case, the International Court of Justice noted that "the waters of the Vestfjord, as indeed the waters of all other Norwegian fjords, can only be regarded as internal waters" (*loc. cit.*, p. 142).

⁴¹ *Le Régime des baies et des golfes en droit international*, Paris, 1938, p. 136.

Norwegian Minister's memorandum, says that "France, accepting the Norwegian contention, expressly stated that it did so solely by reason of the special configuration of the coasts of Norway and in derogation of all the rules of international law".

40. Another fjord, the Varangerfjord, which is about thirty miles across at its entrance and fifty miles long, gave rise to difficulties between Great Britain and Norway. In 1911, the British trawler *Lord Roberts* was arrested and sentenced by the Vardö court for trawling in the waters of the fjord. After the British Government had made representations, the Norwegian Government appointed a commission of inquiry. The commission concluded, on historic grounds, that the monopoly of fisheries for the benefit of Norwegian nationals in the Varangerfjord was justified by long and unchallenged usage.^{42 43}

41. Gidel⁴⁴ says that the Norwegian claims in respect of the Vestfjord and the Varangerfjord should be considered "as fully admitted, despite certain challenges (by France, in the case of the vessel *Les Quatre Frères*, 1868-69 and by Great Britain in 1869 and most recently in April 1911)".

Bays the coasts of which belong to Portugal

42. In its reply to the inquiry addressed to Governments by the Preparatory Committee for the Codification Conference (1930), the Portuguese Government stated that "Portugal regards as part of her European continental territory the bays formed by the estuaries of the Rivers Tagus and Sado, comprising the areas included between Cape Razo and Cape Espichel and between Cape Espichel and Cape Sines respectively" (see *infra*, para. 93).

Other examples of historic bays

43. The undermentioned maritime areas are likewise regarded as historic bays or are claimed as such by the States concerned:

Argentina: The River Plate estuary.⁴⁵

Australia:

Northern Australia: Van Diemen Gulf (opening: sixteen miles); Buckingham Bay (opening: twenty miles); Blue Mud Bay (opening: fifteen miles);

South Australia: Coffin Bay (opening: twelve miles);

⁴² Gidel, *op. cit.*, pp. 661-2.

⁴³ J. Mochot; *op. cit.*, pp. 136-7.

⁴⁴ *Op. cit.*, p. 661.

⁴⁵ Gidel, *op. cit.*, pp. 653-4; Emilio Mitre, *Principales Escritos y Discursos*, 1910; Saavedra Lamas, *La crise de la codification et la doctrine argentine du droit international*, vol. I, pp. 318-32. Both Argentina and Uruguay are riparian States of the River Plate.

⁴⁶ This list of Australian bays is given by Prof. A. H. Charteris in his *Chapters on International Law*, 1940, p. 99; quoted in the Norwegian Counter-Memorial in the *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951, vol. I, pp. 445.

Streaky Bay (opening: fourteen miles); Spencer Gulf (opening: forty-eight miles); Investigator Strait with St. Vincent's Gulf (opening: twenty-eight miles);

Western Australia: Exmouth Gulf (opening: thirteen miles); Roebuck Bay (opening: fourteen miles); Shark Bay (opening: fourteen miles);

Queensland: Broad Sound (opening: fifteen miles); Upstart Bay (opening: ten miles); Moreton Bay (opening: ten miles); Hervey Bay (opening: thirty-eight miles);

Tasmania: Oyster Bay (opening: fifteen miles); Storm Bay (opening: thirteen miles).⁴⁶

Dominican Republic: Bays of Samaná, Ocoa and Neyba.⁴⁷

France: Equatorial Africa: Bays of Mondah, Cape Lopez (opening: eighteen miles), Loango, Pointe Noire and Corisco (Rio Muni) and the Estuary of the Gabon; *East Africa*: Tadjura Gulf (opening: over ten miles).⁴⁸

Tunisia: Gulf of Tunis (opening: twenty-three miles),⁴⁹ Gulf of Gabés (opening: fifty miles).⁵⁰

Union of Soviet Socialist Republics: Kara Sea, Laptev Sea, East Siberian Sea and Chukchi Sea.⁵¹

United Kingdom: Bristol Channel.⁵²

United States of America: Monterey Bay,⁵³ Long Island Sound.⁵⁴

⁴⁷ Act No. 3342 of 13 July 1952, article 2 (United Nations Legislative Series, *Laws and Regulations on the Régime of the Territorial Sea*, ST/LEG/SER.B/6, p. 11).

⁴⁸ Gidel, *op. cit.*, p. 657.

⁴⁹ Gidel, *op. cit.*, p. 663.

⁵⁰ *Ibid.*

⁵¹ See A. N. Nikolaev, *infra*, para. 92.

⁵² The case of *Regina v. Cunningham* in 1859: a collision had occurred three miles from the shore of the county of Glamorgan in Wales in the neighbourhood of Cardiff at a spot where the width of the Bristol Channel is slightly more than ten miles. It was held by Cockburn, C. J., that the part of the sea where the collision had occurred formed part of the county of Glamorgan. Then, using more general language, the learned Chief Justice said: "The whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded" (Bell's *Crown Cases*, 72, 86).

The question of the juridical status of the Bristol Channel arose again in the case of the "Fagernes" [1926] P. 185; [1927] P. 311. (C.A.). A collision had occurred more than twenty miles to the east of Lundy Island and some miles to the eastward of a line drawn from Bull Point in Devon to Port Eynon in Glamorgan. The place where the collision had occurred was also roughly half way across the Bristol Channel, which in this area is about twenty miles wide. Hill, J., held that the collision had taken place in British territory. However, his judgement was overruled by the Court of Appeal [1927] P. 311, which was much influenced by the fact that the Attorney-General, when asked by the Court whether the Crown did or did not claim that particular part of the Bristol Channel where this collision had occurred as being within the territorial jurisdiction of the King, replied that it did not. (See also: P. C. Jessup, *op. cit.*, pp. 383-384; Mochot, *op. cit.*, 126-127; Pitt Cobbett, *Cases on International Law*, 6th ed., 1947, pp. 156-157, 160).

⁵³ P. C. Jessup, *op. cit.*, pp. 428-30.

⁵⁴ See *Mahler v. Transportation Co. Case* (1886), 35 N.Y. 352; *J. Duffy Case* (1926, D. C. Conn.) 14 F. (2nd) 426; P. C. Jessup, *op. cit.*, pp. 424-7.

B. *Bays the coasts of which belong to two or more States*

Gulf of Fonseca

44. This gulf, which is bounded by the territories of Nicaragua, Honduras and El Salvador, is nineteen and a half miles across at its entrance between Cape Cosiguina (Nicaragua) and Cape Amapala (El Salvador). By the Treaty of 5 August 1914 between the United States and Nicaragua, the latter country granted to the former, for the term of ninety-nine years, certain rights in a portion of Nicaraguan territory bordering on the Gulf of Fonseca, as well as certain rights for the construction of an interoceanic canal. El Salvador disputed the validity of the Treaty in proceedings instituted against Nicaragua in the Central American Court of Justice. In its judgement, rendered on 9 March 1917, the Court held unanimously that the gulf in question was "an historic bay possessed of the characteristics of a closed sea".⁵⁵

45. The grounds on which this decision was based are important and, accordingly, in order that all the considerations underlying the Court's reasoning may be fully presented, some extracts from its decision are quoted textually:

"In order to fix the international legal status of the Gulf of Fonseca it is necessary to specify the characteristics proper thereto from the threefold point of view of history, geography and the vital interests of the surrounding States.

"The historic origin of the right of exclusive ownership that has been exercised over the waters of the Gulf during the course of nearly four hundred years is incontrovertible, first, under the Spanish dominion — from 1522, when it was discovered and incorporated into the royal patrimony of the Crown of Castile, down to the year 1821 — then under the Federal Republic of the Centre of America, which in that year attained its independence and sovereignty, down to 1839; and, subsequently, on the dissolution of the Federation in that year, the States of El Salvador, Honduras and Nicaragua, in their character of autonomous nations and legitimate successors of Spain, incorporated into their respective territories, as a necessary dependency thereof for geographical reasons and purposes of common defence, both the Gulf and its archipelago, which nature had indented in that important part of the continent, in the form of a gullet.

"During these three periods of the political history of Central America, the representative authorities have notoriously affirmed their peaceful ownership and possession in the Gulf; that is, without protest or contradiction by any nation whatsoever, and, for its political organization and for police purposes, have performed acts and enacted laws having to do with the national security, the observance of health and with fiscal regulations. A secular possession such as that of the Gulf could only have been maintained by the acquiescence of the family of nations; and in the case here at issue it is not that the *consensus gentium* is deduced from a merely passive attitude on the part of the nations, because the diplomatic history of certain Powers shows that for more than half a century they have been seeking to establish rights of their own in the Gulf for purposes of commercial policy; but always on the basis of respect for the ownership and possession which the States have maintained by virtue of their sovereign authority."⁵⁶

46. The Court stated further:

"The foregoing descriptions give an exact idea of how vital

are the interests guarded by the Gulf of Fonseca, and, if those interests are of incalculable value in making up the characteristics of an 'historic bay' applicable thereto, there are other factors which determine even more clearly that legal status. These are:

"A. The projected railway that Honduras began and which she will not abandon until this great aspiration of hers shall have been concluded. Over that railway will pass the interoceanic traffic that is to develop the rich and extensive regions of the country. Its terminal stations, with their wharves, etc., will be located very probably on one of the principal islands nearest the coast of the Gulf.

"B. El Salvador, in her turn has under her control a railroad which, starting at the port of La Unión, follows its course through important and rich departments of the Republic to connect with lines entering from Guatemala at the Salvadorean frontier.

"C. The long-projected prolongation of the Chinandega railroad to a point on the Real Estuary on the Gulf of Fonseca to expedite and make more frequent communication on that side with the interior of Nicaragua.

"D. The establishment of a free port decreed by the Salvadorean Government on Meanguera island.

"E. The Gulf is surrounded by various and extensive departments of the three riparian countries. These are of great importance because they are destined to great commercial, industrial and agricultural development; their products, like those of the departments in the interior of those States, must be exported by way of the Gulf of Fonseca, and through that Gulf must come also the increasing importations.

"F. The configuration and other conditions of the Gulf facilitate the enforcement of fiscal laws and regulations and guarantee the full collection of imposts against frauds against the fiscal laws.

"G. 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 defense of their independence and sovereignty.

"Whereas: It is clearly deducible from the facts set forth in the preceding paragraphs that the Gulf of Fonseca belongs to the special category of historic bays and is the exclusive property of El Salvador, Honduras and Nicaragua; this on the theory that it combines all the characteristics or conditions that the text writers on international law, the international law institutes and the precedents have prescribed as essential to territorial waters, to wit, secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations, the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that those States should possess the Gulf as fully as required by those primordial interests and the interest of national defence."⁵⁷

47. By a majority vote, the Court held⁵⁸ that the three riparian States were co-owners of the waters of the gulf, "except as to the littoral marine league which is the exclusive property of each". The Court said in this respect:

"The legal status of the Gulf of Fonseca having been recognized by this Court to be that of a historic bay possessed of the characteristics of a closed sea, the three riparian States of El Salvador, Honduras and Nicaragua are, therefore,

⁵⁵ *American Journal of International Law*, vol. 11 (1917), p. 693.

⁵⁶ *Ibid.*, pp. 700-701.

⁵⁷ *Ibid.*, pp. 704-5.

⁵⁸ *Ibid.*, p. 693.

recognized as co-owners of its waters, except as to the littoral marine league which is the exclusive property of each, and with regard to the co-ownership existing between the States here litigant, the Court, in voting on the fourteenth point of the questionnaire, took into account the fact that as to a portion of the non-littoral waters of the Gulf there was an overlapping or confusion of jurisdiction in matters pertaining to inspection for police and fiscal purposes and purposes of national security, and that, as to another portion thereof, it is possible that no such overlapping and confusion takes place. The Court, therefore, has decided that as between El Salvador and Nicaragua co-ownership exists with respect to both portions, since they are both within the Gulf; with the express proviso, however, that the rights pertaining to Honduras as coparcener in those portions are not affected by that decision.”⁵⁹

II. INTERNATIONAL CASE-LAW

48. The important decision of the Central American Court of Justice in the case relating to the Gulf of Fonseca has already been mentioned (paras. 44-47 above).

49. Another important case having a bearing on historic bays was the North Atlantic Coast Fisheries Arbitration between the United Kingdom and the United States; the award, dated 7 September 1910, says:

“But the tribunal, while recognizing that conventions and established usage might be considered as the basis for claiming as territorial those bays on this ground might be called historic bays, and that such claims should be held valid in the absence of any principle of international law on the subject...”⁶⁰

While the award mentioned historic bays incidentally, only Dr. Drago, in his dissenting opinion, considered the question of those bays at more length and tried to identify their characteristic features. Dr. Drago's views on the question are given elsewhere in this paper, in the section on opinions of learned authors (*infra*, para. 92).

50. In the Fisheries Case between the United Kingdom and Norway, decided by the International Court of Justice in its judgement of 18 December 1951, the theory of historic bays played an important part. The parties dealt with it both in their written and in their oral statements. And the judgement of the Court, although not treating the theory as a major issue, devotes many pages to it. Nor does the theory receive less prominence in the separate or dissenting opinions of certain judges. In this section, only the relevant portions of the judgement will be cited.

51. The first noteworthy point is that the Court was asked to rule, not on the territoriality of any particular bay or of specific maritime areas, but on a system of delimitation. The system laid down by the Norwegian Royal Decree of 12 July 1935 included in the internal waters of Norway certain sea areas which, in the view of the United Kingdom, were part of the high seas. The issue in dispute between the two parties was whether this system of delimitation was in conformity with the applicable rules of international law. And it was prin-

cipally by relying on these rules for guidance that the Court endeavoured to resolve the issue. While basing its conclusions on the principles of general international law the Court did not, however, fail to make certain statements concerning the theory of historic rights.

52. In the course of the proceedings, both parties referred to the notion of historic title, but viewing it differently. The judgement, in the recital of facts, mentions this divergence of views.

53. The Norwegian Decree of 12 July 1935 sets out in the preamble the considerations on which its provisions on delimitation are based:⁶¹

“(1) Well-established national titles of right”;

“(2) The geographical conditions prevailing on the Norwegian coasts”;

“(3) The safeguard of the vital interests of the inhabitants of the northernmost parts of the country”.

The Decree “further relies on the Royal Decrees of 22 February 1812, 16 October 1869, 5 January 1881 and 9 September 1889”.

54. Norway put forward the 1935 Decree as the application of a traditional system of delimitation, which that country claimed to be in conformity with international law. Norway did not rely upon history “to justify exceptional rights, to claim areas of sea which the general law would deny”; it invoked history, together with other factors, to justify the way in which it applied the general law.⁶²

55. “This conception of an historic title”, said the Court, “is in consonance with the Norwegian Government's understanding of the general rules of international law. In its view, these rules of international law take into account the diversity of facts and, therefore, concede that the drawing of base lines must be adapted to the special conditions obtaining in different regions.”⁶³

56. The United Kingdom also referred to the notion of historic titles, but considered such titles as derogations from general international law. In its opinion, Norway could justify its claim to part of the waters in dispute “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 recognized although it constitutes a derogation from the rules in force. Norwegian sovereignty over these waters would constitute an exception, historic titles justifying situations which would otherwise be in conflict with international law”.⁶⁴

57. The waters which, in the British view, Norway was entitled to claim on historic grounds, are the subject of Conclusions Nos. 5, 9(a) and 11, and Alternative Conclusion II, presented by the Agent of the United Kingdom Government at the end of his oral reply. The

⁶¹ *Fisheries Case (United Kingdom v. Norway) Judgement of 18 December 1951: I.C.J. Reports (1951), p. 125.*

⁶² *Ibid.*, p. 133.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, pp. 130-131.

⁵⁹ *Ibid.*, p. 716.

⁶⁰ Scott, *Hague Court Reports*, First Series, New York, 1916, p. 185.

waters in question should, he argued, be regarded either as internal or as territorial waters. The text of these Conclusions is here cited in full:⁶⁵

"(5) That Norway is entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fall within the conception of a bay as defined in international law (see No. (6) below), whether the proper closing line of the indentation is more or less than ten sea miles long.

"(9) (a) That Norway is entitled to claim as Norwegian territorial waters, on historic grounds, all the waters of the fjords and sunds which have the character of legal straits.

"(11) That Norway, by reason of her historic title to fjords and sunds (see Nos. (5) and (9) (a) above), is entitled to claim, either as internal or as territorial waters, the areas of water lying between the island fringe and the mainland of Norway. In order to determine what areas must be deemed to lie between the island fringe and the mainland, and whether these areas are internal or territorial waters, the principles of Nos. (6), (7), (8) and (9) (b) must be applied to indentations in the island fringe and to indentations between the island fringe and the mainland—those areas which lie in indentations having the character of bays, and within the proper closing lines thereof, being deemed to be internal waters; and those areas which lie in indentations having the character of legal straits, and within the proper limits thereof, being deemed to be territorial waters."

[Second Alternative Conclusion] "II. That Norway, by reason of her historic title to fjords and sunds, is entitled to claim as internal waters the areas of water lying between the island fringe and the mainland of Norway. In order to determine what areas must be deemed to lie between the island fringe and the mainland, the principles of Nos. (6) and (7) above must be applied to the indentations in the island fringe and to the indentations between the island fringe and the mainland—those areas which lie in indentations having the character of bays, and within the proper closing lines thereof, being deemed to lie between the island fringe and the mainland."

58. The Court defined "historic waters" in these terms:

"By 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title."⁶⁶

59. After stressing the special character of the Norwegian coast, the Court noted that:

"In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing."⁶⁷

60. The Court then considered whether the straight baselines method—the distinctive feature of the Norwegian system of delimitation which, as applied to the Norwegian coast, was approved of by the Court—was applicable to certain sea areas not possessing the character of bays. The Court said:

"It has been contended, on behalf of the United Kingdom, that Norway may draw straight lines only across bays. The Court is unable to share this view. If the belt of territorial waters must follow the outer line of the 'skjaergaard', and if the method of straight baselines must be admitted in certain cases, there is no valid reason to draw them only across bays, as in Eastern Finnmark, and not also to draw them between islands, islets and rocks, across the sea areas separating them,

even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island formations of the 'skjaergaard', *inter fauces terrarum*.⁶⁸

61. The court likewise rejected the contention that the maximum permissible length of straight baselines was ten nautical miles:

"...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 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."⁶⁹

62. The Court did not look upon the Norwegian system of delimitation as exceptional but as the application of general international law to a specific case:

"Furthermore, apart from any question of limiting the lines to ten miles, it may be that several lines can be envisaged. In such cases the coastal State would seem to be in the best position to appraise the local conditions dictating the selection.

"Consequently, the Court is unable to share the view of the United Kingdom Government, that 'Norway, in the matter of baselines, now claims recognition of an exceptional system'. As will be shown later, all that the Court can see therein is the application of general international law to a specific case."⁷⁰

63. On the other hand, the Court said that the delimitation of sea areas "has always an international aspect"; it cannot be dependent merely upon the will of the coastal State. Although it is true that the coastal State is alone competent to undertake it, it is equally true that the validity of the delimitation with regard to other States depends upon international law. Accordingly, the Court indicated certain basic considerations that "bring to light certain criteria which, though not necessarily precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question".⁷¹

"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. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of baselines must not depart to any appreciable extent from the general direction of the coast.

"Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.

"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 a region, the

⁶⁵ *Ibid.*, pp. 121-123.

⁶⁶ *Ibid.*, p. 130.

⁶⁷ *Ibid.*, p. 128.

⁶⁸ *Ibid.*, p. 130.

⁶⁹ *Ibid.*, p. 131.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, p. 133.

reality and importance of which are clearly evidenced by a long usage.”⁷²

64. After noting the existence and consolidation of the Norwegian system of delimitation, the origins of which go back to 1812, the Court found “that this system was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other States”.

65. The passages in the Court’s judgement which deal with the continuity or consistency of the system of delimitation are here cited in full:

“The United Kingdom Government has, however, sought to show that the Norwegian Government has not consistently followed the principles of delimitation which, it claims, form its system, and that it has admitted by implication that some other method would be necessary to comply with international law. The documents to which the Agent of the Government of the United Kingdom principally referred at the hearing on 20 October 1951, relate to the period between 1906 and 1908, the period in which British trawlers made their first appearance off the Norwegian coast, and which, therefore, merits particular attention.

“The United Kingdom Government pointed out that the law of 2 June 1906, which prohibited fishing by foreigners, merely forbade fishing in ‘Norwegian territorial waters’, and it deduced from the very general character of this reference that no definite system existed. The Court is unable to accept this interpretation, as the object of the law was to renew the prohibition against fishing and not to undertake a precise delimitation of the territorial sea.

“The second document relied upon by the United Kingdom Government is a letter dated 24 March 1908, from the Minister for Foreign Affairs to the Minister of National Defence. The United Kingdom Government thought that this letter indicated an adherence by Norway to the low-water mark rule contrary to the present Norwegian position. This interpretation cannot be accepted; it rests upon a confusion between the low-water mark rule as understood by the United Kingdom, which required that all the sinuosities of the coast line at low tide should be followed, and the general practice of selecting the low-tide mark rather than that of the high tide for measuring the extent of the territorial sea.

“The third document referred to is a Note, dated 11 November 1908, from the Norwegian Minister for Foreign Affairs to the French Chargé d’Affaires at Christiania, in reply to a request for information as to whether Norway had modified the limits of her territorial waters. In it the Minister said: ‘Interpreting Norwegian regulations in this matter, whilst at the same time conforming to the general rule of the Law of Nations, this Ministry gave its opinion that the distance from the coast should be measured from the low-water mark and that every islet not continuously covered by the sea should be reckoned as a starting-point.’ The United Kingdom Government argued that by the reference to ‘the general rule of the Law of Nations’, instead of to its own system of delimitation entailing the use of straight lines, and, furthermore, by its statement that ‘every islet not continuously covered by the sea should be reckoned as a starting-point’, the Norwegian Government had completely departed from what it today describes as its system.

“It must be remembered that the request for information to which the Norwegian Government was replying related not to the use of straight lines, but to the breadth of Norwegian territorial waters. The point of the Norwegian Government’s reply was that there had been no modification in the Norwegian

legislation. Moreover, it is impossible to rely upon a few words taken from a single note to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated.

“The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government 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 dispute arose.”⁷³

66. And in the passage which follows the Court found that the Norwegian system had not encountered “any objection from foreign States”:

“Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.

“The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. One cannot indeed consider as raising objections the discussions to which the ‘Lord Roberts’ incident gave rise in 1911, for the controversy which arose in this connexion related to two questions, that of the four-mile limit, and that of Norwegian sovereignty over the Varangerfjord, both of which were unconnected with the position of baselines. It would appear that it was only in its Memorandum of 27 July 1933 that the United Kingdom made a formal and definite protest on this point.

“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 Romsdøl and Nordmøre, 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

⁷² *Ibid.*

⁷³ *Ibid.*, pp. 137-138.

maximum length adopted in the Convention. Having regard to the fact that, a few years before, the delimitation of Sunnmøre 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.

"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 the 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."⁷⁴

67. The Court accordingly arrived at the conclusion :

"...that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast ; that, even before the dispute arose, this 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".⁷⁵

68. The Court proceeded to apply the principles thus set out to certain sectors of the Norwegian coast. The United Kingdom Government had contended that certain baselines prescribed by the Norwegian Decree of 1935 did not follow the general direction of the coast or that they did not respect the natural connexion existing between certain sea areas and the land formations separating or surrounding them. These objectives related more particularly to two sectors : the sector of Svaerholt-havet and that of LoppHAVET.

69. With regard to the former, the Court said :

"...The United Kingdom Government denies that the basin so delimited has the character of a bay. Its argument is founded on a geographical consideration. In its opinion, the calculation of the basin's penetration inland must stop at the tip of the Svaerholt peninsula (Svaerholtklubben). The penetration inland thus obtained being only 11.5 sea miles, as against 38.6 miles of breadth at the entrance, it is alleged that the basin in question does not have the character of a bay. The Court is unable to share this view. It considers that the basin in question must be contemplated in the light of all the geographical factors involved. The fact that a peninsula juts out and forms two wide fjords, the Laksefjord and the Porsangerfjord, cannot deprive the basin of the character of a bay. It is the distances between the disputed baseline and the most inland point of these fjords, fifty and seventy-five sea miles respectively, which must be taken into account in appreciating the proportion between the penetration inland and the width at the mouth. The Court concluded that Svaerholt-havet has the character of a bay."⁷⁶

70. Of the sector of LoppHAVET, the Court said :

"...The LoppHAVET basin constitutes an ill-defined geographic whole. It cannot be regarded as having the character of a bay. It is made up of an extensive area of water dotted with large islands which are separated by inlets that terminate in the various fjords. The baseline has been challenged on the ground

that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the *general* direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse ; nor can one rely on the impression that may be gathered from a large-scale chart of this sector alone. In the case in point, the divergence between the base line and the land formations is not such that it is a distortion of the general direction of the Norwegian coast."⁷⁷

71. The Court then went on to say :

"Even if it were considered that in the sector under review the deviation was too pronounced, it must be pointed out that the Norwegian Government has relied upon an historic title clearly referable to the waters of LoppHAVET, namely, the exclusive privilege to fish and hunt whales granted at the end of the 17th century to Lt.-Commander Erich Lorch under a number of licences which show, *inter alia*, that the water situated in the vicinity of the sunken rock of Gjesbaaen or Gjesboene and the fishing grounds pertaining thereto were regarded as falling exclusively within Norwegian sovereignty. But it may be observed that the fishing grounds here referred to are made up of two banks, one of which, the Indre Gjesboene, is situated between the baseline and the limit reserved for fishing, whereas the other, the Ytre Gjesboene, is situated further to seaward and beyond the fishing limit laid down in the 1935 Decree.

"These ancient concessions tend to confirm the Norwegian Government's contention that the fisheries zone reserved before 1812 was in fact much more extensive than the one delimited in 1935. It is suggested that it included all fishing banks from which land was visible, the range of vision being, as is recognized by the United Kingdom Government, the principle of delimitation in force at that time. The Court considers that, although it is not always clear to what specific areas they apply, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of LoppHAVET. Such rights, founded 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 Court to have been kept within the bounds of what is moderate and reasonable."⁷⁸

72. There remains one further important point to be noted in the Court's judgement : this is the question of the status of a part of the waters of the *skjaergaard*, which the United Kingdom contended should constitute "territorial waters" and not "internal waters". These are, among others, the waters of the navigational route known as the Indreleia. The United Kingdom argued that the waters of this navigational route constituted a strait in the legal sense and, as such, should be treated as territorial waters. The Court observed :

"...that the Indreleia is not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway. In these circumstances the Court is unable to accept the views that the Indreleia, for the purposes of the present case, has a status different from that of the other waters included in the *skjaergaard*."⁷⁹

⁷⁴ *Ibid.*, pp. 138-139.

⁷⁵ *Ibid.*, p. 139.

⁷⁶ *Ibid.*, p. 141.

⁷⁷ *Ibid.*, pp. 141-142.

⁷⁸ *Ibid.*, p. 142.

⁷⁹ *Ibid.*, p. 132.

III. DRAFT INTERNATIONAL CODIFICATIONS OF THE RULES RELATING TO BAYS

73. The draft codifications concerning the law of the sea prepared since the end of the nineteenth century by learned societies make specific provision for the bays which coastal States may claim as internal waters. The same is true of the draft codifications prepared under the auspices of the League of Nations. The rules formulated in most of these drafts make allowance for historic bays. They do not contain special clauses dealing with historic bays but, in most cases, mention them incidentally, in the form of an exception to the general rule recommended for ordinary bays. Nevertheless, the language used in the clause containing the exception, which differs from one draft to another, may offer some clue to the approach of the authors of the drafts to the theory of historic bays.

Most of the drafts that mention historic bays contemplate only the case of a bay the coasts of which belong to a single State.

A. Draft codifications prepared by learned societies

Institute of International Law

74. At its session held in Paris in March 1894, the Institute of International Law adopted a number of rules concerning the definition and the régime of the territorial sea. In its draft article 3, the Institute recognizes the theory of historic bays by using the terms "continuous usage of long standing" (*usage continu et séculaire*):

"Article 3. In the case of bays, the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line 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."⁸⁰

75. However, in the draft regulations concerning the territorial sea in time of peace, adopted by the Institute of International Law at its Stockholm session in August 1928, the theory of historic bays is expressed by the words "international usage":

"Article 3. The territorial sea is measured...; in the case of bays, from a straight line drawn across the bay at the place nearest the opening toward the sea, where the distance between the two shores of the bay is ten nautical miles, unless international usage has sanctioned a greater width.

"In the case of bays the coasts of which belong to two or more States, the territorial sea follows the sinuosities of the coast."⁸¹

76. The first draft of this clause had contained the expression "unchallenged (*incontesté*) international usage". During the debate preceding the adoption of the article, an amendment was proposed for the deletion of the word "unchallenged". The amendment was carried and the word in question was dropped.⁸²

⁸⁰ *Annuaire de l'Institut de Droit International*, vol. 13 (1894-95), p. 329.

⁸¹ *Ibid.*, vol. 34, Stockholm session, August, 1928, p. 755.

⁸² *Ibid.*, pp. 641-642.

International Law Association

77. The draft rules relating to territorial waters, adopted by the International Law Association at its Brussels session in 1895, contain an article 3 which reproduces textually the corresponding clause of the 1894 draft of the Institute of International Law (except that the width of twelve miles is replaced by ten miles).⁸³

78. The draft convention submitted in 1926 to the Association's thirty-fourth conference by the committee appointed by the Executive Council to consider, *inter alia*, maritime jurisdiction in time of peace, uses the expression "established usage":

"Article 7. With regard to bays and gulfs, territorial waters shall follow the sinuosities of the coast, unless an established usage has sanctioned a greater limit."⁸⁴

79. The draft convention, as amended by the Conference, adopts the same expression, adding the terms "generally recognized by the nations". In addition, it introduces the idea of "occupation" into the saving clause:

"Article 7. With regard to bays and gulfs, territorial waters shall follow the sinuosities of the coast, unless an occupation or an established usage generally recognized by the nations has sanctioned a greater limit."⁸⁵

American Institute of International Law

80. Project No. 10, prepared in 1925 by the Commission set up by the American Institute of International Law for the codification of American international law, embodies the theory of historic bays. Article 6 uses the expression "continued and well-established usage":

"Article 6. 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."⁸⁶

81. The project submitted in 1933 to the Seventh International Conference of American States by the American Institute of International Law expresses the theory of historic bays in the following terms:

"Article 11. There are excepted from 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."⁸⁷

⁸³ The International Law Association, *Report of the Seventeenth Conference*, 1895, p. 115.

⁸⁴ *Ibid.*, *Report of the Thirty-fourth Conference*, 1926, p. 43.

⁸⁵ *Ibid.*, p. 102.

⁸⁶ *American Journal of International Law*, 1926, Special Supplement, vol. 20, p. 318.

⁸⁷ "Project on the Territorial Sea", submitted to the Seventh International Conference of American States, 3 December 1933 (Document for the Use of Delegates, No. 4, pp. 38-41); quoted in *I.C.J. Fisheries Case (United Kingdom v. Norway)*, *Judgement of 18 December 1951*, vol. III, Norwegian Reply, p. 455; Bustamante, *The Territorial Sea*, 1930, pp. 142-143.

(Article 16 of the project provides that the same rule is to apply to straits).

Kokusaiho-Gakukwai

(*Japanese International Law Society*)

82. A draft codification adopted in 1926 by Koku-saiho-Gakukwai (The Japanese International Law Society) employs the expression "immemorial usage":

"Article 2. In the case of bays and gulfs, the coasts of which belong to the same State, the littoral waters extend seawards at right angles 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."⁸⁸

Harvard Research

83. The Harvard Research draft on territorial waters employs the expression "established usage":

"Article 22. 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."⁸⁹

84. It will be noticed that this article is general in scope, and does not concern bays only. The comment on the article states:

"This 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. Such claims may enlarge or diminish the extent of territorial waters. Similarly it seems desirable that it should be recognized that usages with respect to other areas may become established in the future and that well-founded claims may be based upon such established usage.

"A State may have claimed for all of its marginal seas a different measure from that which is established by this convention. Some States for instance have for many years claimed four miles as the limit of their marginal seas. This article is not designed to protect such a general claim made by a State with reference to all of its marginal seas. However, in a particular area an established usage might be proved which would entitle a State to include a wider area in its territorial waters than three miles of marginal sea."

B. Draft codifications

prepared under the auspices of the League of Nations

*1. Committee of Experts for the Progressive Codification of International Law*⁹⁰

(a) Draft convention prepared by Mr. Schücking

85. This draft uses the same terms as the 1894 draft of the Institute of International Law:

⁸⁸ J. Mochot, *Régime des baies et des golfes en droit international*, Paris, 1938, p. 144.

⁸⁹ *Research in International Law, Harvard Law School (Nationality, Responsibility of States, Territorial Waters)*, 1929, p. 288.

⁹⁰ This Committee was convened under a resolution adopted

"Article 4. Bays. 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 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 twelve marine miles, unless a greater distance has been established by continuous and immemorial usage..."⁹¹

(b) Draft convention amended by Mr. Schücking in consequence of the discussion in the Committee of Experts

86. The text of article 4 of the amended draft is similar to that of the original draft prepared by the rapporteur, except that the width of twelve miles is replaced by ten miles. In addition, the amended text of article 4 expressly provides that the waters of the bays defined in that article "are to be assimilated to internal waters".⁹²

2. Conference on the Codification of International Law (1930)

*(a) Preparatory Committee*⁹³

87. Basis of Discussion No. 8 prepared by this Committee was worded 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."⁹⁴

The above provision relates only to historic bays, Basis of Discussion No. 7 being concerned with ordinary bays.⁹⁵

by the Assembly of the League of Nations on 22 September 1924.

At its second session in January 1926, the Committee adopted seven questionnaires on the subjects which, in its opinion, were sufficiently ripe for international regulation. Questionnaire No. 2 dealt with territorial waters. On 29 January 1926, the Committee circulated to Governments for their comments a Sub-Committee's report on territorial waters (questionnaire No. 2). This report included, *inter alia* (1) a memorandum by Mr. Schücking, rapporteur of the Sub-Committee, with a draft convention annexed; and (2) the draft convention amended by Mr. Schücking in consequence of the discussion in the Committee of Experts.

⁹¹ Ser. L.O.N.P. 1927, v. 1, p. 58.

⁹² *Ibid.*, p. 72.

⁹³ This Committee was appointed under a resolution adopted by the Council of the League of Nations on 28 September 1927, with the terms of reference contained in a resolution of 27 September 1927 of the Assembly. At its session held at Geneva from 28 January to 17 February 1929, the Preparatory Committee examined the replies of Governments to the request for information upon the three questions on the programme of the proposed Conference: territorial waters, etc. As a result of that examination, the Committee drew up bases of discussion for the use of the Conference.

⁹⁴ Ser. L.O.N.P. 1929, v. 2, p. 45.

⁹⁵ Basis of Discussion No. 7: "In the case of bays 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 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." (*Ibid.*)

88. In its observation, the Preparatory Committee noted that :

"The government replies appear to indicate that agreement can easily be reached to extend the same method of calculation to bays of a greater breadth than ten miles where the coastal State is in a position to prove the existence of a usage to that effect (historic bays)." ⁹⁶

89. Bases of Discussion Nos. 7 and 8 concern bays the coasts of which belong to a single State. Basis of Discussion No. 9 concerns bays the coasts of which belong to two or more States :

"If two or more States touch the coast of a bay or estuary of which the opening does not exceed ten miles, the territorial waters of each coastal State are measured from the line of low-water mark along the coast." ⁹⁷

(b) Report of the Second Committee

90. In its report to the Conference, the Second Committee (Mr. François, Rapporteur), which had been appointed to study the Bases of Discussion drawn up by the Preparatory Committee, said :

"One difficulty which the Committee encountered in the course of its examination of several points of its agenda was that the establishment of general rules with regard to the belt of the territorial sea would, in theory at any rate, effect an inevitable change in the existing status of certain areas of water. In this connexion, it is almost unnecessary to mention the bays known as 'historic bays'; and the problem is besides by no means confined to bays, but arises in the case of other areas of water also. The work of codification could not affect any rights which States may possess over certain parts of their coastal sea, and nothing, therefore, either in this report or in its appendices, can be open to that interpretation." ⁹⁸

IV. OPINIONS OF LEARNED AUTHORS AND OF GOVERNMENTS

A. Opinions of learned authors

91. The preceding section explained how the subject of historic bays has been treated by expert bodies. The present section will cite opinions expressed on historic bays by selected authors either in personal publications, or in connexion with judicial decisions or in the course of collective efforts at codification. As far as possible, only those opinions will be cited which reflect approval or disapproval of the theory of historic bays. The views of authors on other aspects of the problem will be taken into account in part II of this memorandum.

92. The authors cited are listed in the chronological order of the publication of their works.

Vattel (1758) : ⁹⁹

"All that we have said regarding the parts of the sea adjoining the coast is true more particularly and *a fortiori* of roadsteads, bays, and straits, which lend themselves even more easily to occupation and are of greater importance to the

country's safety. I am only speaking, however, of bays and straits which are small in size, and not of those large areas of the sea that are sometimes so described, such as Hudson Bay or the Straits of Magellan, where no *imperium*, much less a right of ownership, is exercisable. A bay which can be defended at its entrance can be occupied and subjected to the Laws of the Sovereign ; indeed, it should be so occupied, for any such place is much more likely to attract the trespasser than a coast open to the winds and the turbulence of the waves."

Kent (1878) : ¹⁰⁰

"It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a State may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbours, gulfs, bays and estuaries, and over which its jurisdiction unquestionably extends. . . . The executive authority of that country [the United States], in 1793, considered the whole of Delaware Bay to be within its territorial jurisdiction ; resting its claims upon those authorities which admit that gulfs, channels, and arms of the sea belong to the people with whose lands they are encompassed ; and it was intimated that the law of nations would justify the United States in attaching to their coasts an extent into the sea, beyond the reach of cannon-shot.

"Considering the great extent of the line of the American coasts, their writers contend that they have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction ; nor would it be unreasonable, as they say, to assume, for domestic purposes connected with their safety and welfare, the control of the waters on their coasts, though included within lines stretching from quite distant headlands ; as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that their 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 their coast, far beyond the reach of cannon-shot, as cruising ground for belligerent purposes. In 1793 the Government of the United States thought they were entitled, in reason, to as broad a margin of protected navigation, as any nation whatever, though at that time they did not positively insist upon more than the distance of a marine league from the sea shores ; and, in 1806, they thought it would not be unreasonable, considering the extent of the United States, the shoalness of their coast, and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare, for the space between that limit and the American shore. It ought, at least, to be insisted, they urged, 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 any where at sea within the distance of four leagues, or from a right line from one headland to another.'"

R. Phillimore (1879) : ¹⁰¹

"Besides the rights of property and jurisdiction within the limit of cannon-shot from the shore, there are certain portions of the sea which, though they exceed this verge, may, under special circumstances, be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries which are enclosed but not entirely surrounded by lands belonging to one and the same State . . ."

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Ser. L.o.N.P. 1930.V.14, p. 125.

⁹⁹ *Le Droit des Gens*, 1758, Carnegie Institution of Washington, 1916, p. 251.

¹⁰⁰ *Kent's Commentary*, 2nd ed. (1878), pp. 100-102.

¹⁰¹ *Commentaries upon International Law*, vol. I, 3rd ed. 1879, p. 284.

*Hall (1880):*¹⁰²

"It seems to be generally thought that straits are subject to the same rule as the open sea; so that when they are more than six miles wide the space in the centre which lies outside the limit of a marine league is free, and that when they are less than six miles wide they are wholly within the territory of the State or States to which their shores belong. This doctrine however is scarcely consistent with the view, which is also generally taken, that gulfs, of a greater or less size in the opinion of different writers, when running into the territory of a single State, can be included within its territorial waters; perhaps also it is not in harmony with the actual practice with respect to waters of the latter kind.... In principle it is difficult to separate gulfs and straits from one another; the reason which is given for conceding a larger right of appropriation in the case of the former than of the latter, viz., that all nations are interested in the freedom of straits, being meaningless unless it be granted that the State can prohibit the innocent navigation of such of its territorial waters as vessels may pass over going from one foreign place to another. If that could be done, it might be necessary to impose a special restriction upon the appropriation of waters which by their position are likely to be so used. Such however not being the case in fact, it is the power of control which has alone to be looked to; and the power of exercising control is not less when water of a given breadth is terminated at both ends by water than when it merely runs into the land. Of practice there is a curious deficiency, and there is nothing to show how many of the claims to gulfs and bays which still find their place in the books are more than nominally alive. It is scarcely possible to say anything more definite than that, while on the one hand it may be doubted whether any State would now seriously assert the right of property over broad straits or gulfs of considerable size and wide entrance, there is on the other hand nothing in the conditions of valid maritime occupation to prevent the establishment of a claim either to basins of considerable area, if approached by narrow entrances such as those of the Zuyder Zee, or to large gulfs which, in proportion to the width of their mouth, run deeply into the land, even when so large as the Bay of Fundy, or still more to small bays, such as that of Cancale."

*A. Chrétien (1893):*¹⁰³

"I only recognize as integral parts of the maritime territory of the State ports, harbours and roadsteads, bays and small gulfs which penetrate into the land domain and man-made waterways which run across it and connect two seas.

...

"In cases where the entrance to a gulf or bay is sufficiently narrow to be wholly commanded by the cannon of the State holding the two shores, and where, in addition, the size of the bay or gulf is not considerable, the waters therein should be assimilated to ports, harbours and roadsteads indented into the land territory of a State. There are the same reasons for regarding them as subject to the complete and absolute sovereignty of the coastal State. This applies to the Bay of Brest in France, to Jade Bay, the Frisches Haff and the Kurisches Haff in Germany, to the Zuyder Zee in Holland, to the Danish and Norwegian fjords, and to other similar indentations.

"Gulfs and bays of large size should be treated either as non-closed internal seas or as open seas, depending on whether the width of the entrance is smaller or larger than twice the traditional range of cannon, that is to say six nautical miles of sixty to a degree. Consequently, the Gulf of Mexico, the Bay

of Biscay and the Gulf of Lions are open seas. The application of these principles to the Gulfs of Bothnia and of Finland in Europa and to Delaware, Hudson and Conception Bays in America would normally lead to the conclusion that they also are free waters. This solution, however, is not accepted by the Russian, American and English Governments, which declare them to be wholly territorial waters."

*Barclay (1894-95):*¹⁰⁴

In explaining the exception contained in the final clause of article 3 of the 1894 draft of the Institute of International Law (*supra*, para. 74) this author states:

"... 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. There are, however, many bays which are more than ten or even sixteen miles wide and yet must necessarily be regarded by reason of their position, as under the absolute sovereignty of the coastal State. This is true of the firths of Scotland. The Bay of Cancale is seventeen miles wide; in Chaleur Bay, in Canada, the width is sixteen miles. All these bays are regarded as under the exclusive dominion of the coastal State. It is thus necessary to establish the principle that the status of a bay differs from that of the territorial sea proper."

*A. Rivier (1896):*¹⁰⁵

"... the portions of the sea, or the seas, which, by reason of their configuration, are called gulfs or bays, are territorial if they border on the territory of a single State and their entrance is sufficiently narrow to be wholly within the range of the coastal batteries. But where there are several coastal States, the gulf is an open sea regardless of its width at the entrance. A gulf is also an open sea, even if it is surrounded by a single State, if its entrance is too wide to be dominated from the coast. This is generally admitted to be the case where the distance between the two shores exceeds ten nautical miles.

"Territorial gulfs are governed by the principles of law which also govern internal seas not designated as gulfs. The littoral sea begins where the territorial gulf ends.

...

"The Frisches Haff and the Kurisches Haff are German, as are the Gulf of Stettin and Jade Bay. The Gulf of Riga is Russian. England has claimed territorial jurisdiction over Conception Bay (Newfoundland) and the Bay of Fundy (Canada)..."

"The Gulf of Bothnia is open sea, as are also the Gulf of Finland — although Russia claims the latter to be Russian — and Delaware and Hudson Bays, despite the contrary opinion of the American and the English. The Behring Sea is open sea."

*Drago (1910):*¹⁰⁶

In his dissenting opinion in the North Atlantic Coast Fisheries Arbitration between Great Britain and the United States (1910) (*supra*, para. 49), Dr. Drago states:

¹⁰⁴ *Annuaire de l'Institut de droit international*, vol. 13 (1894-95) p. 147.

¹⁰⁵ *Principes du Droit des Gens*, vol. I, Paris (1896), pp. 154-155.

¹⁰⁶ Scott, *op. cit.*, pp. 199-200.

¹⁰² *International Law*, 1880, pp. 127-129.

¹⁰³ *Principes de Droit international public*, Paris, 1893, pp. 100-103.

"So it may be safely asserted that a certain class of bays, which might be properly called the historical 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-defence, justify such a pretension. The rights of Great Britain over the bays of Conception, Chaleur and Miramichi are of this description..."

Epitacio Pessoa (1910): 107

This author's draft code of public international law, submitted to the Commission of Jurists of Rio de Janeiro in 1910, admits the theory of historic bays in these terms:

"Article 54. In gulfs and bays, the territorial sea shall be measured from a straight line drawn between the two extreme points at the narrowest part of the mouth; if this part has a width exceeding ten miles, the measurement shall be taken in conformity with the preceding article and with due regard to acquired rights."

Westlake (1910): 108

"But although this is the general rule, it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognized by immemorial usage as territorial seas of the States into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit to such appropriation. Examples are the Bay of Conception in Newfoundland, penetrating forty miles into the land and being fifteen miles in average breadth, which is wholly British, Chesapeake and Delaware Bays, which belong to the United States, and the Bay of Cancale, seventeen miles wide, which belongs to France. Similar exceptions to those admitted for gulfs were formerly claimed for many comparatively shallow bays of great width, for example those on the coast of England from Orfordness to the North Foreland and from Beachy Head to Dunnose, which, together with the whole of the Bristol Channel and various other stretches of sea bordering on the British Isles were claimed under the name of the King's Chambers. But it is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid ground for the assumption of sovereignty, and even in that case the geographical features which may warrant the assumption are too incapable of exact definition to allow of the claim being brought to any other test than that of accepted usage. It is sometimes said and may be historically true that all sovereignty now enjoyed over the littoral sea or certain gulfs is the remnant of the vast claims which, as we have seen, were once made to sovereignty over the open sea and which it is held have been gradually reduced to a tolerable measure through such intermediate stages as that of the King's Chambers; and the impossibility of putting the claim to gulfs in a definite general form may be thought favourable to that view. None the less however the rights which are now admitted stand on a basis clear and solid enough to distinguish and support them."

Fauchille (1925): 109

"If the practice of many States thus seems to conflict with

the principle, which today seems to predominate among the authorities and in treaty-made law, that the only territorial gulfs and bays are those which have an entrance not exceeding ten miles in width, many authors and the statutes of some States recognize that this principle should suffer at least one exception. According to these, there 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. What exactly is the correct definition of a historic or vital bay? It is one of the large gulfs or bays the territorial character of which has been recognized by long-established usage and undisputed custom..."

P. C. Jessup (1927): 110

"Turning to the second point raised above,—namely, prescriptive rights,—one is forced to the rather unsatisfactory conclusion that for large bays each case should be determined on its own merits and that the status of any particular bay more than six miles wide rests upon the success with which the littoral State has succeeded in pressing its claim to entire jurisdiction over that body of water. It will appear below that this general theory in its specific application has been extremely useful and there is no doubt that in so far as already established, it can not be discarded. Where the mouth of a bay is not of very great extent but the bay itself opens up widely well within the body of the country,—as is the case with the Chesapeake and Delaware bays of the United States,—it seems highly proper that the littoral State should have complete authority over the water so lying within its territory. To make such a principle generally useful for universal application, it would practically be necessary for the nations of the world to meet in conference with the assistance of geographic experts and to make a list of all the bays of the world which were to be considered entirely the property of a single country. There seems to be little chance that such a conference could be arranged or that its labours would be successful if it were to be convoked. Holding in abeyance, then, 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."

The same author states in a later passage:

"It is believed that it will appear from a study of this material that no established rule of international law exists as to bays except to the effect that bays not more than six miles wide are deemed territorial waters as well as those to which a nation has established a prescriptive claim. Such a prescriptive claim may be established over bays of great extent; the legality of the claim is to be measured, not by the size of the area affected, but by the definiteness and duration of the assertion and the acquiescence of foreign Powers. The evidence of international practice and usage does not indicate that a claim to a large bay is illegal."

Antonio Sanchez de Bustamante y Sirven (1930): 111

"A solution is required for the problem of historic bays, by virtue of which the coastal State is recognized the right over them, whatever the extent of their openings. There are many in this case, both great Powers and countries less strong or materially not very great. As is natural, there is a tendency to convert into a *de jure* rule this *de facto* situation."

¹⁰⁷ *A Codificação Americana do Direito Internacional*, vol. III, p. 36.

¹⁰⁸ *International Law*, 2nd ed., Cambridge, 1910, pp. 191-192.

¹⁰⁹ *Traité de droit international public*, vol. I, Paris, 1925, p. 380.

¹¹⁰ *The Law of Territorial Waters and Maritime Jurisdiction*, 1927, pp. 362-363, 382.

¹¹¹ *The Territorial Sea*, New York, 1930, p. 99.

Gidel (1930-1934): 112

"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 possibility of devising general rules concerning this branch of the public international law of the sea."

G. Scelle (1946-1947): 113

"Without rejecting the automatic system altogether, Governments have always made a reservation regarding 'historic bays', which are the widest and of the greatest importance to their interests. They contend that these maritime areas which they have always claimed as reserved for their exclusive use and which are, in fact, closed to common traffic by an immemorial usage accepted by other States should be regarded not only as territorial waters but as internal waters. According to this view, then, the claim rests on a form of prescription."

"We believe that there are valid grounds for recognizing prescription as a mode of acquiring rights in international law. Indeed, we think that in the international system prescription is even more fundamental than in municipal systems, inasmuch as it is very generally recognized that prolonged possession of control produces effects in law. In this, as in all primitive legal systems, it is the *occupation* that lies at the root of the title. The essential difference between international law and municipal law in this respect is that in the former the period of prescription is indeterminate and is governed in each case by the test of 'reasonableness'. In any event, the onus is on the claimant State to prove its claim by showing 'immemorial' usage and 'acceptance', at least by implication, as well as the absence of any suspension or interruption."

Pitt-Cobbett (1947): 114

"Gulfs and bays running into the territory of a single State are also commonly regarded as 'territorial waters' and hence as subject to the sovereignty and jurisdiction of the territorial Power. It is universally admitted that this is so, if the width of the gulf or bay at its point of actual junction with the open sea does not exceed six miles. The North Sea Convention of 1882, already considered, extends this to ten miles. There are, however, territorial bays and gulfs whose entrance largely exceeds this limit. Thus, as we have seen, Conception Bay, with an entrance twenty miles wide, was held to be part of British territory, and Hudson Bay, with an entrance of fifty miles, is also claimed as territorial water by Great Britain. So, too, the United States include in their 'territorial waters' Chesapeake Bay, the entrance to which is twelve miles from headland to headland; Delaware Bay, which is eighteen miles wide; and Cape Cod Bay, which is thirty-two miles wide; as well as other inlets of a similar kind. France, for special reasons, claims the Bay of Cancale, the entrance to which is seventeen miles in width. Norway claims the Varanger Fjord, with an entrance of thirty-two miles, as territorial waters. Such claims would probably be admitted by other States, subject to the body of water in question exhibiting a well marked configuration as a gulf or bay; and perhaps subject also to such claims being confirmed by prescription and acquiescence. But it would not extend to a long curvature of the coast with an open face; or to claims such as those formerly made by the Crown in England as regards the 'Kings Chambers'; or to a claim such as that put forward by the United States in the Behring Sea controversy. So far as such bodies of water are rightly regarded

as territorial, they will be subject alike to the sovereignty and jurisdiction of the territorial Power to the same extent and for the same purposes as those already indicated in the case of the littoral or marginal sea."

Higgins and Colombos (1952): 115

"...The best rule appears to be that in the case of bays bounded by the territory of one and the same State, the ordinary distance of territorial waters should be generally applied and therefore a limit of six marine miles should be recognized to the littoral State. This rule is subject to the exception that on historical or prescriptive grounds, or for reasons based on the special characteristics of a bay, the territorial State is entitled to claim a wider belt of marginal waters, provided that it can show affirmatively that such a claim has been accepted expressly or tacitly by the great majority of other nations."

M. Bourquin (1952): 116

"...But we should note immediately that it would never be possible to accept it [the ten-mile rule] without qualifying it by important exceptions. Its rigid application would so seriously upset the existing situation that it cannot even be contemplated. The number of bays the opening of which exceeds ten miles and which are nevertheless wholly within the internal waters of the coastal State is considerable. Unless we wish to accuse the States to which they belong of infringing the rules of international law, we must therefore validate their claims by recognizing an exceptional rule."

A. N. Nikolaev (1954): 117

"In areas containing internal maritime waters or other national waters, the territorial sea is measured from the outer limit of those waters. The internal waters of the USSR include the Sea of Azov, the Gulf of Riga, the White Sea (to the south of a straight line drawn from Cape Svyatoy Nos to Cape Kanin Nos) and Cheskaya Bay (south of a line going from Cape Mikulino to Cape Svyatoy Nos).

"The author of this work is in full agreement with the Soviet scholars who regard as 'historic' and subject to the régime of the internal waters of the USSR the seas which form bays in the Siberian coast: the Sea of Kara, the Laptev Sea, the East Siberian Sea and the Chukchi Sea. Many centuries were required by Russian navigators to establish mastery over these seas, which now constitute a national waterway of the Soviet State. Through these seas passes the northern maritime route from Murmansk and Archangel to Vladivostok, which was only opened through the prodigious efforts of our heroic Soviet people. In this connexion, we should also recall the judgement delivered on 18 December 1951 by the International Court of Justice in the dispute between the United Kingdom and Norway: this judgement recognizes that the maritime route of Indreleia, which follows the Norwegian coast and was only rendered navigable by special work executed by Norway, forms part of Norwegian internal waters."

Oppenheim (1955): 118

"Such gulfs and bays as are enclosed by the land of one and the same littoral State and have an entrance from the sea not

¹¹² *Op. cit.*, p. 651.

¹¹³ *Droit international public*, 2nd ed., Paris, 1946-47, p. 435-436.

¹¹⁴ *Cases on International Law*, 6th ed., 1947, p. 158.

¹¹⁵ Higgins and Colombos, *The International Law of the Sea*, London, 1943, p. 112. (French text published in 1952.)

¹¹⁶ *Les baies historiques*, *Mélanges Georges Sauser-Hall*, 1952, p. 38.

¹¹⁷ *Problema territorialnykh vod v mezhdunarodnom prave* (1954) pp. 207-208.

¹¹⁸ *International Law*, 8th ed., 1955, pp. 505-508.

more than six miles wide are certainly territorial; those on the other hand, that have an entrance too wide to be commanded by coast batteries erected on one or both sides of it, even though enclosed by one and the same littoral State, are certainly not territorial. These two propositions may safely be maintained. . . .

"Gulfs and bays surrounded by the land of one and the same littoral State whose entrance is so wide that it cannot be commanded by coast batteries, and, further, as a rule,¹ all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial. They² are parts of the open sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated; . . ."

¹ For an exception to the rule, see the next note as to the Gulf of Fonseca."

² This is not uncontested. A few writers—see, for instance, Twisse, i, sec. 181—assert that narrow gulfs and bays surrounded by the land of two different States are territorial, the central line dividing the territorial portions. However, the majority of writers do not accept this opinion, and it would seem that the practice of States likewise rejects it, except in the case of such bays as possess the characteristics of a closed sea. Thus, in the case of *San Salvador v. Nicaragua*, the International Court of the Central American Republics (A.J., 11 (1917) pp. 693, 700-717) decided in 1917 that, taking into consideration the geographical and historical conditions as well as its situation, extent, and configuration, the Gulf of Fonseca must be regarded as 'an historic bay possessed of the characteristics of a closed sea', and that it therefore was part of the territories of San Salvador, Honduras and Nicaragua. The decision of this Court has, of course, only force with regard to the three Central American States concerned; but the United States acknowledges the territorial character of this Gulf. The attitude of other States is not known.

"As regards the Bay of Fundy, see the *Schooner Washington*, British-American Claims Commission, 1853-1855, Report of Decisions, page 170; Scott, *Cases*, p. 229."

G. Balladore Pallieri (1956): 119

"As a further exception [to the foregoing principle], some States have maintained or acquired sovereignty of certain bays known as 'historic' bays. These are often quite spacious bays, the mouth being sometimes tens of miles wide, which certainly cannot be considered as part of the territorial sea on the basis of the rules governing that sea which will be set out hereunder. Claims made by States to sovereignty over such bays have thus a totally different basis and must be considered as a last and somewhat pale remnant of the ancient claim to sovereignty over the high seas. The legal basis of each of these claims to a 'historic' bay is constituted by continued usage with the explicit or implicit consent of the members of the international community. As we shall soon see, however, these are exceptional departures which do not in any way detract from the validity of the general principle [that the sea cannot form the subject of an act of appropriation]. Furthermore, these exceptions are progressively disappearing. . . . At present, only the following maritime areas appear to remain subject to sovereignty as an exception to the general principle: Conception and Chaleur Bays (Canada); Chesapeake and Delaware Bays, Monterey Bay and Long Island Sound (United States of America); the Bays of Fundy and Miramichi; Cancale or Granville Bay; the Bristol Channel (United Kingdom); Vestfjord (Norway); the Gulf of Tunis (Tunisia); the Gulf of Fonseca (Costa Rica, Honduras, Nicaragua and El Salvador); and the Zuyder Zee (Netherlands). In addition, the International Court has declared (judgement of 18 December 1951) that, under a recently established usage, Norway is authorized to measure its territorial sea from a baseline which is different from the normal baseline and by virtue of which it has more extensive sovereign rights over maritime areas."

¹¹⁹ *Diritto Internazionale Pubblico*, 7th ed. (revised) (1956), pp. 377-378.

B. Opinions of Governments

93. Certain Governments expressed their opinion on the subject of historic bays in their replies to the list of points prepared by the Preparatory Committee of the Codification Conference of 1930 (*supra*, para. 87):

Australia: 120

"There are certain historic bays whose width exceeds six or even ten miles which are regarded by general acquiescence as territorial waters. In these cases, the coastal belt of territorial waters is measured from a baseline drawn across the bay at the point so recognized as being the limits of national territory. In the case of bays whose coasts belong to two or more States, territorial waters should be measured from mean low-water spring tide and follow the sinuosities of the coast."

Belgium: 121

"Any claim by a State to a breadth of territorial waters greater than that agreed upon in an international convention could only be accepted if justified by undisputed international usage based on a special geographical configuration."

Canada: 122

"In the case of bays where the distance from headland to headland is more than ten miles but the bay itself cannot be entered without traversing territorial waters, the waters of such bays shall be national waters."

"In the case of bays where the distance from headland to headland is more than ten miles and the bay can be entered without traversing territorial waters, the base line is a straight line drawn across the bay at the place where the entrance first narrows to ten miles."

"An exception should be made in the case of bays which, for historic or geographic reasons, are considered as part of the inland waters of the coastal State. Here the base line is drawn from headland to headland."

France: 123

"Granville Bay is recognized to consist of territorial waters by the Fisheries Convention of 2 August 1839, concluded with Great Britain (Article 1), and by Article 2 of the Fisheries Regulations concluded on 24 May 1843 with Great Britain."

Germany: 124

"As regards 'historic bays', it would seem right in principle to require the coastal State making such a claim in respect of bays exceeding six nautical miles in width to prove that the bay has acquired the status of 'inland waters' of the coastal State through long usage generally recognized by other States."

Great Britain: 125

"By general acquiescence, certain historic bays have been recognized as forming part of the national territory, even though their width exceeds that indicated in the earlier part of the

¹²⁰ Ser. L.O.N.P. 1929.V.2, p. 117.

¹²¹ *Ibid.*, p. 120.

¹²² *Ibid.*, Supplement (a), p. 2.

¹²³ *Ibid.*, p. 160.

¹²⁴ *Ibid.*, p. 111.

¹²⁵ *Ibid.*, p. 163.

answer on this point. In the case of such bays, the territorial waters are measured from a base line passing across the bay at the place recognized as forming the limits of the national territory."

Japan : 126

"In the case of a bay or gulf the whole of which is regarded, by time-honoured and generally accepted usage, as belonging to the coastal State in spite of the fact that the distance between the two coasts exceeds ten nautical miles, the territorial waters extend seawards at right angles from a straight line drawn across the bay or gulf at the entrance."

Norway : 127

"There is no rule in Norway regarding the maximum distance between the starting-points of the base lines from which the breadth of the territorial waters is calculated. In choosing the places which, according to the Decree of 1812, are to be regarded as the extreme points, the particular circumstances of each part of the coast have to be taken into account. There may be historical, economic or geographical factors, such as a traditional conception of territorial limits, the undisturbed possession of the right of fishing, exercised by the coastal population since time immemorial and necessary for its subsistence, and also the natural limits of fishing-grounds.

...

"In this connexion, it should also be observed that all fjords, bays and coastal inlets have always been claimed as part of the Norwegian maritime territory, whatever the width at their mouth and no matter whether they are formed by the mainland or by developments of the 'Skjaergaard'. In determining the starting-points for calculating the breadth of territorial waters, the base line chosen is the lowest-water mark."

Netherlands : 128

"The Netherlands see no reason to object to the recognition of historic rights in respect of certain bays ; such rights would, however, have to be precisely defined in the proposed Convention."

Poland : 129

"...Regard should also be had to established usage. If a State exercises sovereignty over a bay and no objection has been raised by other States, the waters of the bay should be regarded as territorial waters."

Portugal : 130

"There are, however, bays with a breadth largely exceeding the limits previously suggested which nevertheless are regarded in their entirety as part of the national territory of the States to which their shores belong. These are what are known as historic bays. This exception is founded on 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 recognized both in judgements of the courts and in certain treaties. 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.

"In addition, these bays are in some cases recognized spawning- and breeding-grounds of certain species of fish of high commercial and industrial value. These species would tend to disappear if no restrictions were placed on the methods of fishing. Again, such bays may be very productive fishing-grounds, and for that reason it is absolutely essential that the industry there should be regulated and controlled. As was previously stated, this would only be feasible if the sovereignty of the bays was assigned to the State owning its shores.

"It should be specially pointed out that regulation and control of this kind would also be advantageous to other States as, owing to the well-known fact of the dispersion of species, the open sea would be abundantly stocked with fish.

"Moreover, the population on the shores of certain bays enjoy the exclusive right of fishing through immemorial and unbroken usage, and fishing is their best and most remunerative occupation. The retention of this exclusive right is a matter of supreme importance for such populations.

"In the case of any bay possessing some or all of the characteristics mentioned above, no limitation is or can be placed on its breadth reckoned along the lines joining the outermost headlands. These bays belong wholly to the States concerned and form an integral part of their territory, the base line for calculating the belt of territorial waters being the line uniting the outermost points of the bay.

"In this way Portugal regards as part of her European continental territory the bays formed by the estuaries of the rivers Tagus and Sado, comprising the areas included between Cape Razo and Cape Espichel and between Cape Espichel and Cape Sines respectively."

PART II

The theory of historic bays: an analysis

I. LEGAL STATUS OF THE WATERS OF BAYS REGARDED AS HISTORIC BAYS

94. Are the waters of a bay which is regarded as a historic bay part of the "territorial sea", or are they assimilated to "internal waters"? This question is very important, for different rules govern the two parts of the sea, particularly as regards one point of vital interest in international law: the innocent passage of foreign vessels. As a general rule, States are not bound under international law, to allow such passage in their internal waters.

95. For the purpose of determining the legal status of historic bays, two distinct situations have to be considered: (a) historic bays bordering on the shores of a single State; and (b) those bordering on the shores of two or more States.

A. Historic bays the coasts of which belong to a single State

96. The distinction between the waters within historic bays surrounded by the territory of a single State and the territorial sea seems to be a well established fact. Nevertheless, the distinction has not always been formulated with all the desirable clarity. For example, the

¹²⁶ *Ibid.*, p. 168.

¹²⁷ *Ibid.*, p. 174.

¹²⁸ *Ibid.*, p. 177.

¹²⁹ *Ibid.*, p. 182.

¹³⁰ *Ibid.*, p. 184.

note addressed by the Norwegian Minister of the Interior to the Norwegian Minister of Foreign Affairs concerning the Vestfjord, states that the fjord in question "is considered to form part of the territorial sea of Norway" (*supra*, para. 38). In its reply to questionnaire No. 2 prepared in 1926 by the Committee of Experts for the Progressive Codification of International Law, the Norwegian Government stated that "Norwegian bays and fjords have always been regarded and claimed by Norway as forming part of the territory of the Kingdom". In the same paragraph, however, the Norwegian Government added that "Norwegian law has always held from most ancient times that these bays and fjords are *in their entirety* an integral part of Norwegian territorial waters" (*supra*, para. 35).

97. In its reply to the list of points prepared by the Preparatory Committee of the Codification Conference, 1930, the French Government stated that "Granville Bay is recognized to consist of territorial waters" (*supra*, para. 93). Similarly the Polish Government stated that "if a State exercises sovereignty over a bay and no objection has been raised by other States, the waters of the bay should be regarded as territorial waters" (*supra*, para. 93). The Egyptian Government said that "according to Egyptian public law, the breadth of the territorial waters is . . . , except as regards the Bay of El Arab, the whole of which is, owing to its geographical configuration, regarded as territorial waters."¹³¹

98. Some of the authorities also seem—at least, that is the impression one obtains from the language they use—to confuse the waters of historic bays with the territorial sea. For example, De Cussy regards certain maritime areas such as the Sea of Azov, the Zuyder Zee and the Gulf of Bothnia, as part of the territorial sea (*supra*, para. 12). It may well be that the confusion is often due to the looseness of the terminology employed rather than to differences of opinion on the actual principle.

99. Westlake states that many gulfs are "recognized by immemorial usage as territorial sea of the States into which they penetrate". Yet in citing certain examples, he goes on to say: "The Bay of Conception . . . which is wholly British . . . Chesapeake and Delaware Bays, which belong to the United States, and the Bay of Cancale . . . which belongs to France" (*supra*, para. 92).

100. Similarly, Pitt-Cobbett states that Conception Bay "was held to be a part of British Territory"; that Hudson Bay "is also claimed as territorial water by Great Britain"; that the United States "include in their territorial waters" Chesapeake Bay, Delaware Bay and others; that France "claims" the Bay of Cancale; and that Norway claims Varangorffjord "as territorial waters" (*supra*, para. 92).

101. The terms in which these opinions are expressed would hardly justify the conclusion that their authors necessarily assimilate the waters of historic bays to the territorial sea. The distinction between these two classes of maritime area is often obscured by defective

terminology. Areas normally regarded as "internal waters" are variously referred to as "territorial waters", "national waters" or "waters forming part of the territory". The International Law Commission has now put an end to this terminological chaos by giving each of the three parts of the sea a distinct designation: "the high seas", "the territorial sea" and "internal waters".

102. The distinction between the waters of historic bays and the territorial sea is always clearly drawn in draft codes. According to the draft codes, whether prepared by learned societies or under the auspices of the League of Nations—all of which use more or less the same formula regarding the delimitation of the territorial sea in bays—the line from which the territorial sea is to be measured in a bay is a straight line drawn across the mouth at the point nearest to the sea where the width of the bay does not exceed a given distance (ten miles, twelve miles, etc.).¹³² The fact that the territorial sea does not begin, in a bay, until a fictitious line drawn in the sea at a certain distance from the coast clearly implies that the waters situated to landward of that line are not part of the territorial sea. The same applies, therefore, to the waters of historic bays, the status of which is recognized by these draft codes as an exception (or as a possible exception) to the general rule applicable to ordinary bays. The draft convention amended by Mr. Schücking in consequence of the discussion in the Committee of Experts (*supra*, para. 86) even states expressly, in article 4, that the waters of the bays defined in that article are to be assimilated to internal waters; and the bays defined in that article are those which are bordered by the territory of a single State and in which the territorial sea is measured from a straight line drawn across the bay at the part nearest the opening towards the sea where the distance does not exceed ten miles "unless a greater distance has been established by continuous and immemorial usage".

103. The draft articles prepared by the International Law Commission¹³³ also draw a clear distinction between the waters of bays and the territorial sea. The Commission's draft assimilates the waters of ordinary bays, which it defines and for which it lays down the

¹³² The same procedure for delimiting the territorial sea in bays is prescribed in many treaties and national statutes; e.g. Treaty of 2 August 1939 between Great Britain and France, article 9 (de Martens, *Nouveau recueil général de traités*, vol. XVI, p. 254); Convention of 6 May 1882 between Germany, Belgium, Denmark, France, Great Britain and the Netherlands, article 2 (*Ibid.*, 2nd series, vol. XIX, p. 510); Treaty of 27 March 1893 between Portugal and Spain, article 2 (*British and Foreign State Papers*, vol. 85, p. 416); Treaty of 31 December 1932 between Denmark and Sweden, article 2 (*League of Nations Treaty Series*, vol. 139, p. 215).

National statutes: Brazil, Decree No. 5796 of 11 June 1940, article 17 (1) (*Collecção das leis*, 1940, vol. VI); Italy, Navigation Code of 30 March 1942, article 2 (*Gazzetta Ufficiale* No. 75, 1942).

A number of statutes classify as internal waters all bays bordering on the country's shores; some of these specify limits, others do not. See for example, the Yugoslav Act of 1 December 1948 (*Sluzbeni List*, vol. 4, No. 106, 8 December 1948, item 875, p. 1739).

¹³³ *Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159)*.

¹³¹ *Ibid.*, p. 125; see also *supra*, para. 24.

applicable rules, to internal waters. Article 7, which is reproduced in its entirety above (para. 2), expressly states that the waters within a bay, the coasts of which belong to a single State and the width of which at the mouth does not exceed fifteen miles, shall be considered internal waters. In a bay with a wider opening, the only waters regarded as internal are those enclosed by a line drawn within the bay at the point where its width does not exceed fifteen miles. The article also provides for the case where different lines of a length of fifteen miles can be drawn. In that case, that line should be chosen which encloses the maximum water area within the bay. Paragraph 4 of the same article then provides that these rules do not apply to historic bays. Accordingly, following the precedent of the draft codes referred to in the preceding paragraph, the International Law Commission's draft recognizes that in the case of the so-called historic bays there may be some departure from the restrictive rules envisaged for ordinary bays.

104. The exception contained in article 7, paragraph 4, covers, in addition, certain other noteworthy cases, namely those where the straight baseline system provided for in article 5 is applied.¹³⁴ The full text of article 5 reads as follows:¹³⁵

"1. Where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the baseline may be independent of the low-water mark. In these cases, the method of straight baselines joining appropriate points may be employed. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. Account may nevertheless be taken, where necessary, of economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. Baselines shall not be drawn to and from drying rocks and drying shoals.

"2. The coastal State shall give due publicity to the straight baselines drawn by it.

"3. Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as defined in article 15, through those waters shall be recognized by the coastal State in all those cases where the waters have normally been used for international traffic."

105. In its draft, therefore, the Commission envisages another category of waters which it likewise describes as internal waters. These are the maritime areas lying to landward of straight baselines the drawing of which is justified by the special geographic features of the coast or, "where necessary", by economic interests "the reality and importance of which are clearly evidenced by a long usage". These provisions were drafted on the basis of the judgement of the International Court of Justice in the *Anglo-Norwegian Fisheries Case* (18 December 1951). The Court held that certain basic considerations brought to light criteria which could provide courts with an adequate basis for their decision regarding the delimitation of

the territorial sea. In the light of these considerations, the Court approved the Norwegian system of delimitation (*supra*, para. 64) prescribed by the Decree of 1935 on the grounds of "well-established national titles of right", "the geographical conditions prevailing on the Norwegian coasts" and the "vital interests of the inhabitants of the northernmost parts of the country". The Court held that the Norwegian waters situated between the baseline and the land were internal waters.^{136 137}

106. Nevertheless, the provisions of the International Law Commission's draft governing this category of internal waters are so worded that, in certain circumstances, these waters may not enjoy exactly the same status as internal waters normally enjoy, for within these internal waters created by the drawing of straight baselines, the coastal State is bound to recognize the right of innocent passage in all cases where those waters "have normally been used for international traffic".

107. In effect, the Commission has propounded a principle which could be termed the principle of the historic right of innocent passage in a specified category of internal waters. It seems, however, that this principle can only be invoked in wholly new situations. The commentary to article 5 states:

"The question arose whether in waters which become internal waters when the straight baseline system is applied the right of passage should not be granted in the same way as in the territorial sea. Stated in such general terms, this argument was not approved by the majority of the Commission. The Commission was, however, prepared to recognize that if a State wished to make a fresh delimitation of its territorial sea according to the straight baseline principle, thus including in its internal waters parts of the high seas or of the territorial sea that had previously been waters through which international traffic passed, other nations could not be deprived of the right of passage in those waters. Paragraph 3 of the article is designed to safeguard that right."

108. Article 5, paragraph 3, which is the paragraph in which this principle is stated, was non-existent in the draft articles on the régime of the territorial sea prepared by the Commission at its seventh session. The Commission inserted this paragraph in its final draft in the light of observations made by Governments. In the comments submitted by the Government of the United Kingdom, it is stated that:¹³⁸

"... Her Majesty's Government regard it as imperative that, in any new code which would render legitimate the use of baselines in proper circumstances, it should be clearly stated that the right of innocent passage should not be prejudiced thereby, even though this may involve that, in certain cases, this right shall become exercisable through internal as well as through territorial waters. Her Majesty's Government consider that the Commission would be performing a most useful function if it were to give mature consideration to the problem how the use of baselines is to be reconciled with existing rights of passage. For their part, Her Majesty's Government can only say at this

¹³⁶ *Fisheries Case (United Kingdom v. Norway)*, Judgement of 18 December 1951; I.C.J. Reports, 1951, p. 132.

¹³⁷ See also the Court's ruling on the legal status of "historic waters", *supra*, para. 58.

¹³⁸ *Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934)*, pp. 43 and 44.

¹³⁴ For the text of article 7, paragraph 4, see *supra*, para. 2.

¹³⁵ *Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159)*, pp. 13 and 14.

stage that, in their view, in case of conflict, the right of passage, as a prior right and the right of the international community, must prevail over any alleged claim of individual coastal States to extend the areas subject to their exclusive jurisdiction."

109. In this connexion, it is pertinent to recall the United Kingdom's admission in the Anglo-Norwegian Fisheries Case that Norway was entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fell within the conception of a bay (conclusion No. 5); and that, also on historic grounds, Norway was entitled to claim as Norwegian territorial waters all the waters of the fjords and sunds which had the character of legal straits (conclusion No. 9) (*supra*, para. 57). The United Kingdom contended, however, that part of those waters, including those forming the channel known as the Indreleia, constituted an international route and that, consequently, the right of innocent passage through it could not be denied. In dealing with this last submission, the Court held that the Indreleia was not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway. In those circumstances, the Court was unable to accept the view that the Indreleia had a status different from that of the other waters included in the *skjaergaard*. The Court did, however, qualify its ruling on the Indreleia by stating that it applied only "for the purposes of the present case" (*supra*, para. 72).

110. It will be noted that, in this case, the United Kingdom, in taking the view that the "historic waters" constituted an international navigational route, proposed that those waters should be assimilated not to internal waters but to the territorial sea. Accordingly, the proposal took into account the legal incompatibility between the concept of internal waters and that of the right of innocent passage of foreign vessels. On the other hand, it constitutes a departure from the rule that historic waters are internal waters.

111. The treatment of the waters of historic bays as internal waters is recognized in the decisions of national courts relating to certain bays, such as the Bay of Chaleur, Chesapeake Bay, Conception Bay and Delaware Bay (*supra*, paras. 14-23).

112. In their replies to the list of points prepared by the Preparatory Committee of the Codification Conference, 1930, several Governments expressed the opinion that the waters of historic bays were internal waters (see, for example, the replies of the Governments of Germany,¹³⁹ Canada,¹⁴⁰ Great Britain,¹⁴¹ Japan¹⁴² and Portugal¹⁴³). The majority of the learned authorities take the same view.

113. Sir Cecil Hurst¹⁴⁴ makes a special point of showing that the waters of bays are internal waters and not part of the territorial sea. In support of his argu-

ment, he cites, first, the opinion expressed by Lord Hale, in *De Jure Maris* (p. 1), which has been followed in various judicial decisions and which forms the substance of British doctrine on that subject:

"That arm or branch of the sea which lies within the *fauces terrae* where a man may reasonably discern between shore and shore is, or at least may be, within the body of a county and therefore within the jurisdiction of the sheriff or coroner."

114. The author also cites some judicial decisions, among them those which determine the status of Conception Bay, Chaleur Bay and Chesapeake Bay. He concludes this part of his article by saying:

"The series of precedents and authorities quoted above, all working back ultimately to Lord Hale's principle that waters *intra fauces terrae* may be within the body of a county, confirm the proposition that the interior waters of a bay are national waters¹⁴⁵ and not territorial waters, but the question of what is for this purpose a bay, that is to say, what body of water *intra fauces terrae* can be so appropriated as to become part of the national territory, must still be considered."

115. After considering the rules applicable to the bays which should be considered as forming part of the national territory, Sir Cecil concludes as follows:

"A bay for this purpose means a defined inlet, penetrating into the land, moderate in size and with both shores subject to the same sovereign. An inlet at the mouth of which one can see clearly from shore to shore may be presumed to have been appropriated as part of the national territory and will, therefore, constitute a bay; for working purposes this distance may be taken as ten miles and the line will then pass from headland to headland. In the case of a larger inlet, it lies on the territorial State to establish that it has been appropriated as part of the national territory. Where this is not proved, the line from which the territorial waters are measured will not pass from headland to headland but will cross the inlet at the spot where it first narrows to such an extent as to be obviously a bay; in practice this may be taken as the place where it first narrows to ten miles.

"All the waters lying inwards from this base line are national waters and form part of the national territory. They stand in all respects on precisely the same footing as the national territory. Waters within the three-mile limit to seawards of this base line are territorial waters. In territorial waters foreign States are entitled, to the extent recognized by international law, to the exercise of the right of passage. In national waters there is no such right."

116. Gidel¹⁴⁶ firmly insists that the waters of historic bays, like those of ordinary bays whose width does not exceed the distance adopted for determining whether or not an inlet constitutes a bay (in his opinion, ten miles), are internal waters. He expresses himself as follows:

"... a statement that a bay, for example one within two headlands fifty miles apart from each other, is a 'historic' bay, means that all the waters of that bay enclosed by that fictitious line between the two headlands are internal waters and that only from that line, representing the outer limit of 'internal waters', can the territorial sea be measured. If the bay were not 'historic', the belt of territorial sea would follow the

¹³⁹ Ser. L.o.N.P. 1929.V.2, p. 111.

¹⁴⁰ *Ibid.*, Supplement (a), p. 2.

¹⁴¹ *Ibid.*, p. 163.

¹⁴² *Ibid.*, p. 168.

¹⁴³ *Ibid.*, p. 184.

¹⁴⁴ "The Territoriality of Bays", *British Year Book of International Law*, 1922-23, pp. 42-54.

¹⁴⁵ By "national waters" the author means "internal waters". He uses the first of the two expressions in order to draw a clear distinction between the "marginal belt, commonly known as territorial waters, and the bay".

¹⁴⁶ *Op. cit.*, pp. 624-627.

sinuosities of the coast and, as long as those sinuosities created no small bays with a mouth wider than the distance adopted for determining whether an inlet constitutes a bay (in our opinion, ten miles), that bay would contain no internal waters besides the very small area between the low water mark and the shore. When once a bay has been held to be 'historic', all of its waters become internal waters with all the consequences which the status of internal waters entails. One consequence is that the coastal State is no longer bound to admit the 'innocent passage' of foreign vessels in the waters of that bay.

"It cannot be too strongly stressed, therefore, that 'historic' waters are not merely waters over which the coastal State claims certain rights, certain powers taken from the aggregate of the powers which together constitute what is called 'sovereignty'; there is nothing in common between the appropriation by a State of a certain area as 'historic waters' and the extension of some of that State's powers beyond its maritime territory into the part of the high seas known as the contiguous zone. In a sea area which has acquired a 'historic' character, the coastal State may wholly deny to the other members of the international community any access whatsoever to the subsoil, soil, mass and surface of the water, or the super-jacent air space. Furthermore, the limits of the maritime territory of that State are advanced by an equivalent distance seawards, the baseline of the territorial sea coinciding with the outer limit of internal waters. Consequently, any claim by a State alleging a 'historic' title to a portion of the sea which is not part of its maritime territory under the generally accepted rules has extremely serious consequences for all the other States, without distinction.*"

"* As a rule, the coastal State will not in fact claim over the waters which it means to transfer to the 'historic' category all of the rights which a coastal State is entitled to exercise in its internal waters; normally, only the exercise of the right of fishing (or, in the case of certain species of marine fauna, the right of hunting) will be claimed as the exclusive prerogative of its nationals or made conditional, without discrimination on grounds of nationality, on the previous issue of a licence. Such a prohibition against foreign fishermen in a specified area of water does not prove that that area is regarded as internal waters, for international law permits the exclusion of foreign fishermen from waters forming part of the territorial sea. Such a denial of the right to fish in areas where that right had until then been exercised implies that those areas are now regarded by the coastal State as at least within its territorial sea; the coastal State must therefore show either that the breadth of its territorial sea has been increased or that the baseline of its territorial sea — the breadth of which remains unchanged — has been carried seawards; such an advance of the baseline implies a corresponding extension of internal waters. In practice, the coastal State will always adopt the latter method, which is much simpler than the former; for the extension of internal waters can be done administratively, by drawing new baselines, without disturbing the legislative provisions on the breadth of the territorial sea. The desired result can be attained by routine measures taken by the executive. The final success of the operation will depend on the nature and vigour of the reactions which it will provoke among foreign States. The ensuing diplomatic discussions will then provide the coastal State with the necessary opportunity to invoke, in more or less direct form, the theory of 'historic waters', as justifying the inclusion in its internal waters of sea areas which the ordinary rules of the public international law of the sea do not authorize it to appropriate."

117. In a later passage, Gidel stresses the incompatibility between the concept of internal waters and the exercise of the right of innocent passage by foreign vessels.

"It is always necessary to remember, in dealing with 'historic waters', the essential point that those waters are internal waters. This fact explains many aspects which would otherwise be difficult to grasp. The theory was originally evolved to apply to 'bays', and is still referred to as the theory of 'historic bays', because it was never envisaged that it might apply except in areas which, by reason of their configuration, are generally not used as major international routes of transit; the idea of internal waters and the right of innocent passage exercisable by foreign vessels are two incompatible concepts. The theory of

historic waters as internal waters has consequently never applied except to waters where this right of innocent passage is but of insignificant practical interest. That was the idea in the mind of Judge Draper in the *Alleganean* case, when he emphasized, with reference to the 'historic' Chesapeake Bay, that that Bay could not be made a roadway from one nation to another (Moore's *International Arbitrations*, vol. IV, p. 4341). And, lastly, this explains why the doctrine of historic bays is, as a general rule, never invoked except in the case of bays enclosed by the territory of a single State. For where there are several coastal States around a given bay, freedom of passage becomes a necessity and, as there can be no question of innocent passage through internal waters, the theory of historic bays, which would assimilate such an area to internal waters, cannot apply. Neither the Committee of Experts nor any of the learned societies which have examined the question of 'historic bays' ever had in mind, in that context, any bay other than one bordering on the territory of a single coastal State..."

118. L. Cavare¹⁴⁷ maintains that since the juridical regime of historic waters corresponds to that of internal waters there can be no right of innocent passage through these waters. The State (he says) exercises over historic waters the totality of the rights which it possesses in its internal waters. He presupposes, however, that "the existence of historic waters is contingent on one general and social condition: that the waters in question do not constitute international waterways. If they did, the position would be very different and the coastal State would be unable to prevent innocent passage in such waters."

119. Higgins and Colombos¹⁴⁸ express a similar opinion:

"The rights of jurisdiction of the littoral State over its territorial gulfs and bays should be considered to be the same as over its national waters. The State is therefore entitled to reserve fisheries to its own subjects and to prescribe and regulate the admission and sojourn of foreign vessels therein, under the same conditions. Where, however, bays or gulfs constitute an international highway, the right of innocent passage of merchant ships must be conceded by the territorial State."

120. Fauchille states the following:¹⁴⁹

"... According to a generally accepted opinion, the status of gulfs and bays varies, depending on whether they border on the land of one State or of several States, whether their entrance is or is not less than ten miles wide and whether they have or have not a historic character. Gulfs and bays which are less than ten miles wide and are surrounded by a single State, as well as those which, regardless of their width and the ownership of the surrounding coast, are historic bays, form part of the national territory of the countries on which they border; the others are nothing other than a portion of the open sea. This distinction is important in two respects: (1) From the point of view of the rights of States in gulfs and bays. If they [the gulfs and bays] are part of the territory of the coastal country, that country enjoys therein, in matters of navigation, fishing and jurisdiction, all the rights implicit in sovereignty, the scope of those rights depending on whether sovereignty is given an absolute or a relative character. If they are parts of the open sea, they must, both in time of peace and in time of war, remain open to all ships of all nations without restrictions and, as they are not subject to the jurisdiction of any single State,

¹⁴⁷ *Le droit international public positif*, vol. II, Paris, 1951, p. 514.

¹⁴⁸ *Ibid.*, p. 120.

¹⁴⁹ *Op. cit.*, pp. 386-387.

the coastal State cannot enforce its fishing regulations therein; the principle of the freedom of the seas is then applicable in its entirety. (2) From the point of view of the determination of the territorial sea in the gulfs and bays. If these are really part of the State territory, the most landward line from which the littoral sea can be measured is the outer limit of that territory, which means from an imaginary line drawn between the outermost extremities of the coast at the orifice of the gulf or bay. If they are simply a continuation of the high seas, the territorial sea will, on the other hand, have to be measured outwards from the coasts of the gulfs or bays, over their entire curvature, following the sinuosities of the coast."

121. Oppenheim considers as "territorial" such bays as are enclosed by the land of a single littoral State and have an entrance not more than six miles wide (*supra*, para. 92). He defines the term "territorial" as follows:¹⁵⁰

"The expression 'territorial bay' must not be allowed to obscure the facts (1) that the waters contained in territorial bays, and in the territorial portions of bays not wholly territorial, are not territorial waters and part of the maritime belt, but national waters; and (2) that the limit of the national waters is the datum line for the measurement of the maritime belt."

122. In describing the juridical consequences of the territoriality of bays, Oppenheim states:¹⁵¹

"As regards navigation, fisheries, and jurisdiction in territorial gulfs and bays the majority — rightly, it is believed — contend that the same rules of the Law of Nations are valid as in the case of navigation and fisheries within the territorial maritime belt. The right of fishery may therefore be reserved exclusively for subjects of the littoral State.¹ And navigation, *cabotage* excepted, must be open² to merchantmen of all nations, though foreign men-of-war need not be admitted unless the gulfs or bays in question form part of the highways of international traffic. But the matter is not settled, and there are some who maintain that foreign vessels may be excluded altogether from territorial gulfs and bays, or admitted only on payment of dues, rates etc."

¹ The Hague Convention concerning Police and Fishery in the North Sea, concluded on 6 May 1882, between Great Britain, Belgium, Denmark, France, Germany and Holland, by Article 2 reserves the fishery for subjects of the littoral States of such bays as have an entrance from the sea not wider than ten miles, but reserves likewise a maritime belt of three miles to be measured from the line where the entrance is ten miles wide. Practically, the fishery is therefore reserved for subjects of the littoral State within bays with an entrance much wider than ten miles. See Martens, *N.R.G.*, 2nd ser., 9, p. 556."

² But this is not universally recognized. See, for instance, Twiss i, para 181; Calvo i, para. 367."

123. It may be pertinent to cite the opinions of some members of the Institute of International Law on the legal status of internal waters created through the drawing of straight baselines. In his report of the "distinction between territorial waters and internal waters" submitted to the Tenth Committee of the Institute at its 1954 session at Aix-en-Provence, Mr. Frede Castberg makes the following statement:¹⁵²

"For the purpose of calculating the outer limit of its territorial sea, and especially when the object is to establish the territorial limit within which the right of coastal fishery is reserved exclusively to its population, a State may be entitled on historical, economic and social grounds, to draw long base-

lines between islands and rocks. Yet that State may conceivably decide not to regard all the waters within those baselines as internal waters, within the meaning attaching to this expression in international law. It may deem it fair or convenient to permit vessels of other States, in time of peace, too, to exercise the right of passage in a portion of the waters situated within the baselines."

124. In a footnote, Mr. Castberg refers to the following statement by Raestad:¹⁵³

"In any case, it is only natural for the foreign States concerned to object to a declaration that all the waters within the baselines are internal waters in the strictest sense."

125. Later, in his conclusion No. 4, Mr. Castberg states:¹⁵⁴

"The limits of the internal waters of the coastal State may be drawn differently for different purposes, pursuant to legislative provisions enacted by that State, provided always that such a measure does not prejudice the rights of other States, especially the right of innocent passage through the territorial sea."

126. Sir Gerald Fitzmaurice, while sharing the view expressed by Mr. Castberg in conclusion No. 4, prefers to express the idea in the following manner:¹⁵⁵

"... I would prefer to say that all waters inside the base line from which territorial waters are measured, are internal waters; but that a further distinction is to be drawn between those internal waters which are genuinely *inland* waters (e.g., rivers, creeks, inland lakes, canals, etc.) and those which are not (e.g., large bays and waters between the mainland and islands off the coast). Generally speaking, there is no right of passage through the former waters, but there is, or should be, through the latter. (If this idea were adopted, the expressions 'internal waters' and 'inland waters', instead of meaning the same thing, as they do at present, would each have a distinct meaning.) Under no circumstances should the extension of internal waters made possible by the new base line method operate so as to impede the right of innocent passage through what would be territorial sea if the older coast-line (or tide-mark) rule were still applied."

127. Mr. J. P. A. François, on the other hand, expresses a completely contrary opinion on this question. He states in this connexion (addressing his remarks to Mr. Castberg, rapporteur):¹⁵⁶

"... The system which you advocate would lead to the adoption of three different zones of the sea: the territorial sea, internal waters and a third zone, which is neither territorial sea nor internal waters, with a somewhat vague legal régime. I would like to dispute the suggestion that international law recognizes the existence of this third zone. International law, in my opinion, bases itself on the assumption — which is, indeed, the most logical one — that the two lines coincide. Your attempt to show the existence in international law of this third zone has not, in my opinion, succeeded. For it is not sufficient to show, as you have done, that certain States do not exercise all their rights in internal waters over the area of those waters. A State is free at any time and in any part of its territory, not to exercise the plenitude of its rights, and this abstention does not produce any essential change in the juridical status of that part of the territory. An area of the sea within the limit of the

¹⁵³ "Le problème des eaux territoriales à la Conférence pour la codification du Droit international", *Revue de Droit international*, 1931, VII, p. 134.

¹⁵⁴ *Annuaire*, vol. I (1954), p. 172.

¹⁵⁵ *Ibid.*, p. 206.

¹⁵⁶ *Ibid.*, p. 208.

¹⁵⁰ *Op. cit.*, p. 505, footnote 1.

¹⁵¹ *Op. cit.*, pp. 509-510.

¹⁵² *Annuaire*, vol. I (1954), pp. 126 and 127.

territorial sea, drawn in conformity with the rules of international law, remains internal waters, whether or not the coastal State chooses to exercise therein all the rights which it possesses. To create new 'zones' in such cases and to recognize, as you propose, 'that the limit of internal waters may be drawn differently for different purposes' can only lead to confusion. Instead of recognizing different limits of internal waters, we should, in my opinion, maintain the clear and practical rule of international law that the outer limit of internal waters coincides with the inner limit of the territorial sea, without prejudice to the freedom of the coastal State to abstain from exercising all of its sovereign rights over the whole extent of that zone."

128. Gidel also questions the views expressed by Mr. Castberg on this point. He states: ¹⁵⁷

"The partitioning which you suggest in internal waters would, I fear, be most dangerous and would only introduce an element of discord on a point on which we have the good fortune to see agreement both in practice and among the authorities. Such a partitioning would imply that each coastal State could, at its pleasure, invest *its own* internal waters with a special juridical status; in this private régime governing internal waters, it would retain all the powers which it might consider advantageous while disclaiming all those creating some liability. But a régime consistent with legal principles should compose a balanced whole, in which the recipient of advantages also has to bear the disadvantages. This concept is of particular importance in international law, where the members of the international community should, in the eyes of the law, stand in a comparable position in their mutual relations. . . ."

129. Further on, Gidel adds: ¹⁵⁸

"The fact that a State chooses not to exercise in a given part of its internal waters all the prerogatives vested in it by ordinary international law, neither produces any substantial modification in the juridical status of that State's internal waters nor changes in any way the delimitation of those waters in relation to territorial waters."

130. Gidel ends his criticism of Mr. Castberg's conclusion No. 4 with these words: ¹⁵⁹

"... It is not within the powers of a coastal State to invest its internal waters with a special juridical status less favourable to it than the concept of 'internal waters', as understood in international law, necessarily implies. But the coastal State remains free to forgo, either by treaty or by legislative action, the exercise of any particular prerogative which ordinary international law accords in its internal waters to the coastal State as such."

B. Historic bays the coasts of which belong to two or more States

131. The information on this category of bays is not very plentiful. The draft codes prepared by learned societies and those drawn up under the auspices of the League of Nations ¹⁶⁰ consider solely the case of a historic bay bordering on the shores of a single State.

¹⁵⁷ *Ibid.*, pp. 219 and 220.

¹⁵⁸ *Ibid.*, p. 221.

¹⁵⁹ *Ibid.*, p. 223.

¹⁶⁰ All the Governments which replied to the Bases of Discussion prepared by the Preparatory Committee of the Codification Conference, 1930, expressed the view that, in the case of bays bordering on the territory of two or more States, the breadth of the territorial sea should be measured from the low-water mark along the coast (Basis of Discussion No. 9 and Observations of the Committee: Ser. L.o.N.P. 1929.V.2, p. 45).

The same is true of the draft of the International Law Commission, which does not deal with bays bordering on the coasts of two or more States because the Commission had not "sufficient data at its disposal concerning the number of cases involved or the regulations at present applicable to them".

132. The status of the Gulf of Fonseca, the waters of which abut on the territories of Nicaragua, Honduras and El Salvador, was settled by the judgement delivered on 9 March 1917 by the Central American Court of Justice (*supra*, paras. 44-47). This judgement, although confirming that the waters of the Gulf are of a historic character, does not attribute to them the characteristics of internal waters; rather, it tends to class them as territorial sea. The judgement recognizes that the three riparian States are "co-owners" of the waters of the Gulf, except as to the littoral marine league, which is the "exclusive property" of each. This means that the waters of the Gulf are divided into two parts: the first, which begins at the shoreline and continues for a distance of one marine league, is the territorial sea of each of the coastal States; the second, containing all the remaining ("non-littoral") waters of the Gulf, is an area of territorial sea belonging to the three States in common. The Court held that "as to a portion of the non-littoral waters there was an overlapping or confusion of jurisdiction in matters pertaining to inspection for police and fiscal purposes and purposes of national security, and that as to another portion thereof, it is possible that no such overlapping and confusion takes place". The Court decided, therefore, "that as between El Salvador and Nicaragua co-ownership exists with respect to both portions, since they are both within the Gulf; with the express proviso, however, that the rights pertaining to Honduras as *coparcener* in those portions are not affected by that decision".

133. The judgement of the Central American Court of Justice on the status of the Gulf of Fonseca contains two essential points: (1) as historic waters, the waters of the Gulf belong to the coastal States; (2) those waters have the characteristics of the territorial sea and not of internal waters. With reference to the last point, Gidel remarks: ¹⁶¹

"The judgement of The Central American Court of Justice . . . attributes to the waters of the gulf the characteristics not of internal waters, which their status as a historic bay would normally have required, but of the territorial sea. This is a truly remarkable departure from the logical rules governing historic bays."

134. Another relevant case is that of the Bay of Fundy, a ruling on the status of which was requested from Umpire Bates, appointed under the Anglo-American Claims Convention of 1853, in consequence of the seizure of the United States vessel "Washington" at a point ten miles from the shore. The umpire, in deciding that the Bay of Fundy was not a British bay, stated: ¹⁶²

"The Bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long. It has several bays on its coast. Thus the word bay, as applied to this great body of water, has the same

¹⁶¹ *Op. cit.*, p. 627.

¹⁶² Moore, *International Arbitrations*, vol. 4 (1898), p. 4344.

meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The islands of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situated in the Atlantic Ocean. The conclusion is, therefore, in my mind irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818."

135. Dana,¹⁶³ in an opinion expressed in November 1877 to the Halifax Fishery Commissioners established pursuant to the Washington Treaty of 1871 between Great Britain and the United States, commented on this decision in these terms:

"This decision was put partly upon its width, but the real ground was that one of the assumed headlands belonged to the United States, and it was necessary to pass the headland in order to get to one of the ports of the United States."

136. Similarly, Fauchille¹⁶⁴ states:

"The arbitral award of 23 September 1854 regarding the Bay of Fundy ruled that that Bay was an open sea, not only because its opening is sixty-five to seventy-five miles wide but also, and indeed principally, because its coasts do not all belong to a single State; one of its headlands is situated in the territory of the United States, the other in the territory of Great Britain."

II. THE CONSTITUENT ELEMENTS OF THE THEORY OF HISTORIC BAYS AND THE CONDITIONS FOR THE ACQUISITION OF HISTORIC TITLE

137. The original purpose of the theory of historic bays was to exclude from the application of the general régime of bays which was then being elaborated certain bays whose status had already been settled by history. In other words, its object was to ensure that, despite the tendency to restrict the area within any large bay which could validly be deemed internal waters, the status of those bays which had already been accepted as wholly internal, on essentially historical grounds, would remain unchanged. Hence, under the theory as originally conceived, a State would be unable to lay claim to a particular bay except by relying mainly on historical evidence, by arguing from the fundamental principle: this bay belongs to me because it has always belonged to me, or because it has belonged to me for a certain time. Today, however, the theory is no longer conceived in such limited terms. In order to place certain bays outside the scope of the normally applicable rules, States no longer rely on factors of a purely historical character; they also—and sometimes even exclusively—rely on factors of a very different nature. The purpose of this inquiry is to discover the factors relied on for the purpose of determining which bays are to constitute exceptions to the rules generally accepted—or, at least, to be elaborated—with respect to ordinary bays.

138. Municipal and international case-law, draft codes and the works of the learned authorities reveal

¹⁶³ Cited by Phillimore, *International Law*, vol. I (1879), pp. 287-289.

¹⁶⁴ *Op. cit.*, p. 384.

two fundamentally different conceptions of this particular point of the problem. These conceptions are most clearly apparent in doctrine and in the works of codification, as judicial decisions have always ruled on the territoriality of certain bays or certain sea areas strictly in the light of the special circumstances of each case.

A. First conception: "usage" the sole root of historic title

139. According to this conception, the right to a bay which does not come under the general rule applicable to ordinary bays can only be founded on "usage". The supporters of this view do not, however, agree on the conditions which such usage should fulfil. One school of thought holds that national usage *per se* is a good root of historic title. Another school considers, on the contrary, that national usage cannot be a good root of historic title unless the usage was recognized, in one form or another, by the other States.

1. National usage *per se* a good root of historic title

140. Basis of Discussion No. 8 drafted by the Preparatory Committee of the First Conference for the Codification of International Law, 1930, in confirming the theory of historic bays, speaks only of "usage" (*supra*, para. 87).¹⁶⁵ Other drafts also base the theory exclusively on usage but take into account two additional notions: "time" and "continuity".

141. The draft adopted in 1926 by the Japanese International Law Society only takes into account the notion of time. It limits itself to the expression "immemorial usage" (*supra*, para. 82). By contrast, certain other drafts contain both the notions simultaneously. This is the case with the draft adopted by the Institute of International Law (Paris session 1894) in which the word "usage" is qualified by "continued and of long standing". The same expression recurs in the draft prepared by the International Law Association at its Brussels session (1895) and a similar one in the draft convention amended by Mr. Schücking in consequence of the discussions in the Committee of Experts. The same idea is taken up in Project No. 10 prepared in 1925 under the auspices of the American Institute of International Law (*supra*, paras. 74, 78, 80 and 85).

142. The definition of historic bays given in the project submitted in 1933 to the Seventh International Conference of American States by the American Institute of International Law refers solely to the attitude of the coastal State. It provides that bays or estuaries called historic are those over which the coastal State or States have traditionally exercised and maintained their sovereign ownership (*supra*, para. 81).

¹⁶⁵ "Basis of Discussion No. 8, drafted by the Preparatory Committee, merely stated that a historic title was acquired by 'usage'. This expression was doubtless intended to imply a peaceful and continued exercise of sovereignty. It could not have been meant as a purely national usage, considered independently of the reactions which it provokes in the international community." (*I.C.J. Pleadings, Oral Arguments, Documents, Fisheries Case (United Kingdom v. Norway), Judgement of 18 December 1951*, vol. III, Rejoinder of Norway, p. 454).

143. In its Counter-Memorial submitted to the International Court of Justice in the Fisheries case, Norway stated:¹⁶⁶

"What essential point must a State establish in order to substantiate its claim to a bay on historic grounds? The first prerequisite of the coastal State's title is its assertion of sovereignty. It is not in itself sufficient, but it is indispensable. The other factors are but 'special circumstances', which support and justify the claim."

2. *National usage not a good root of historic title unless recognized by the other States*

144. The draft convention adopted by the International Law Association in 1926 speaks of "established usage generally recognized by the nations" (*supra*, para. 79). The draft adopted at its 1928 session at Stockholm by the Institute of International Law uses the expression "international usage". The Institute also considered the possibility of further qualifying this expression with the word "uncontested" (*incontesté*). That word, however, was finally not included (*supra*, paras. 75 and 76). In its reply in the Fisheries Case, the United Kingdom stated:¹⁶⁷

"It is true that the word *incontesté* was dropped, but the word 'international' was retained to express the principle that *unilateral national pretention is not sufficient*. The national usage must have received *international recognition*."

145. During the debate in the Second Committee of the Codification Conference (1930) concerning the Preparatory Committee's Basis Discussion No. 8 (*supra*, para. 87), certain speakers emphasized the inadequacy of the concept of "usage" as the basis of the theory of historic bays. In the opinion of the Japanese delegation, "a mere claim on the part of the State concerned — which seems to be the sole condition according to the present text, to judge from the words 'by usage' — is not enough". For that reason, the Japanese delegation proposed that the words "long established and universally recognized" should be inserted before the word "usage".¹⁶⁸

146. A. Raestad makes the following observation:¹⁶⁹

"In my opinion the most important point is not when and how the occupation or usurpation of any given right in the coastal sea took place. What matters is when and how other nations gave their express or tacit consent, which transformed that occupation or usurpation into a legal title."

147. Fauchille gives the following definition of "historic or vital bays":¹⁷⁰

"They are the large gulfs and large bays the territoriality of which has been recognized by long-accepted usage and by undisputed custom."

Later, the same author adds:¹⁷¹

"Similarly, it is the acquiescence of States which — so it has

been held in judicial decisions — accounts for the territoriality of historic bays."

In support of this statement, Fauchille cites the judicial decisions regarding the Bays of Conception, Chesapeake and Delaware (*supra*, paras. 16-23). Then, after giving further examples of historic bays, he again states:¹⁷²

"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."

148. Jessup also contends that:¹⁷³

"... the legality of the claim is to be measured, not by the size of the area affected, but by the definiteness and duration of the assertion and the acquiescence of foreign Powers."

149. Gidel takes the following view:¹⁷⁴

"... The mere fact that the coastal State advances the claim that specified waters should be regarded as its property does not in itself oblige other States to accept that claim; in the absence of any organ formally established to examine such claims and expressly authorized by each of the States concerned to render decisions, such claims can only be borne out by evidence of international acquiescence; as a general rule, prolonged usage will afford the necessary proof."

150. Higgins and Colombos express the similar view that:¹⁷⁵

"... the territorial State is entitled to claim a wider belt of marginal waters, provided that it can show affirmatively that such a claim has been accepted expressly or tacitly by the great majority of other nations."

B. *Second conception: the vital interests of the coastal State as the possible and sole basis of the right to a bay*

151. According to Dr. Drago (*supra*, para. 92), a bay can only be considered historic if there is proof of both of the following: (1) the assertion of sovereignty, which is the basic requirement; and (2) some "particular circumstances" such as those cited by way of example, namely, geographical configuration, immemorial usage or (in Drago's view "above all") the requirements of self-defence.

152. In article 7 of the draft international convention submitted to the Buenos Aires Conference of the International Law Association in 1922 by Captain Storny the following definition of the theory of historic waters is given:

"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 article 2; that is to say, for the requirements of self-defence or neutrality or for ensuring the various navigation and coastal maritime police services."¹⁷⁶

¹⁶⁶ *Ibid.*, vol. I, p. 555.

¹⁶⁷ *Ibid.*, vol. II, pp. 623 and 624.

¹⁶⁸ League of Nations publication V. Legal, 1930, V. 16 (document C.351 (b). M.145 (b). 1930, V), p. 103.

¹⁶⁹ *La mer territoriale*, 1913, p. 167.

¹⁷⁰ *Op. cit.*, p. 380.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, pp. 381 and 382.

¹⁷³ *Op. cit.*, p. 382.

¹⁷⁴ *Op. cit.*, p. 651.

¹⁷⁵ *Op. cit.*, p. 112.

¹⁷⁶ International Law Association, *Report of the Thirty-first Conference*, Buenos Aires, 1922, vol. 2, pp. 98 and 99.

153. According to Captain Storny, that article is :

"... of the greatest importance ; it affirms in a more decisive form the last part of article 3 of the *Project 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 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 a thousand years or more."

154. When the Second Committee of the 1930 Conference considered Basis of Discussion No. 8 (*supra*, para. 87), the representative of Portugal proposed that the Basis of Discussion should be amended by the addition of the following words :¹⁷⁷

"or if it is recognized as being absolutely necessary for the State in question to guarantee its defence and neutrality and to ensure the navigation and maritime police services."

155. In support of this amendment, the representative of Portugal pointed out that the idea of usage envisaged in Basis of Discussion No. 8 was no longer unanimously accepted and that some authors adduced not only usage but also other factors which should be taken into account in determining the character of historic bays. After referring to the opinions expressed on this subject by Dr. Drago and Captain Storny, the Portuguese representative stated :¹⁷⁸

"Generally speaking, usage must be respected, 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 ?"

156. Thus, according to this conception, the right to a bay might derive either from usage or from the vital interest of the coastal State. The State would then be entitled to claim such a right by invoking circumstances into which the historical factor does not even enter. Gidel states :¹⁷⁹

"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' suggested conditions of form only."

157. Expressing his opinion on the value of the notion of "vital bays", Gidel states :¹⁸⁰

"... claims 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."

158. Another significant comment is made by Bourquin :¹⁸¹

"... If the territoriality of a bay is to be determined in the light of all the circumstances which characterize each of them, then clearly the vital interests of the coastal State must be taken into account. The formula proposed by Captain Storni and later by the Portuguese Government tends perhaps to oversimplify the issue. Instead of embracing all the factors determining the bay's character, it concentrates on only one, to which it attaches, without any reservation or proviso, a decisive influence. But whatever criticisms may properly be levelled at the formula on that score, there seems little doubt that 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."

"But why should this factor be considered strictly within the context of 'historic titles' ? However widely the concept of a 'historic title' is construed, surely it cannot be claimed in circumstances where the historic element is wholly absent. 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."

C. Various elements considered in judicial decisions dealing with the territoriality of certain bays or maritime areas

1. International cases

Permanent Court of Arbitration (1910)

159. In an award cited earlier in this paper (*supra*, para. 49), the special arbitral tribunal which decided the North Atlantic Coast Fisheries Case between Great Britain and the United States (1910) recognized that "conventions and established usage might be considered as the basis for claiming as territorial those bays... called historic bays." But this statement was only made *obiter* and the tribunal did not go into the details of the theory which it upheld in principle.

160. It is pertinent, nevertheless, to quote from the tribunal's opinion the remarks relating to the notion of "bays" in general. The dispute concerned the interpretation of the Treaty concluded between Great Britain and the United States in 1818 and the meaning of the term "bay" was one of the contested points. The tribunal held that, for the purpose of determining the question of territoriality, the interpretation must take into account all the individual circumstances which were to be appreciated in the case of the bay in question :¹⁸²

"... the relation of its width to the length of penetration inland ; the possibility and the necessity of its being defended by the State in whose territory it is indented ; the special value which it has for the industry of the inhabitants of its shores ; the distance by which it is secluded from the highways of nations on the open sea ; and other circumstances not possible to enumerate in general."

¹⁷⁷ Ser. L.O.N.P. 1930.V.16, p. 107.

¹⁷⁸ *Ibid.*, p. 106.

¹⁷⁹ *Op. cit.*, p. 629.

¹⁸⁰ *Ibid.*, p. 635.

¹⁸¹ *Op. cit.*, p. 51.

¹⁸² *Scott, op. cit.*, p. 187.

Central American Court of Justice (1917)

161. The judgement delivered by the Central American Court of Justice in 1917 regarding the Gulf of Fonseca (for an extract from this decision see *supra*, paras. 44-47) stated that that Gulf belonged to the category of historic bays because it combined all the characteristics that doctrine and the practice of States has prescribed as essential, namely: Secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations; the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States; and the indispensable necessity that those States should possess the Gulf as fully as required by those primordial interests and the interest of national defence.

The International Court of Justice (1951)

162. The judgement delivered by the International Court of Justice on 18 December 1951 in the Fisheries Case between the United Kingdom and Norway contains some useful statements on this subject. In that case, the issue before the Court was not the territoriality of certain bays or maritime areas but the international validity of the Norwegian system of delimitation, which was disputed by the United Kingdom. The Court, however, in holding that the system was indeed consistent with the rules of international law, found support for its findings in the historic titles which Norway had claimed,¹⁸³ together with other circumstances, in order to justify its system.¹⁸⁴ Some passages from the judgement have already been cited (*supra*, paras. 58-67). They show the grounds on which the Court based its finding that the Norwegian system of delimitation was valid and the circumstances which it held justified Norway's contention that that system was binding on foreign States.

¹⁸³ Judge Hackworth declared that he concurred in the operative part of the judgement but desired to emphasize that he did so for the reason that he considered that the Norwegian Government had proved the existence of an historic title to the disputed areas of water (*Fisheries Case (United Kingdom v. Norway)*, Judgement of 18 December 1951; *I.C.J. Reports*, 1951, p. 144).

¹⁸⁴ Sir Gerald Fitzmaurice makes the following comment: "The point of vital interest regarding historic rights in the Fisheries Case was that the Court recognized yet another basis of historic title—a right to certain waters, deriving not from a historic claim to a given area of sea, as such, but from a historic system of delimiting territorial waters in general which, even if it were otherwise contrary to international law, the State concerned could be said to have acquired a right to employ by long-continued usage and action in that sense, acquiesced in, or anyhow not objected to, by other States." (*The Law and Procedure of the International Court of Justice, 1951-54: Point of Substantive Law, The British Year Book of International Law*, 1954, p. 382.)

In another article, Sir Gerald states: "It should... be noticed that since the Court had already found that the general rules of international law, as laid down by the Court, did in themselves justify the Norwegian delimitation, it was strictly unnecessary for it to go into the issue of historic rights. Nevertheless, the Court did so and found in favour of Norway on that question also. There was, however, an important difference between the doctrine of historic rights as put forward by Norway and as found by the Court." (*The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law, Ibid.*, 1953, p. 27.)

2. National cases

163. Decisions of municipal judicial bodies recognizing the territoriality of certain bays have invariably been based on the special circumstances of each particular case. The section of this paper which discusses the practice of States reproduces the relevant passages from the municipal judicial decisions concerning certain bays, e.g. Chesapeake Bay, Conception Bay and Delaware Bay (*supra*, paras. 16-23).¹⁸⁵

D. The proof of historic title

1. The onus of proof

164. Basis of Discussion No. 8 drafted by the Preparatory Committee of Codification Conference, 1930, states that the onus of proving usage is upon the State which seeks to rely on it (*supra*, para. 87). In replying to the list of points prepared by that Committee (*supra*, para. 93), the German Government expressed the opinion that "as regards 'historic bays', it would seem right in principle to require the coastal State making such a claim in respect of bays exceeding six nautical miles in width to prove that the bay has acquired the status of 'inland waters' of the coastal State through long usage generally recognized by other States".

165. Gidel comments on this point as follows:¹⁸⁶

"The onus of proof rests on the State which claims that certain maritime areas close to its coast possess the character of inland waters which they would not normally possess. The coastal State is the petitioner in this sort of action. Its claims constitute an encroachment on the high seas; and it would be inconsistent with the principle of the freedom of the high seas, which remains the essential basis of the whole public international law of the sea, to shift the onus of proof onto the States prejudiced by that reduction of the high seas which is the consequence of the appropriation of certain waters by the claimant State."

166. In the Fisheries Case, the United Kingdom and Norway were in agreement that the onus of proof was upon the State claiming a historic title. They expressed different opinions, however, on the conditions which have to be made in order to discharge that onus and especially on the nature of the evidence to be produced.¹⁸⁷

2. The elements of proof

167. Since the basic element underlying the theory of historic bays—at least as that theory was originally conceived—is "usage", one must inquire how such usage can be proved. Article 11 of the project sub-

¹⁸⁵ These decisions were interpreted differently by the parties in the Fisheries Case (see, in particular, the Counter-Memorial of Norway, *I.C.J. Pleadings, Oral Arguments, Documents, Fisheries Case, Judgement of 18 December 1951*, vol. I, paras. 541, 543 and 544; the Reply of the United Kingdom, *ibid.*, vol. II, paras. 438, 440 and 441).

¹⁸⁶ *Op. cit.*, p. 632.

¹⁸⁷ *I.C.J. Pleadings, Oral Arguments, Documents, Fisheries Case, Judgement of 18 December 1951*, vol. I, Counter-Memorial of Norway, p. 556; *ibid.*, vol. II, Reply of the United Kingdom, p. 645.

mitted in 1933 to the International Conference of American States by the American Institute of International Law (*supra*, para. 81) regards as "historic" the bays over which the coastal States have traditionally exercised and maintained their sovereign ownership, either by provisions of internal legislation and jurisdiction, or by deeds or writs of the authorities. According to that definition, before a State can claim a historic title to a bay it must have exercised its sovereignty over that bay. The mere claim of sovereignty does not, therefore, suffice; to satisfy the terms of the definition, sovereignty has to be exercised effectively. On the other hand, the exercise of sovereignty can, according to the definition, be proved by reference to measures under municipal law.¹⁸⁸

168. In the Fisheries Case, Norway made the following statement:¹⁸⁹

"It cannot be seriously questioned that, in the application of the theory of historic waters, the acts of municipal authority by the coastal State occupy an essential place.

"The existence of a historic title necessarily implies the accomplishment of such acts. The basis of the title is the exercise of sovereignty, which, provided that it is peaceful and continuous, gains international recognition and takes its place in the international legal order."

169. After an analysis of the title of ownership resulting from occupation and of the title which derives from historic continuity, Norway contended that:

"In both cases, therefore, — in occupation and in prescription — the exercise of territorial sovereignty is essential.

"How can such sovereignty be asserted? First and foremost by acts of municipal authority (laws, regulations, administrative measures, judicial decisions, etc.)."

170. In its Rejoinder, when explaining its position regarding the importance of "international recognition" in the acquisition of a historic title, Norway added:¹⁹⁰

"It is certain that a State can only invoke a historic title if it is in a position to prove the existence of a *peaceful and continued* usage. A State which asserted its sovereignty over certain sea areas but failed to exercise that sovereignty effectively, or, because of the opposition of other States, did not succeed in exercising a sufficient degree of sovereignty, cannot rely on such usage. Hence, the attitude of other States is an element which should be taken into consideration.

¹⁸⁸ Bustamante, the author of the project in question, states: "... when attempt is made to determine what is to be understood by the word 'historic', some Governments maintain that to the traditional possession of the bay, there must be added the consent of other States.

"It is very dangerous, because this last condition lends itself to notable abuses. No one specifies from how many and from which States this conformity must proceed, or what is the legal value of one or various divergent opinions. In respect to a certain bay, the continuous possession of which is claimed by a coastal State by right of sovereignty, no controversies or difficulties have ever arisen, either on account of its distance from the great maritime and commercial currents of the Globe, because the opportunity of expounding and solving doubtful questions has not presented itself. It is inadmissible that such circumstances should suffice to deprive the bay of its historic character" (*op. cit.*, pp. 99 and 100).

¹⁸⁹ I.C.J. Pleadings, Oral Arguments, Documents, Fisheries Case (*United Kingdom v. Norway*), Judgment of 18 December 1951, vol. I, Counter-Memorial of Norway, para. 564, pp. 567 and 568.

¹⁹⁰ *Ibid.*, vol. III, paras. 574-576, pp. 452 and 453.

"But the Norwegian Government does not share the opinion of the United Kingdom Government either concerning the weight to be attached to that element or on the circumstances in which it becomes relevant.

...

"The United Kingdom Government regards usage as *merely evidence of the acquiescence of other States*. In that Government's view, the decisive factor, *indeed the only one capable of legitimating the claim of the coastal State, is the acquiescence of other States*.

"The Norwegian Government believes that the essence of a historic title can never be reduced to such a simple formula.

"In the explanation offered by the opposing Party, it is argued that the historic title is merged in the title based on recognition (unilateral or by treaty). Yet the legal effects of peaceful and continued usage derive from a principle very different from that applicable to recognition.

"In reasoning as it does, the United Kingdom Government seems to overlook the fact that in the creation of historic title one of the essential factors is *time*.

"In recognition, *time* plays no part whatsoever. Juridically, recognition may be instantaneous. Nor does it lose any of its force thereby, *because in recognition the decisive and only factor is acquiescence*.

"A historic title can never be acquired unless it is supported by *long usage*. In such a title, the essential factor is *duration*. Admittedly, a usage which has acquired validity with the passage of time must also have been *peaceful and continuous*. If it had not been, it would never have acquired validity. But — as the word itself shows clearly enough — a 'historic' title derives its force from history, that is to say from *the passage of time*.

"The United Kingdom Government, it is true, recognizes that this time element is necessary; but it only considers this element in the light of what it [that Government] considers the sole test: the acquiescence of other States. In its view, 'the passage of time — that is the long duration of usage — is a vital element in the title *as supplying evidence of the implied acquiescence of other States in the claim*' (para. 511 (10)). (*Our italics*.)

"The acquisition of juridical force through the passage of time is, however, based on something very different. It is explained by *the need for stability*.

"A situation which has subsisted peacefully over a long period comes to be regarded as permanent; it becomes part of the general legal order, unless there are compelling reasons for excluding it therefrom. In Fauchille's words 'Since the interests of the international community demand peaceful relations, the rights of States must, after a certain time, be made secure against any attack.' (*Traité de Droit international public*, vol. I part II, p. 757.)

"This principle, which stands on its own merits, independently of the acquiescence of States, certainly plays an important part in the notion of historic titles."

171. By contrast, the reply of the United Kingdom states:¹⁹¹

"... Municipal decrees and other acts of municipal authority have no higher significance in an international tribunal than as relevant facts which show an exercise of State authority *but which may or may not be sufficient to establish an international right to exercise the State authority*. Whether or not municipal decrees and other acts of State authority in fact provide evidence of a title valid in international law necessarily depends

¹⁹¹ *Ibid.*, vol. II, Reply of the United Kingdom, paras. 475-477, pp. 647-649.

not only upon the nature of the municipal act but upon the rules of international law. In an international tribunal the question in each case must always be: 'what interpretation is placed upon the municipal acts by international law?'

172. Further on, the Reply continues:

"...The United Kingdom Government in effect maintains that the assertion of State authority, though essential to the establishment of a claim to maritime territory, is not sufficient and that, the rights of other States being affected, their acquiescence is required..."

173. Later, under the title "An historic title to an area of sea is acquired by prescription, not by occupation" the Reply states:

"Where the claim of title is to land which is a *res nullius* and in which, therefore, other States possess no legal interest, the mere peaceful exercise of State authority in regard to the land suffices to establish the occupation. The *res nullius* is in law susceptible of occupation by the first comer and the exercise of State authority in regard to the land will be an exercise of exclusive State authority creating an appropriation binding on other States. In these cases, the sole question is whether the claimant State can establish, to use the words of the Permanent Court in the *Eastern Greenland case* (A/B 53, p. 46), '*l'intention et la volonté d'agir en qualité de souverain, et quelque manifestation ou exercice effectif de cette autorité.*' The long period of the exercise of State authority in these cases merely serves as confirmatory evidence of an occupation, which is equally valid without the long period, provided that the occupation already exists at the 'critical date', namely, the date when another State seeks to assert a rival authority (see the *Eastern Greenland case* (A/B 53, p. 45). No doubt the position will be much the same in a case where the dispute concerns a boundary the facts of which are confused or in a case where, as in the *Island of Palmas Arbitration*, the earlier status of the territory is obscure. In these classes of case the acquiescence of other States in the exercise of State authority upon which the claim of title is founded is irrelevant. The acts of State authority do not touch the rights of other States and the title is valid *ab initio*. The acts of State authority are thus both essential and sufficient to establish the title.

"Where, on the other hand, the claim is to waters of the sea which are not *res nullius*, the position is quite different. It matters not whether the legal status of the high seas be considered to be a *res communis*, as is the opinion of Sir Cecil Hurst, or whether it be considered to be a *res sui generis*, as is the opinion of Gidel. The legal incidents of the régime of the high seas are well understood. No one disputes that each and every State has both a right to claim for its nationals rights of navigation and fishing in the high seas and a competence to exercise exclusive jurisdiction over all vessels of its flag on the high seas. Hence, a claim to exclusive sovereignty over areas of sea beyond the generally recognized limits of maritime territory directly touches and derogates from the existing rights of other States. Such a claim is not like a claim to a *res nullius* (occupation) because it interferes with established rights. It is a case of prescription and is open to the challenge that in origin it is 'illegal and invalid', as the Permanent Court said of the attempted Norwegian occupation of Eastern Greenland (A/B 53, p. 64), because at the critical date Eastern Greenland was not *res nullius*. Where prescription is involved, it is not sufficient to prove the exercise of State authority by acts under municipal law. It is necessary to show both a long and continuous exercise of State authority and also acquiescence in that exercise by other States."

174. In his dissenting opinion in the Fisheries Case, Sir Arnold McNair states:¹⁹²

¹⁹² Fisheries Case (United Kingdom v. Norway), Judgement of 18 December 1951; I.C.J. Reports, 1951, p. 164.

"...to constitute an historic bay it is not sufficient merely to claim a bay as such, though such claims are not uncommon. Evidence is required of a long and consistent assertion of dominion over the bay and of the right to exclude foreign vessels except on permission. The matter was considered by the British Privy Council in the case of Conception Bay in Newfoundland in *Direct United States Cable Company v. Anglo-American Telegraph Company* (1877) 2 Appeal Cases 394. The evidence relied upon in that case as justifying the claim of an historic bay is worth noting. There was a Convention of 1818 between the United States of America and Great Britain which excluded American fishermen from Conception Bay, followed by a British Act of Parliament of 1819, imposing penalties upon 'any person' who refused to depart from the bay when required by the British Governor. The Privy Council said:

'It is true that the Convention would only bind the two nations who were parties to it, and consequently that, though a strong assertion of ownership on the part of Great Britain, acquiesced in by so powerful a State as the United States, the Convention, though weighty, is not decisive. But the Act already referred to... goes further'... 'No stronger assertion of exclusive dominion over these bays could well be framed.' [This Act] 'is an unequivocal assertion of the British legislature of exclusive dominion over this bay as part of the British territory. And as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh Convention was made, this would be very strong in the tribunals of any nation to show that this bay is by prescription part of the exclusive territory of Great Britain...'

175. Later, Sir Arnold states:

"Another rule of law that appears to me to be relevant to the question of historic title is that some proof is usually required of the exercise of State jurisdiction, 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."

176. Referring to the nature of the evidence which is required, Gidel¹⁹³ expresses the following opinion:

"It is hard to specify categorically what kinds of acts of appropriation constitute sufficient evidence; the exclusion from these areas of foreign vessels and their subjection to rules imposed by the coastal State which exceed the normal scope of regulations made in the interests of navigation would obviously be acts affording convincing evidence of the State's intent. It would, however, be too strict to insist that only such acts constitute adequate evidence..."

177. Similarly, Bourquin¹⁹⁴ states that:

"...The State which forbids foreign ships to penetrate the bay or to fish therein indisputably demonstrates by such action its desire to act as the sovereign.

"There are, however, some borderline cases. Thus, the placing of lights or beacons may sometimes appear to be an act of sovereignty, while in other circumstances it may have no such significance."

178. Gidel and Bourquin were referring to the award of the special arbitral tribunal convened in 1909 at The Hague to deal with the question of the delimitation of a certain part of the maritime boundary between Norway and Sweden. One of the circumstances which

¹⁹³ Op. cit., p. 633.

¹⁹⁴ Op. cit., p. 43.

the tribunal held to constitute evidence supporting the Swedish claim was:

"...The circumstance that Sweden has performed various acts in the [disputed waters], especially of late, owing to her conviction that these regions were Swedish, as, for instance, the placing of beacons, the measurement of the sea, and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought that she was exercising her right but even more that she was performing her duty."¹⁹⁵

179. In the Fisheries Case, the International Court of Justice found that:

"The Norwegian Government has relied upon an historic title clearly referable to the waters of LoppHAVET [*supra*, para. 71], namely, the exclusive privilege to fish and hunt whales granted at the end of the 17th century to Lt.-Commander Erich Lorch under a number of licences which show, *inter alia*, that the water situated in the vicinity of the sunken rock of Gjesbaen or Gjesbaene and the fishing grounds pertaining thereto were regarded as falling exclusively within Norwegian sovereignty..."

180. In his separate opinion, Judge Hsu Mo pointed out that:

"With regard to the licences for fishing granted on three occasions by the King of Denmark and Norway to Erich Lorch, Lieutenant-Commander in the Dano-Norwegian Navy towards the close of the 17th century, I do not think that this is sufficient to confer historic title on Norway to LoppHAVET. In the first place, the granting by the Danish-Norwegian Sovereign to one of his subjects of what was at the time believed to be a special privilege can hardly be considered as conclusive evidence of the acquisition of historic title to LoppHAVET *vis-à-vis* all foreign States. In the second place, the concessions were limited to waters near certain rocks and did not cover the whole area of LoppHAVET. Lastly, there is no evidence to show that the concessions were exploited to the exclusion of participation by all foreigners for a period sufficiently long to enable the Norwegian Government to derive prescriptive rights to LoppHAVET."¹⁹⁶

3. Evidence of international recognition

181. It has been shown that, according to some schools of thought, international recognition is a decisive factor in the acquisition of historic title. Now the question is what form the recognition should take. Must it be universal? Must it be express, or can it be inferred from absence of opposition? And, in a case where a State has expressly recognized the territoriality of a bay, to what extent is that recognition valid *vis-à-vis* States which have abstained from lodging objections?

182. On this point Raestad says:¹⁹⁷

"Since prescription, as it is known in municipal law, does not exist in international law, except where provision is made for it in treaties, a situation which has existed for a long period is only recognized by the law of nations if the prolonged existence of that state of affairs proves the tacit consent of States; the consent of the States most directly concerned, by reason of proximity or other circumstance, binds also the States less

directly concerned and those which acquired an interest in that state of affairs subsequently..."

183. Fauchille¹⁹⁸ makes the following comment:

"As every State has the right to renounce any right vested in it, we believe that States which have expressly consented to respect the territoriality of a bay which previously, because of its size, constituted an open sea, and consequently an area in which they were entitled to navigate freely, would be estopped from objecting to the coastal State's exercise of exclusive sovereignty in that bay. But should the territorial status of that bay also be regarded as binding on States which simply abstained from objecting? Can such abstention be equivalent to consent? This seems rather more doubtful. Many jurists have indeed disputed the soundness of the theory of historic bays. Perels, for example, states (in his *Droit maritime*, p. 35) that 'the unilateral exercise of alleged rights, even if it does not evoke any objections from other States (either because they are acting in collusion or because they are impotent to resist), can never be placed against those which have not acquiesced, either expressly or by conduct showing an unmistakable intention'..."

184. Gidel¹⁹⁹ expresses the following opinion:

"It is a particularly delicate matter to determine, in general terms, the conditions which the established 'usage' must fulfil; it seems impossible to insist that the recognition of that usage should either be 'universal' in the strict sense of the word, or express. A single objection formulated by a single State will not invalidate the usage; furthermore, all objections cannot be placed on an equal footing, regardless of their nature, the geographical or other situation of the objecting State..."

185. The judgement of the International Court of Justice in the Fisheries Case contains some significant statements on this subject (*supra*, para. 66).²⁰⁰ The Court held that the absence of "opposition on the part of other States" was a circumstance supporting the validity of the Norwegian system of the delimitation, of which it established "the existence and the constituent elements". The Court said in this connexion:

"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."

186. Some paragraphs later, the judgement says:

"Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.

"The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact..."

187. And in a subsequent passage, the Court adds:

"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.

¹⁹⁵ Scott, *op. cit.*, p. 130.

¹⁹⁶ Fisheries case (*United Kingdom v. Norway*), Judgement of 18 December 1951, I.C.J. Reports 1951, p. 157.

¹⁹⁷ *Op. cit.*, p. 174.

¹⁹⁸ *Op. cit.*, p. 382.

¹⁹⁹ *Op. cit.*, p. 634.

²⁰⁰ As regards the attitude of the Parties on this subject, see, particularly, the Reply of the United Kingdom (vol. II, pp. 652-659) and the Rejoinder of Norway (vol. III, pp. 457-461).

"The notoriety of the 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."

188. Sir Gerald Fitzmaurice, commenting on the Court's judgement²⁰¹ under the title "The criterion of 'absence of opposition'", makes the following statement:

"It will be seen that in these passages²⁰² the Court (in contradistinction to the more positive criteria of the minority Judges) set up the test of absence of opposition by other States. How far is this test conclusive? 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, particularly for instance where the

²⁰¹ "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law", *British Year Book of International Law*, 1953, pp. 1-70.

²⁰² The passages in question are extracts from the Court's judgement which the author cites in the preceding paragraph of his article in order to show the Court's attitude on the element of "recognition" or consent. That paragraph reads as follows:

"The consent of other States necessary. While finding in favour of Norway that other States — and in particular the United Kingdom — must be held to have acquiesced in the Norwegian system of delimitation, the Court did not adopt the Norwegian theory of the absolute and conclusive character, as against all the world, of a long-continued national usage *per se*. It considered the acquiescence, the consent in some form, or at least the toleration, of other States, to be necessary. This is apparent from such passages as the following (*I.C.J. Reports*, 1951, pp. 136-7):

'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.'

and again (p. 138):

'From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.'

Similarly (*ibid.*):

'The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact.'

and (at p. 139):

'The notoriety of the facts, the general toleration of the international community, ... would in any case warrant Norway's enforcement of her system....

'The Court is thus led to conclude that the method... established in the Norwegian system... 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.'

The Judges delivering separate or dissenting opinions took a like view on this point. Thus, Judge Hsu Mo (*ibid.*, p. 154) referred to Norway's 'consistent past practice which is acquiesced in by the international community as a whole'. Judge Read (p. 194) said:

'If it can be shown that the Norwegian system has been recognized by the international community, it follows that it has become the doctrine of international law applicable to Norway, either as special or as regional law.'

Later (at p. 195), he spoke of a Norwegian system

'... applicable or applied to the coasts in question; known to the world; and acquiesced in by the international community.'

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 a form such that it is not reasonably possible for other States to infer what its true character is. These proved to be the crucial points of the historic aspects of the Norwegian case."²⁰³

189. Later, in a section entitled "Protests, Admissions", Sir Gerald makes the following statement:²⁰⁴

"... in certain circumstances failure to protest may amount to an admission, and an admission may be implied from silence or inaction."

The author develops this statement by citing passages from the Court's judgements in the Fisheries Case, in the Minquiers and Ecrehous Case (1953) and in the case concerning the rights of United States of America nationals in Morocco (1952).²⁰⁵

E. The time factor in the acquisition of an historic title

190. Is there some specified period of time which must elapse before an historic title is acquired? Expressions such as "of long standing", "immemorial", "confirmed by time" or "well-established", which occur both in judicial decisions and in the works of authors, all suggest a fairly long period but do not give a clear indication of its exact duration.

191. Scelle,²⁰⁶ who admits prescription as a mode of acquiring rights in international law, states that the period of prescription "is indeterminate [in international law] and must in each case be submitted to the test of reasonableness".

192. Judge Alvarez,²⁰⁷ in his separate opinion in the Anglo-Norwegian Fisheries Case, states that:

"International law does not lay down any specific duration of time necessary for prescription to have effect. A comparatively recent usage relating to the territorial sea may be of greater effect than an ancient usage insufficiently proved."

193. Sir Gerald Fitzmaurice²⁰⁸ expresses the following view on this subject:

"... the passage of an appreciable period of time is necessary for the acquisition or formation of historic rights, because if the essential role of the historic element is to supply an inference of acquiescence on the part of other States, arising from their inactivity coupled with the passage of time — then time must be allowed to pass."

194. After citing the extract from the separate opinion of Judge Alvarez quoted above, Sir Gerald Fitzmaurice comments on it as follows:²⁰⁹

"If the emphasis is placed on the words 'comparatively' and 'insufficiently proved', this pronouncement is fully acceptable, but it is even so more applicable to the case of the formation

²⁰³ *Ibid.*, p. 33.

²⁰⁴ *Ibid.*, p. 42.

²⁰⁵ *Ibid.*, pp. 42-47.

²⁰⁶ *Op. cit.*, p. 435.

²⁰⁷ *Fisheries Case (United Kingdom v. Norway), Judgement of 18 December 1951; I.C.J. Reports*, 1951, p. 152.

²⁰⁸ *Op. cit.*, pp. 30-31.

²⁰⁹ *Op. cit.*, p. 31.

by usage of a new general rule of customary international law than to the acquisition of specific and special rights by an individual State on a prescriptive basis. Professor Lauterpacht has recognized this distinction in the following passage:¹

'However, assuming... that the emergence of the doctrine of sovereignty over the adjacent areas constituted a radical change in pre-existing international law, the length of time within which the customary rule of international law comes to fruition is irrelevant.² For customary international law is not yet another expression for prescription.³ A "consistent or uniform usage practised by the States in question"—to use the language of the International Court of Justice in the *Asylum Case* [*I.C.J. Reports*, 1950, p. 276]—can be packed within a short space of years. The "evidence of a general practice as law"—in the words of Article 38 of the Statute—need not be spread over decades. Any tendency to exact a prolonged period for the crystallization of custom must be proportionate to the degree and the intensity of the change that it purports, or is asserted, to effect.'

"A new rule of customary law based on the practice of States can in fact emerge very quickly, and even almost suddenly, if new circumstances have arisen that imperatively call for legal regulation—though the time factor is never wholly irrelevant: but the acquisition of prescriptive rights by individual States, contrary to the existing (and otherwise still subsisting) international order, involves different considerations and criteria, that make the passage of time, and an appreciable period of time at that, essential at any rate in all those cases (which are the type of the true prescriptive or historic claim) where the positive consent or express recognition of States cannot be shown."

¹ 'Sovereignty over the Submarine Areas', *British Year Book of International Law*, 27 (1950), p. 393."

² Or perhaps not so much irrelevant as *not* determinant *per se*."

³ This is obviously correct, but the two have important features in common. Both depend on the establishment of a practice or usage—one general and the other particular—and each derives its eventual legal sanction from some form of consent on the part of States—either general acceptance in the one case, and in the other specific recognition or tacit acquiescence. Apart from any difference in the time factor, the *method* (practice and assent) is the same both for the establishment of new customary law and for the acquisition of prescriptive or historic rights."

195. Bourquin²¹⁰ notes that, by contrast with municipal law (where the prescriptive period for usucapion is laid down by precise rules), international law does not, for the purpose of the acquisition of historic title, contain any rule laying down a specific period. He adds:

"...As far as the so-called historic bays are concerned, the question is of no practical interest. The usage on which the State relies in such a case goes back to the most distant past. It is an immemorial usage, in the strict sense of that word.

"We should not forget that the general trend of the development of the law of the sea in modern times is characterized by a gradual shrinkage of the maritime territory of States.¹ In principle, it is not the sovereignty of the State which has spread at the expense of the high seas but the high seas which have spread by absorbing areas previously subject to the authority of the State. Consequently, the waters in respect of which an historic title is claimed are not waters which the coastal State has appropriated at a more or less recent date, but waters which

¹ We are now witnessing—for reasons too elaborate to set forth here—a reverse trend, a reaction against any excessive reduction of the prerogatives of the coastal State. But from the time of the *Mare liberum* Grotius until the Codification Conference of 1930 the dominating influence had been the desire to extend the area of the high seas."

²¹⁰ *Op. cit.*, p. 49.

have always formed part of its territory and which have never been a portion of the high seas..."²¹¹

196. The author cites Baldoni,²¹² who says:

"...At the time when the rule of the freedom of the seas was asserting itself, the Bays of Cancale, Chaleurs, Chesapeake, Conception, Delaware, Fonseca and Miramichi were already under the effective permanent sovereignty of the coastal States. The principle of the freedom of the seas had accordingly never applied to them. It is unnecessary, therefore, in order to explain the coastal State's title thereto, to rely on any rules of prescription or, as others believe, on some supposed special rules created as exceptions to the principle of the freedom of the high seas. The status of these bays can be explained—by analogy with our treatment of the other parts of the territorial sea—by the general rule governing occupation, the application of which, even in the present case, is not excluded by any rule of an exceptional nature. Consequently, the status of historic bays is not, as the authorities generally contend, exceptional. Their status is normal, because it derives from a fundamental principle of the law of nations. We may add, though strictly in passing, that some of these bays, such as Chesapeake and Delaware, are of such configuration and size that they can so surely be regarded as accessory to the coasts surrounding them that no further inquiry of any kind is necessary to establish that they are not subject to the principle of the high seas."

F. The notion of continuity in the formation of a historic title

197. As has been shown above (para. 141), some draft codes qualify the "usage" which gives rise to a historic title by the adjective "continuous". In other words, according to these drafts a historic title cannot be acquired without proof of "continuous usage".

198. In the Fisheries Case, the International Court of Justice, after having established the existence and the constituent elements of the Norwegian system of delimitation, held "that this system was 'consistently' applied by Norwegian authorities". In that connexion, it considered the documents on which the United Kingdom based its contention that the Norwegian Government had not consistently followed the principles of delimitation which, it claimed, formed its system. The Court concluded as follows:²¹³

"The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government 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 dispute arose."

²¹¹ Norway expressed a similar opinion in the Fisheries Case (see Rejoinder, para. 561).

²¹² "Les navires de guerre dans les eaux territoriales étrangères", Academy of International Law, *Recueil des Cours*, 1936 vol. III, pp. 221-222.

²¹³ See *supra*, para. 65.

III. SCOPE OF THE THEORY OF HISTORIC BAYS

199. The application of the theory is not limited to bays. It tends to be applied also to straits, to the waters within archipelagos and, generally, to the various areas capable of being comprised in the maritime domain of the State.

200. Article 2 of the draft convention adopted in 1936 by the International Law Association refers to all such maritime areas in general terms, as follows:²¹⁴

"...each maritime State shall exercise territorial jurisdiction within the limits hereinafter provided and not further, save to the extent that jurisdiction is conferred by...or established usage generally recognized by Nations."

201. At the eighth plenary meeting of the 1930 Conference on the Codification of International Law, Mr. Giannini, the Italian representative, said that the Second Committee:²¹⁵

"...recognized that there were historic situations — 'historic' bays, although the use of the adjective was criticized. This conception was also extended from bays to certain historic waters. It will be the first time that this adjective used in this sense will appear in official documents."

202. At the eleventh meeting of the Second Committee of that Conference, Mr. Miller, the representative of the United States of America, criticized the expression "historic bays". In his view:²¹⁶

"Both words are inaccurate — both 'historic' and 'bays'. It is a question, so far as the latter word is concerned, of waters, not merely waters that either from habit or technical definition are called bays, but waters by whatever name they may have generally or technically have been called. Furthermore, the word 'historic' is an inaccurate word, because it is not only a question of history, it is also a question of the national jurisdiction of the coastal State. That, I submit, is the question involved in regard to these waters, and the continual use of the expression 'historic bays', with mention of one or two bays here and there in different parts of the world, has led to a great deal of confusion of thought as to the principles which are involved."

203. The United States delegation consequently submitted an amendment to Basis of Discussion No. 8, in the following terms:²¹⁷

"Waters, whether called bays, sounds, straits, or by some other name, which have been under the jurisdiction of the coastal State as part of its interior waters, are deemed to continue a part thereof."

204. It should be noted that in the Fisheries Case the International Court of Justice recognized as consistent with international law the Norwegian argument

that all the waters²¹⁸ within the limits drawn by the Decree of 1935 were historically Norwegian waters.

205. A statement of special significance in this context is that made by the Court regarding the LoppHAVET basin, which it refused to characterize as a bay (*supra*, paras. 70-71):

"Even if it were considered that in the sector under review the deviation was too pronounced, it must be pointed out that the Norwegian Government has relied upon a historic title clearly referable to the waters of LoppHAVET..."

206. And later:

"The Court considers that, although it is not always clear to what specific areas they apply, the historical data produced...lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom... Such rights, founded 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 Court to have been kept within the bounds of what is moderate and reasonable."

PART III

Various suggestions made at the First Codification Conference of The Hague (1930) for the solution of the problem of historic bays

207. The Preparatory Committee of the First Codification Conference of The Hague (1930) suggested that "it would be convenient that at the Conference the Governments should state what are the bays which they claim to be historic bays and what are the roadsteads for which they claim to have the territorial-waters belt measured from the exterior boundary of the roadstead".²¹⁹

208. At the eleventh meeting of the Second Committee of that Conference, held on 28 March 1930, Mr. Giannini, the Italian representative, submitted a proposal in the following terms:²²⁰

"The Conference expresses a *vœu* that the Communications and Transit Committee should appoint a special Committee to study what are the so-called historic bays, and what is their present *de facto* and *de jure* situation, with a view to collecting the data necessary to codify their legal status at a subsequent Conference for the Codification of International Law."

209. In 1930, Antonio Sanchez de Bustamante y Sirven prepared a study of the territorial sea²²¹ which was transmitted, through the American Institute of International Law, to the First Codification Conference

²¹⁴ Report of the Thirty-fourth Conference, 1926, p. 43. See also article 12 of the draft contained in *Harvard Research* (*supra*, para. 83), articles 11 and 16 of the draft submitted in 1933 to the Tenth International Conference of American States (*supra*, para. 81) and the Report of the Second Committee of the Codification Conference, 1930 (*supra*, para. 90).

²¹⁵ Ser. L.O.N.P. 1930.V.14, p. 53.

²¹⁶ Ser. L.O.N.P. 1930.V.16, p. 107.

²¹⁷ *Ibid.*

²¹⁸ All the Norwegian coastal waters within the straight base-lines following the general direction of the coast. The Court stressed that the Norwegian coast meant the outer contour of the "skjaergaard", i.e. "all the islands, islets, rocks and reefs...". Furthermore, "within the 'skjaergaard', almost every island has its large and its small bays; countless arms of the sea, straits, channels and mere waterways serve as a means of communication for the local population...". (*Fisheries Case* (*United Kingdom v. Norway*), *Judgement of 18 December 1951*, I.C.J. Reports, 1951, p. 127).

²¹⁹ Ser. L.O.N.P. 1929.V.2, p. 64.

²²⁰ Ser. L.O.N.P. 1930.V.16, pp. 112-113.

²²¹ *The Territorial Sea*, 1930 (already cited).

of The Hague. In this study, the eleventh chapter of which contains a "Project of Convention" on the juridical regime of the territorial sea, the author states: ²²²

"It appears necessary that the Convention should define these historic bays, in order that it be their fundamental element, the exercise or uninterrupted sanction of their character, that determines the recognition of this quality. The permanent right of the coastal State may be proved, both by the provisions of its internal legislation, if it has such, and by acts of jurisdiction and of government as well as by declarations previous to the signing of the proposed Convention by the competent authorities.

"Some means must, however, exist so as to avoid future abuses, as well as discussions and conflicts. With this aim, the Project of Convention establishes that every country having historic bays, within the definition that it contains, shall specifically state this on depositing its ratification. And as claims from third parties may arise, the opportunity to try them and the jurisdiction to decide them must not be passed over in silence. These claims we shall in due time discuss and formulate in view of the maximum extent of territorial waters." ²²³

Article 11 of the "Project of Convention" gives a definition of historic bays (*supra*, para. 81). The other relevant articles are 18 to 25, which are worded as follows: ²²⁴

"Art. 18. Territorial sea has an exterior maritime zone three miles wide, of sixty to the degree of longitude on the Equator, and starting from the interior limits indicated in this Convention.

"Art. 19. The contracting States which maintain, for all purposes or for some, a greater extent which has been fixed previous to the signing of the present Convention, shall declare

this extent when depositing their respective ratification or when adhering to same.

"Art. 20. Such declaration shall be communicated at once by the Secretariat of the League of Nations to all other contracting or adhering States, which may oppose it within a period of six months from the notification, if not in accord with the conditions established in the foregoing article.

"Art. 21. Each State ratifying the present Convention or adhering thereto after the said declaration has been made, shall also be notified in the same manner, and may oppose it within the six months that follow its notification or adhesion, or take part in the current legal procedure, save in the event of an already existing judicial or arbitrary decision.

"Art. 22. The opposition shall be communicated to the Secretariat of the League of Nations, which shall notify thereof the remaining contracting parties or adherents.

"Art. 23. The opposing State shall be obliged, within another six months following reception of advice of opposition by the Secretariat of the League of Nations, and if it has not solved the difficulty through direct diplomatic negotiations between those interested, to submit it to the decision of third parties, in the manner established in the Conventions which it has in force with the opposed State, and, in the absence of this, to the Permanent Court of International Justice, if both of them were signatories of the Statute. In the event that neither of these cases should be applicable to them, the difference shall be submitted to arbitration.

"Art. 24. The procedure adopted according to the foregoing article, shall be immediately notified by the opposing State, and authentic copies of documents recording the results shall be furnished to the Secretariat of the League of Nations, and the latter shall also immediately transmit these copies and notify the other contracting States or adhering to the Convention, that may take part in the same procedure, although without intervening in the appointment of the arbitrary Court or in the organization and constitution of any other means of conciliation or decision that may have been accepted.

"Art. 25. The rules established in the foregoing articles 19 to 24 shall be applicable also to the bays, estuaries and straits comprised in articles 11 and 16 of the present Convention."

²²² *Ibid.*, p. 100.

²²³ *Ibid.*, pp. 109-111.

²²⁴ *Ibid.*, pp. 143-144.