

Document:-
A/CN.4/143

**Juridical Regime of Historic waters including historic bays - Study prepared by the
Secretariat**

Topic:
Juridical régime of historic waters, including historic bays

Extract from the Yearbook of the International Law Commission:-
1962 , vol. II

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JURIDICAL REGIME OF HISTORIC WATERS, INCLUDING HISTORIC BAYS

DOCUMENT A/CN.4/143 Study prepared by the Secretariat

[Original text: English]
[9 March 1962]

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I. Origin and background of the study

1. The present study was prepared by the Codification Division of the Office of Legal Affairs at the request of the International Law Commission. The Commission's decision to initiate the study was taken at its twelfth session (1960), in pursuance of General Assembly resolution 1453 (XIV) of 7 December 1959. The Assembly resolution was prompted by a resolution on the matter taken by the United Nations Conference on the Law of the Sea held in 1958 at Geneva. A brief review of these resolutions and of their background will help to clarify the purpose of the study.

2. At its eighth session (1956) the International Law Commission completed the final draft of its articles

concerning the Law of the Sea¹ and this draft was subsequently referred by the General Assembly to the above-mentioned United Nations Conference on the Law of the Sea. Article 7 of the draft dealt with bays; paragraphs 1 to 3 contained a definition of a bay and laid down rules for the delimitation of internal waters in a bay (the coasts of which belong to a single State), while paragraph 4 read in part as follows:

"4. The foregoing provisions shall not apply to so-called historic bays . . ."²

¹ See chapter II of the Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, *Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159)*.

² *Ibid.*, pages 5 and 15.

3. Although much attention was given in the reports of the Special Rapporteur and in the discussions of the Commission to the substantive provisions on bays in article 7 in its successive stages of development, there is little in the records of the Commission to shed light on the concept of "historic bays" referred to in paragraph 4 of the article.

4. A clause regarding "historic bays" did not appear in the first two reports on the territorial sea prepared by the Special Rapporteur. He submitted, however, at the fifth session of the Commission, an addendum³ to his second report in which he presented redrafts of certain articles contained in the second report, among them the article on bays. These new drafts were to a large extent inspired by solutions proposed by a group of experts to a number of technical problems which had been referred to them by the Special Rapporteur. As redrafted, the article on bays, in its first paragraph, gave a definition of "a bay in the juridical sense" and thereafter stated:

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

In his third report,⁴ submitted at the sixth session of the Commission, the Special Rapporteur transferred this clause regarding "historic bays" from the text of the article to the commentary. At the following session, he submitted a new redraft of the article on bays,⁵ and in the text of that redraft the clause regarding "historic bays" reappeared. However, now the clause excepted "historic bays" not from the general definition of a bay but from the rules regarding the drawing of closing lines in bays. Another difference from the previous formulation of the clause was that the provision that "historic bays" should be marked on the maps, had been omitted.

5. In this form, i.e., as a proviso excepting "historic bays" from the rules regarding drawing closing lines in bays, the clause was included in article 7 (on bays) of the preliminary draft on the régime of the territorial sea which was adopted by the Commission at its seventh session and circulated to the Member States for observations.

6. In its reply⁶ the Union of South Africa pointed out that the commentary accompanying the article seemed to indicate that the real intention of the Commission was to exempt "historic bays" not only from the rules on the drawing of closing lines but also from the other rules on bays laid down in the article. The Special Rapporteur and the Commission agreed, and the clause regarding "historic bays" was, consequently, in the final draft of the article formulated as set out above in paragraph 2 of this paper.

7. In the course of the discussions in the Commission of the article on bays in its successive formulations, only passing references were made to "historic bays". The debates, as a consequence, did not substantially contribute to the clarification of the concept.⁷

³ A/CN.4/61/Add.1, the French text of which is printed in *Yearbook of the International Law Commission, 1953*, volume II, page 76.

⁴ A/CN.4/77, printed in French, in *Yearbook of the International Law Commission, 1954*, volume II, page 1.

⁵ In A/CN.4/93, the French text of which is printed in *Yearbook of the International Law Commission, 1955*, volume II, page 5.

⁶ A/CN.4/99, *Yearbook of the International Law Commission, 1956*, volume II, page 77.

⁷ The question of bays was discussed at the fourth session in 1952, the seventh session in 1955, and the eighth session, in

8. In order to provide the United Nations Conference on the Law of the Sea with material relating to "historic bays", a memorandum⁸ on the subject was prepared by the Codification Division and circulated as a preparatory document of the Conference. It was pointed out in the memorandum that historic rights were claimed not only in respect of bays but also in respect of other maritime areas. However, as the purpose of the memorandum was to shed light on the concept of "historic bays" referred to in the draft of the International Law Commission, the emphasis was on this latter concept, and historic claims to other waters were dealt with only incidentally. The content of the memorandum was succinctly set out in its paragraph 5 as follows:

"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."⁹

9. The United Nations Conference on the Law of the Sea which met in Geneva on 24 February 1958 referred those articles of the International Law Commission draft dealing with the territorial sea and the contiguous zone, including article 7 on bays, to its First Committee. At the third meeting of the Committee, in connexion with the organization of the Committee's work, the representative of Panama proposed that the Committee should set up a sub-committee to examine the question of bays and in particular the problem of the legal status of "historic bays". The representative referred to the above-mentioned Secretariat memorandum and stated that it was

"essential that the international instruments to be drafted by the Conference should deal with such questions as the definition of historic bays, the rights of the coastal State or States, the procedure for declaring a bay 'historic', the conditions for recognition by other States, and the peaceful settlement of disputes arising from objections by other States".

1956; see, respectively, *Yearbook of the International Law Commission, 1952*, volume I, pages 188-190; *Yearbook, 1955*, volume I, pages 205-216, 251, 278, 279-80; and *Yearbook, 1956*, volume I, pages 190-193. In the 1955 discussion, Sir Gerald Fitzmaurice affirmed that the concept of "historic bays" formed part of international law (*Yearbook, 1955*, volume I, page 209), while Mr. García-Amador and Mr. Hsu (*ibid.*, pages 210 and 211) said that they had doubts about "historic bays". Mr. García-Amador contended that this concept only benefited old countries having a long history and that there were many comparative newcomers to the international community—countries in Latin America, the Middle East and the Far East—which could not claim such historic rights. The reference to "historic bays" in the relevant article was, however, adopted without any member voting against it (*ibid.*, page 214).

⁸ Historic Bays, Memorandum by the Secretariat of the United Nations (A/CONF.13/1), printed in *Official Records of the United Nations Conference on the Law of the Sea, 1958*, United Nations publication, Sales No.: 58.V.4, vol. I: Preparatory Documents, pages 1 *et seq.*

⁹ *Ibid.*, page 2.

The work of the First Committee with respect to these problems would, in the opinion of the representative, be considerably facilitated if it appointed a sub-committee specifically concerned with the law relating to bays.¹⁰

10. After a short discussion of the matter in the First Committee, the Chairman suggested that, as the forthcoming general debate in the Committee would probably make clear what other sub-committees would be needed, and it was desirable to consider the composition of all the sub-committees at the same time, the Panamanian proposal should be held over for the time being, on the understanding that he would bring it before the Committee at an early convenient date. The representative of Panama agreed to that procedure.

11. In the discussion at the third meeting and the general debate in the First Committee, the Panamanian proposal won support from several delegations, in particular the delegations of Saudi Arabia, Yemen,¹¹ El Salvador,¹² and Pakistan,¹³ while the representative of the United Kingdom¹⁴ expressed doubts regarding the usefulness of a study of the matter by a sub-committee. The representative of the Federal Republic of Germany¹⁵ said that he thought that it would be difficult to establish general rules applicable to "historic bays". Mr. J. P. A. François, the International Law Commission's special rapporteur on the law of the sea, who was present at the Conference as an expert to the Secretariat, also advised against setting up a sub-committee to deal with "historic bays". In his view, the Conference did not have at its disposal the material needed for a thorough study of the question, and the Conference might therefore

"merely use the term 'historic bays' and leave it to be construed, in case of dispute, by the Court, with due regard for all the features of the special case, which could not possibly be provided for in a general rule".

If necessary, he added, the International Law Commission

"could be instructed to study acquisition by prescription, with special reference to 'historic bays'".¹⁶

12. When the Panamanian proposal was taken up for decision at the twenty-fifth meeting of the First Committee,¹⁷ the representative of India stated that although his delegation was highly interested in the question of "historic bays", he felt that the Committee had neither the time nor the material available to deal with the matter properly. Each bay, he said, having its own particular characteristics, a mass of data would have to be sifted and collated before any general principles could be established. Instead of setting up a sub-committee, the Conference should therefore adopt a resolution recommending that the General Assembly make arrangements for further study of the question of "historic bays" by whatever body it might consider appropriate. The representative of Panama indicated willingness to accept this idea put forth by India and consequently to withdraw his own proposal. At the

suggestion of the Chairman, the Committee thereafter agreed to postpone its decision until the text of a joint proposal by the delegations of India and Panama along these lines had been submitted.

13. In the meantime, the delegation of Japan submitted a proposal containing a definition of "historic bays". The delegation proposed that paragraph 4 of article 7, on bays, should be replaced by the following text:

"4. The foregoing provisions shall not apply to historic bays. The term 'historic bays' means those bays over which coastal State or States have effectively exercised sovereign rights continuously for a period of long standing, with explicit or implicit recognition of such practice by foreign States."¹⁸

The representative of Japan explained that his delegation has submitted this proposal because the definition of "historic bays" was part of the task of codification and could not be left to arbitral tribunals or courts dealing with particular disputes regarding such bays.¹⁹ The definition included in the proposal had been prepared with the aid of the Secretariat's memorandum on "historic bays" (A/CONF.13/1).

14. The representative of Thailand agreed with the Japanese delegation that the definition of the term "historic bays" should not be left to any court or tribunal, but on the other hand he considered that the definition included in the Japanese amendment was not precise enough. The representative of the Soviet Union urged that the Japanese amendment should not be considered until the Committee was ready to take up the Indian-Panamanian proposal referred to above.²⁰

15. At its forty-eighth meeting the First Committee had before it both the Japanese amendment to article 7 and a draft resolution submitted jointly by India and Panama and reading as follows:²¹

"The First Committee,

"Considering that the International Law Commission has not provided for the régime of historic waters including historic bays,

"Recognizing the importance of the juridical status of such areas,

"Decides to request the Secretary-General of the United Nations to arrange for the study of the régime of historic waters including historic bays and the preparation of draft rules which may be submitted to a special conference."

16. As far as the records of the meeting²² show, no explanation was given why the subject of the proposed study in the joint draft resolution was described as "historic waters including historic bays", not merely "historic bays" which was the term used in paragraph 4 of article 7 and also in the original Panamanian proposal to set up a sub-committee. When introducing the draft resolution, one of the sponsors used the term "historic waters" while the other used the term "historic

¹⁸ A/CONF.13/C.1/L.104, op. cit., page 241.

¹⁹ Op. cit., pages 145, 198.

²⁰ Op. cit., pages 146, 198.

²¹ A/CONF.13/C.1/L.158, op. cit., page 252.

²² Op. cit., pages 147-148. It may be of interest in this respect to note that during the deliberations in the First Committee the question of an historic title to maritime areas came up not only in regard to bays but also in connexion with the problem of the delimitation of the territorial seas of two States whose coasts are opposite or adjacent to each other (article 12 of the Convention on the Territorial Sea and the Contiguous Zone); see op. cit., pages 187-193.

¹⁰ *Official Records of the United Nations Conference on the Law of the Sea, Volume III, First Committee, page 2.*

¹¹ *Ibid.*

¹² Op. cit., page 48.

¹³ Op. cit., page 51.

¹⁴ Op. cit., page 9.

¹⁵ Op. cit., page 45.

¹⁶ Op. cit., page 69.

¹⁷ Op. cit., page 74.

bays", and in the debate some speakers used the former, others the latter, term.

17. The attention of the Committee was in fact focused on other aspects of the draft resolution. It was in particular pointed out that the resolution should rightly be in the name of the Conference not of the First Committee, and also that it was more seemly for the Conference to address itself to the General Assembly than to the Secretary-General. Both these points were admitted by the sponsor. Another change which was of more substantive importance was also accepted by the sponsors. Their attention was drawn to the possibility that the study might result in the conclusion that in view of the diversity of the particular cases of "historic waters, including historic bays" no general rules could be drawn up. The representative of India replied that no general rules could, of course, be drafted if it was clearly impossible to do so, and that it was precisely the object of the proposed study to determine whether such rules could be drafted.

18. In view of the various points brought up during the discussion, a decision on the draft resolution and on the Japanese amendment was further postponed.

19. The matter came before the First Committee again at its sixty-third meeting.²³ India and Panama now submitted a revised version of their draft resolution, reading as follows:²⁴

"The First Committee,

"Considering that the International Law Commission has not provided for the régime of historic waters including historic bays,

"Recognizing the importance of the juridical status of such areas,

"Recommends that the Conference should refer the matter to the General Assembly of the United Nations with the request that the General Assembly should make appropriate arrangements for the study of the juridical régime of historic waters including historic bays, and for the result of these studies to be sent to all Member States of the United Nations."

In this wording, the draft resolution was adopted by the First Committee. The delegation of Japan withdrew its amendment to article 7.

20. It might be useful to point out that in the revised draft resolution which was adopted, the word "juridical" had been inserted before the word "régime" so as to clarify the character of the study to be undertaken. The points made in discussion referred to above had also been taken into consideration in the revised version.

21. The resolution adopted by the First Committee was submitted to the Conference in the Committee's report on its work.²⁵ The resolution was adopted without discussion, by the Conference, at its twentieth plenary meeting.²⁶ The clause in the article on bays stating that the provisions of the article did not apply to "historic bays" was adopted in the wording proposed by the International Law Commission and quoted above in paragraph 2 of this paper.

22. In consequence, the following resolution dated 27 April 1958 was transmitted to the General Assembly:

²³ Op. cit., pages 197-198.

²⁴ A/CONF.13/C.1/L.158/Rev.1, op. cit., page 252.

²⁵ *Official Records of the United Nations Conference on the Law of the Sea, Volume II, Plenary Meetings*, page 125.

²⁶ Op. cit., page 68.

"The United Nations Conference on the Law of the Sea,

"Considering that the International Law Commission had not provided for the régime of historic waters, including historic bays,

"Recognizing the importance of the juridical status of such areas,

"Decides to request the General Assembly of the United Nations to arrange for the study of the juridical régime of historic waters, including historic bays, and for the communication of the results of such study to all States Members of the United Nations."

23. The General Assembly, at its 752nd plenary meeting on 22 September 1958, placed on the agenda of its thirteenth session the item "Question of initiating a study of the juridical régime of historic waters, including historic bays" and referred it to the Sixth Committee. After a short discussion, the Committee adopted and recommended to the General Assembly a draft resolution whereby the Assembly would postpone consideration of the question to its fourteenth session. This draft resolution was approved by the General Assembly at its 783rd plenary meeting, on 10 December 1958.²⁷

24. At its fourteenth session, the General Assembly again referred the item to the Sixth Committee which discussed it at its 643rd to 646th meetings.²⁸ In the course of the debate some representatives discussed the substance of the question, but most of the speakers reserved their position on the substance and limited themselves to the problem of how the study of the question should be organized. In the end there was general agreement that the study of the question should be entrusted to the International Law Commission. The Sixth Committee unanimously adopted and submitted to the General Assembly a draft resolution to that effect, and at its 847th plenary meeting on 7 December 1959, the Assembly adopted the following resolution 1453 (XIV):

"The General Assembly,

"Recalling that, by a resolution adopted on 27 April 1958, the United Nations Conference on the Law of the Sea requested the General Assembly to arrange for the study of the juridical régime of historic waters, including historic bays, and for the communication of the results of the study to all States Members of the United Nations,

"Requests the International Law Commission, as soon as it considers it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems appropriate."

25. General Assembly resolution 1453 (XIV) was included in the agenda of the twelfth session of the International Law Commission and discussed at its 544th meeting on 20 May 1960.²⁹ As might be expected, the discussion mainly dealt with the methods of the study to be undertaken.

²⁷ See *Official Records of the General Assembly, Thirteenth Session, Sixth Committee*, 597th and 598th meetings and annexes to agenda item 58.

²⁸ Op. cit., *Fourteenth Session, Sixth Committee*, 643rd to 646th meetings and annexes to agenda item 58.

²⁹ *Yearbook of the International Law Commission, 1960, volume I*, pages 111-116.

26. According to one school of thought which turned out to be the minority opinion, the Commission should invite the Member States to send to the Secretariat all available documentation concerning those historic waters, including historic bays, which were subject to their jurisdiction and to indicate the régime claimed by them for these waters. Only from such data provided by Governments could the Commission, according to this view, learn the rules of customary international law concerning historic waters. Although it was not the task of the Commission to decide on particular claims to these waters, nevertheless, it must discover what bays and other waters were claimed as historic and on what grounds, in order to be able to determine the principles governing the juridical régime of historic waters on the basis of existing international custom.

27. The majority of the members of the Commission, on the other hand, feared that if Governments were invited to specify their claims to historic waters they might be tempted, as a matter of prudence, to protect their position by advancing all their claims, including possibly some totally new ones. They might also thereby commit themselves to a rigid attitude which could make a solution of the problem more difficult in the future. Furthermore, possibly exaggerated claims would not be a suitable basis for the formulation of principles on the matter. Those members who held this opinion therefore felt that the Commission should first determine the principles governing the matter and then invite the Governments to comment on those principles. If the Governments so wished they could, of course, in their observations on the principles, refer to particular claims to historic waters.

28. While the majority of the members of the Commission were against requesting information from Governments at the present stage, they considered that in order to expedite the Commission's work in this field, some action should be undertaken forthwith. It was therefore decided to request the Secretariat to follow up the work begun by the preparation of the memorandum on "historic bays" mentioned above in paragraph 8. This decision was set out in paragraph 40 of the Commission's report on its twelfth session (A/4425) as follows:

"... The Commission requested the Secretariat to undertake a study of the juridical régime of historic waters, including historic bays, and to extend the scope of the preliminary study outlined in paragraph 8 of the memorandum on historic bays prepared by the Secretariat in connexion with the first United Nations Conference on the Law of the Sea..."

29. Paragraph 8 of the memorandum referred to in the quotation reads:

"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."

30. It is apparent from what has been said above that the subject-matter of the study to be undertaken is wider in scope than the subject-matter of the memorandum on "historic bays" (A/CONF.13/1) prepared by the Secretariat with the purpose of shedding light on the clause exempting such bays from the provision of the article on bays contained in the International Law Commission's draft on the law of the sea. The subject-matter was widened to include also other "historic waters" than "historic bays". On the other hand, very little information can be gathered from the discussions related above as to the scope and meaning of the term "historic waters" or as to the relationship between that term and the term "historic bays". This was to be expected as the discussion was mainly concerned with methods and procedures for dealing with the matter. Moreover, as will be seen below, the question of the relationship between the terms "historic bays" and "historic waters" does not involve major problems.

31. Another point which clearly emerges from the foregoing is that the study at the present stage should not have as its purpose to attempt to establish a list of existing "historic bays" and other "historic waters". As far as "historic bays" are concerned, the previous Secretariat memorandum (A/CONF.13/1) contains a comprehensive enumeration of such bays and it would be difficult to make useful additions thereto without consulting the Governments.³⁰

32. The purpose of the study should rather be to discuss the principles of international law governing the régime of "historic waters". The question then arises how these principles can be ascertained. The proper inductive method would be to study the particular cases of "historic waters" and see what common principles can be abstracted from them. This procedure would, however, seem to require that the first step should be to establish a collection of cases which would be as complete as possible. That would mean that the Governments must be approached with a request to provide information. On the other hand, if not every governmental claim to "historic waters" is to be accepted, some principles would be needed in the light of which the claims could be evaluated. Theoretically at least, there seems to be a dilemma here: in order to decide whether a claim to "historic waters" is rightful, it is necessary to have principles of international law by which the claims can be appraised, but in order not to be arbitrary these principles must be based on the actual practice of States in these matters. As usual the dilemma can be solved only in a pragmatic way. There is already available considerable material in the form of known claims to "historic waters", discussions of the subject in the literature of international law and previous attempts to establish and formulate the relevant principles. Most of the material has already been recorded in the Secretariat memorandum on "historic bays" (A/CONF.13/1). On this basis it is possible to analyse and discuss important aspects of the question and to arrive at certain tentative conclusions which can be further developed and where necessary modified in the light of information and observations received at a later stage from Governments. The present paper is conceived as a contribution to this initial or tentative discussion of the subject. Its purpose is to bring to

³⁰ The question of establishing a list of historic waters is discussed more extensively below in paragraphs 168-176.

light, analyse and discuss problems connected with the subject rather than to present complete solutions to these problems. In order to be useful and to advance the study of the relevant problems, the paper must go beyond the mere enumeration of the various opinions expressed in theory and practice. Without presuming to give judgements on these opinions, it will sometimes be necessary to point out difficulties which seem to be inherent in some of them and to express a preference for others.

II. Juridical régime of historic waters, including historic bays

A. PRELIMINARY EXPLANATION OF THE TERMS "HISTORIC WATERS" AND "HISTORIC BAYS"

33. It is hardly necessary to go deeply into the matter of "historic waters" to realize that this is a subject where superficial agreement among authors and among practitioners conceals several controversial problems as well as some obscurity or at least lack of precision. Nobody would contest that there are cases in which a State has a valid historic title to certain waters adjacent to its coasts, but when it comes to a more precise definition of this title, its relation to the rules of international law for the delimitation of the maritime territory of a State or the question of the circumstances in which the historic title may arise, agreement is far from complete. Although it would have been convenient to be able to give, at the outset, a definition of "historic waters", this is therefore not possible. Without an examination and discussion of the controversial problems involved, the presentation of a definition would be premature. Furthermore, as was said above, the purpose of the present preparatory study is not so much to provide ready-made solutions to the relevant problems as to indicate these problems and so to prepare the way for the International Law Commission's consideration of the matter. In other words, in the paper an attempt will be made to set forth, analyse and clarify a number of problems connected with the concept or theory of "historic waters", departing from the fact that it is universally recognized in the doctrine and practice of international law that States may under certain circumstances on historic grounds have valid claims to certain waters adjacent to their coasts.

34. One of the lesser problems which, at least in a preliminary way, should be clarified is the terminological question arising from the use in theory and practice rather indiscriminately of the terms "historic bays" and "historic waters". These two terms are obviously not synonymous; the latter term has a wider scope, as is also apparent from the expression used in the resolutions of the Conference on the Law of the Sea and the General Assembly, namely, "historic waters, including historic bays". It is a fact that the term "historic bays" is more frequently used or has until recent times been more frequently used than "historic waters". This circumstance cannot, however, be taken as evidence that the more general view is that only bays, not other waters, may be claimed by States on an historic basis. On the contrary, it can be said that all those authorities who have directed their attention to the problem seem to agree that historic title can apply also to waters other than bays, i.e., to straits, archipelagos and generally to all those waters which can be included in the maritime domain of a State. If the term "historic bays" has been used more frequently than "historic waters", this is mainly due to the fact that claims on an historic

basis have been made more often with respect to what were called or considered to be bays than to other waters. In principle, as was said in the Secretariat memorandum (A/CONF.13/1), referred to above in paragraph 29, "the theory of historic bays is of general scope", i.e., it applies also to other maritime areas than bays. Sir Gerald Fitzmaurice no doubt expressed a generally held opinion when he stated that:

"... there seems to be no ground of principle for confining the concept of historic waters merely to the waters of a bay... Even if the cases would in practice be fewer, a claim could equally be made on an historic basis to other waters..."³¹

It may be of interest to note that in the *Fisheries* case between the United Kingdom and Norway, both parties agreed that the theory of "historic waters" was not limited to bays.³² It will be seen below that the legal status of "historic bays" may be different from that of other "historic waters", but that circumstance obviously does not weaken the position that an historic title can exist to other waters than bays.

35. It is easily discernible that many of the problems and difficulties inherent in the theory of "historic waters" have their origin or are conditioned by the circumstances in which the theory arose and was developed. A short description of the background of the theory, in fact and in law, should therefore facilitate its understanding.

B. CONCEPT OF "HISTORIC WATERS"

1. Background

36. There are above all two factors which have contributed to the emergence and development of the concept of "historic waters". One important factor was the controversial status of the international legal rules relating to the delimitation of the maritime territory of the State. Without taking a position regarding the question whether or not there ever was a generally accepted maximum width of the territorial sea or a maximum breadth of the opening of bays, it can safely be said that these questions through the ages were enveloped in controversy and therefore appeared to both lawyers and laymen as subject to doubt. In these circumstances it was natural that States laid claim to and exercised jurisdiction over such areas of the sea adjacent to their coasts as they considered to be vital to their security or to their economy. When a controversy arose after a State had for some time exercised jurisdiction over such an area of the sea, and the opponent State alleged that, according to the general rules of international law relating to the delimitation of territorial waters, the area in question was outside such waters, it was also natural for the defendant State to reply not only that it had a different opinion about the content of the applicable rule of general international law but also that by force of long usage it now had an historic title to the area. In the course of time there occurred quite a number of cases in which a State

³¹ *British Year Book of International Law*, vol. 31 (1954), page 381; see also Gidel, *Droit international public de la mer*, vol. III (1934), page 651, and the Norwegian Counter-Memorial in the *Fisheries* case, paragraphs 539, 549 and 557-560; *International Court of Justice, Pleadings, Oral Arguments, Documents, Fisheries Case*, volume I, pages 548, 557 and 564-566, and British reply, paragraphs 471-472, op. cit., vol. II, pages 643-645; Cf. also the report of the Second Committee in *Acts of the Conference for the Codification of International Law (1930)*, vol. III, page 211.

³² Cf. op. cit., vol. II, page 643.

asserted its sovereignty, based on historic rights, over certain maritime areas, whether or not according to general international law rules such areas might be outside its maritime domain. No attempt will be made in this paper to enumerate these cases; an enumeration and description of many of them may be found in the Secretariat's memorandum on "historic bays" (A/CONF.13/1), pages 3 *et seq.*

37. The second important factor in the development of the concept and theory of "historic waters" was the attempts, official and unofficial, to substitute for the controversial and doubtful international law relating to the delimitation of territorial waters a set of clear-cut, generally acceptable, written rules on the subject. For various such projects, reference may also be made to the aforementioned Secretariat memorandum (A/CONF.13/1), pages 14 *et seq.* As pointed out in that memorandum (pages 2-3), a codification of the international law rules relating to the delimitation of territorial waters and in particular regarding the delimitation of bays would in several cases have conflicted with existing situations. In other words, considerable maritime areas over which States claimed and exercised sovereignty would, if the codification were accepted, fall outside the jurisdiction of these States and belong instead to the high seas. It is obvious that a codification having such consequences would not commend itself to the States affected. The proposed rules would stand a better chance of being accepted if they included a clause excepting from its regulations waters to which a State had a historic title. As a consequence, the proposed codifications dealing with the delimitation of territorial waters generally contained such clauses in varying formulations. The concept of "historic waters" came to be considered as an indispensable concept without which the task of establishing simple and general rules for the delimitation of maritime areas could not be carried out. Gidel expresses this thought when he says:

"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 public international law . . .".³³

38. In summary, the concept of "historic waters" has its root in the historic fact that States through the ages claimed and maintained sovereignty over maritime areas which they considered vital to them without paying much attention to divergent and changing opinions about what general international law might prescribe with respect to the delimitation of the territorial sea. This fact had to be taken into consideration when attempts were made to codify the rules of international law in this field, i.e., to reduce the sometimes obscure and contested rules of customary law to clear and generally acceptable written rules. It was felt that States could not be expected to accept rules which would deprive them of considerable maritime areas over which they had hitherto had sovereignty. The Second Committee of the 1930 Hague Codification Conference said in its report:

"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 connection, 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."³⁴

39. The circumstance that the existence of historic rights to certain areas of the sea came to be of particular interest in connexion with the endeavour to formulate general rules of international law on the delimitation of the territorial sea had as a consequence a tendency to consider the juridical régime of "historic waters" as an exceptional régime. The protagonists of the codification of international law in this field understood that, as a practical matter, a long-standing exercise of sovereignty over an area of the sea could not suddenly be invalidated because it would not be in conformity with the general rules being formulated. On the other hand, as the purpose of the codification was the establishment of general rules it was natural to look upon these historic cases as exceptions from the rule. Gidel succinctly expressed this view as follows:

". . . while the theory of historic waters is a necessary theory, it is an exceptional theory . . .".³⁵

40. Whether or not the régime of "historic waters" is an exceptional régime may seem to be an academic question. In reality, it is of practical importance with respect to the question of what is needed to establish title to such waters. If the right to "historic waters" is an exceptional title which cannot be based on the general rules of international law or which may even be said to abrogate these rules in a particular case, it is obvious that the requirements with respect to proof of such title will be rigorous. In these circumstances the basis of the title will have to be exceptionally strong. The reasons for accepting the title must be persuasive; for how could one otherwise justify the disregarding of the general rule in the particular case? To quote Gidel again:

"The coastal State which makes the claim of 'historic waters' is asking that they should be given exceptional treatment; such exceptional treatment must be justified by exceptional conditions."³⁶

41. Both from the theoretical and from the practical point of view, it is therefore important to examine, analyse and clarify the notion that the régime of "historic waters" is an exceptional régime.

2. *Is the régime of "historic waters" an exceptional régime?*

42. It is probably true that, at least among the writers on the subject, the dominant opinion is that "historic waters" constitute an exception to the general rules of international law governing the delimitation of the maritime domain of a State. Gidel has been quoted above as an adherent of that opinion. His thoughts on the matter are expressed in greater detail in the following passage:

³⁴ *Acts of the Conference for the Codification of International Law, Meetings of the Committee*, volume III: Minutes of the Second Committee (Series of League of Nations publications, V.Legal.1930.V.16), page 211.

³⁵ Gidel, *op. cit.*, page 651.

³⁶ Gidel, *op. cit.*, page 635.

³³ Gidel, *op. cit.*, page 651.

"An examination of the facts shows: (1) that certain States have claimed as part of their maritime domain waters which under the generally accepted rules applicable in principle to such areas would have had to be considered as part of the high seas, and (2) that such claims have often been recognized by other States.

"This state of affairs has given rise to a theory commonly referred to as the theory of 'historic bays': it has tried, with varying success, to identify a possible link between these different exceptional situations, whose only common feature appears to be their derogation from the generally accepted rules. Since it is necessary, if the general rule is not to be destroyed, to limit the claims of States tempted to nullify the generally recognized rules for determining areas that have a juridical status other than that of the high seas, the 'historic bays' theory has aimed at making such derogations subject to certain conditions, on which agreement, both in the doctrine and in practice, appears not to be complete."³⁷

In this statement the exceptional character of "historic waters" is strongly emphasized as well as the necessity of limiting claims of this nature in order not to jeopardize the general rules regarding the delimitation of the maritime domain of States. It is also interesting to note that Gidel mentions two facts as bases of the concept of historic waters: a claim by a State to a maritime area which according to the general rules would be high seas, and the recognition by the other States of this exceptional claim. This indicates the connexion, according to this view, between the exceptional nature of the claim and a requirement that in order to be the basis of a valid title, the claim has to be combined with some form of recognition by the other States. We shall come back to this important proposition later. Here it is sufficient to point out the connexion as it appears in Gidel's statement.

43. A similar position is taken by another prominent authority on these matters. In an article discussing the law and procedure of the International Court of Justice, Sir Gerald Fitzmaurice says with reference to the *Fisheries* case between the United Kingdom and Norway:

"The Norwegian contention was essentially an attempt to remove from the conception of 'historicity' of given rights, the element of *prescription*, that is, in effect, the element of an *adverse* acquisition of rights in the face of existing law. Yet this element is of the essence of the matter, for a title or right based on historic considerations only becomes material when (and indeed assumes that) the actions involved are not or could not be justified according to the recognized rules, and can therefore be justified, if at all, only by reference to some special factor such as an historic right.

"As was suggested in the United Kingdom's written reply in the *Fisheries* case, this right takes the form essentially of a 'validation in the international legal order of a usage which is intrinsically invalid, by the continuance of the usage over a long period of time'."³⁸

Sir Gerald is here referring to the subsidiary issue in the *Fisheries* case whether Norway, even if the general

rules of international law did not allow it to do so, had an historic right to delimit its waters in the manner provided by the Norwegian legislation and opposed by the United Kingdom. In his view, such an historic right would be an adverse acquisition of certain maritime areas, an acquisition on the basis of a title which in the particular case would constitute an exception to or an abrogation of the general rule. A similar thought is expressed in the following passage from another article of his on the law and procedure of the Court:

"It has for long been part of international law that, on a basis of long-continued use and treatment as part of the coastal domain, waters which would not otherwise have that character may be claimed as territorial or as internal waters . . ."³⁹

44. In the opinion of Sir Gerald, the exceptional nature of the historic title also has as a consequence that some form of acquiescence on the part of other States is necessary.⁴⁰ Further attention to this aspect of the problem will be given below.

45. Other authors who consider the régime of "historic waters" to be an exception to the general rules are, e.g., Westlake, Fauchille, Pitt-Cobbett, Higgins and Colombos, Balladore Pallieri and others. Pertinent quotations from their works are found in the Secretariat memorandum on "historic bays" (A/CONF.13/1), pages 18-20.

46. The view that "historic waters" constitute an exception to the generally valid rules regarding the delimitation of maritime areas was argued by the United Kingdom in the *Fisheries* case. A summary of its position is set out in the reply of the United Kingdom as follows:

"(i) A State is entitled to a belt of territorial waters of a certain breadth—the generally accepted limit is three miles—but Norway has an historic or prescriptive title to a belt of four miles.

"(ii) The belt of territorial waters must be measured from a base-line, which, subject to certain exceptions, must follow the low-water mark on the land.

"(iii) Where there are bays or similar indentations of the coast (whatever name these indentations have) which are of a certain character and where there are islands off the coast, there are rules of general international law which permit the base-line of territorial waters to cease to follow low-water mark on the land and to enclose as national waters certain areas of sea.

"(iv) A State can only establish a title to areas of sea which do not come within these general rules of international law on the basis of an historic or prescriptive title."⁴¹

47. In the opinion of the United Kingdom there were two essential elements in such an historic or prescriptive title, namely:

"(i) Actual exercise of authority by the claimant State;

"(ii) Acquiescence by other States."⁴²

48. The connexion between the exceptional character of the claim to an historic title and the requirement of acquiescence by other States is clear from the following statement by the United Kingdom:

³⁹ Op. cit., vol. 31 (1954), page 381.

⁴⁰ See op. cit., vol. 30 (1953), pages 27 *et seq.*

⁴¹ *International Court of Justice, Pleadings, Oral Arguments, Documents, Fisheries Case*, vol. II, page 302.

⁴² Op. cit., page 303.

³⁷ Gidel, op. cit., pp. 621-623.

³⁸ *British Year Book of International Law*, vol. 30 (1953), pages 27-28.

“ . . . where the claim goes beyond what is accepted under general customary international law, it is the acquiescence of other States, express or implied from long usage, that sets the seal of legal validity upon the exceptional claim”.⁴³

49. In contrast to this theory according to which the régime of “historic waters” is an exceptional régime, there is another opinion which denies that there exist general rules of international law regarding the delimitation of bays and other maritime areas from which the régime of “historic waters” could be an exception. In a study on “historic bays”⁴⁴ Bourquin has developed this line of thought. He says that:

“ . . . Before taking a position on the theory of ‘historic bays’, one must ask oneself whether ordinary law subjects the delimitation of territorial bays to strict rules. The answer to this question cannot fail to influence the way in which one regards the practical importance and juridical function of historic titles.

“Is there a rule, valid for all States, which would limit the width of the opening of territorial bays to a given distance? More precisely, has the so-called ten-mile rule, generally advanced by those who favour a rigid delimitation, been consecrated by customary law?”⁴⁵

50. After having reached the conclusion that no such fixed limitation of the opening of a bay exists in general international law and that in any case:

“The character of a bay depends on a combination of geographical, political, economic, historical and other circumstances . . .”⁴⁶

he continues:

“If it is agreed that the solution given by ordinary law to the problem of the territoriality of bays is not a matter of a mathematical limitation of their width but depends on an appreciation of the various elements that make up the character of the particular bay, the notion of ‘historic titles’ assumes a meaning that is quite different from that given it by those who favour the ten-mile rule. ‘Historic title’ no longer has the function of making an otherwise illegal situation legitimate. It is no longer a means whereby the coastal State can include a part of the high seas in its domain. It is no longer connected with the idea of usucapion. It is one element along with others characterizing a particular state of affairs, which must be considered as a whole and in its various aspects.

“Where long usage is invoked by a State, it is a ground additional to the other grounds on which its claim is based. In justification of its claim, it will be able to point not only to the configuration of the bay, to the bay’s economic importance to it, to its need to control the bay in order to protect its territory, etc., but also to the fact that its acts with respect to the bay have always been those of the sovereign and that its rights are thus confirmed by historical tradition.”⁴⁷

51. As he does not consider the régime of historic bays as a deviation from general rules of international law, Bourquin is inclined to de-emphasize the impor-

tance of the acquiescence of other States. The historic title is for him “a juridical consolidation by the effect of time”,⁴⁸ and such title is created by “the peaceful and continuous exercise of sovereignty”.⁴⁹ Therefore,

“While it is wrong to say that the acquiescence of these States [foreign States] is required, it is true that if their reactions interfere with the peaceful and continuous exercise of sovereignty, no historic title can be formed.”⁵⁰

As said before, this question will be further analysed later on; the purpose of mentioning it here is to point out the connexion between the author’s concept of “historic bays” and his attitude regarding the requirement of acquiescence on the part of foreign States.

52. In the *Fisheries* case, Norway took a similar position. The argument was, however, not limited to “historic bays” but referred to “historic waters” in general:

“In sum, it is not at all the function of an historic title, as conceived by the Norwegian Government and invoked in the present case, to legalize an otherwise illegal situation, but rather to confirm the validity of a situation.

“The Norwegian Government does not believe it necessary to discuss to what extent parts of the high seas may be included in the maritime domain of the State by virtue of an historic title, since the question does not arise in this case. It would only arise if the general rules which the United Kingdom Government alleges to be applicable to the delimitation of the maritime domain were really in force. But, the Norwegian Government has demonstrated that they are not and that they have never acquired the stability of customary rules . . .

“The Norwegian Government recognizes that the usage on which an historic title is based must be peaceful and continuous, and consequently that the reaction of foreign States constitutes an element to be taken into account in an appreciation of such title; but it completely rejects the thesis of the adverse Party that the acquiescence of other States is the only basis of an historic title, which would then be virtually indistinguishable from the juridical institution of recognition.

“The Norwegian Government considers that the absence of reaction by other States endows usage with the peaceful and continuous character it must have in order to give rise to an historic title.

“As to the consequences that must be deemed to ensue in this connexion from opposition by certain States, the Norwegian Government believes that it is a specific question, that each case must be judged in the light of its circumstances; that not all protests can be placed on the same footing; that, in any case, isolated opposition is incapable of preventing the creation of an historic title; and that in decisions in such matters one should bear in mind the wise counsel of the maxim *quieta non movere*.”⁵¹

53. Also Counsel for Norway said, as quoted by the Court in its judgement:

“The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of

⁴³ Op. cit., page 621.

⁴⁴ Bourquin, “Les baies historiques” in *Mélanges Georges Sauser-Hall* (1952), pages 37-51.

⁴⁵ Op. cit., page 39.

⁴⁶ Op. cit., page 42.

⁴⁷ Op. cit., pages 42-43.

⁴⁸ Op. cit., page 45.

⁴⁹ Op. cit., page 46.

⁵⁰ *Ibid.*

⁵¹ *International Court of Justice, Pleadings, Oral Arguments, Documents, Fisheries Case*, vol. III, pages 461-462.

sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law."⁵²

54. Without passing judgement on these two opposing opinions, it may be pointed out that there seem to be certain difficulties inherent in the view that title to "historic waters" is an exception to the general rules of international law regarding the delimitation of the maritime domain of the State and that such title therefore must be based on some form of acquiescence on the part of the other States. If such general rules exist, and whatever their contents may be, they must obviously be customary rules. When the Geneva Convention on the Territorial Sea and the Contiguous Zone comes into force and is widely ratified, this situation will change to a certain extent.⁵³ For the present, however, the general rules in this field from which the régime of "historic waters" would be an exception could only be customary rules. This means that both the general rules and the title to "historic waters" would be based on usage. Why then should the latter be considered as exceptional and also inferior with regard to its validity, so that the acquiescence of the other States would be necessary to validate the title? The facts on which the title to "historic waters" are based belong to the usage in this field, no less than the facts on which the general customary rules would be based. And the *opinio juris* exists in the case of "historic waters" just as much as in the case of the so-called general rules.

55. If there are general rules in this field, the most that could be asserted is that, within the framework of customary international law, certain maximum limits for the territorial sea and the width of the opening of bays are generally applicable and that in certain cases there exists an historic title to waters which do not come within these limits. The so-called general rules would then be "general" in the sense only that they would be more generally applicable than the "exceptional" title to "historic waters". But they would not be "general" in the sense of having a superior validity in relation to the "exceptional" historic title. Both the general rules and the historic title would be part of customary international law, and there would be no grounds for claiming *a priori* that the historic title is valid only if based on the acquiescence of the other States.

56. However, it might be doubted whether it is even possible in this manner to distinguish within the framework of customary international law between a "general" régime and an "exceptional" régime based on an historic title. It may well be argued that a distinction between "general" and "exceptional" in this case would be wholly arbitrary. It could be said that only by *a priori* classifying certain cases as exceptional, or by *a priori* classifying certain cases as normal, can one arrive at general customary rules regarding such questions as the limits of the territorial sea, bays, etc.

57. Furthermore, it may even be doubted whether there exist at present any general customary rules regarding the delimitation of the maritime domain of States. The fact is that through the ages many conflicting opinions have been expressed in the doctrine and in practice on these problems and that claims to maritime areas have been made by States on grounds which have varied greatly both within the same period

of time and from one time to another. International doctrine and practice therefore present a rather confusing picture in this respect. It is to be expected that the Geneva Conventions will, when they come into force, bring more stability to this field, but as far as the customary law is concerned the situation is far from clear.

58. If that is true, the view that the régime of "historic waters" is an exceptional régime which deviates from certain precise general rules of customary international law becomes even more doubtful. If the rules of customary international law on fundamental questions such as the breadth of the territorial sea or the width of the opening of bays are in dispute between the States, where are the general rules from which the historic title would be an exception? In these circumstances, would not the most realistic view be not to relate the claim or right to "historic waters" to any general customary rules on the delimitation of maritime areas, as an exception or not an exception from such rules, but to consider the title to "historic waters" independently, on its own merits.⁵⁴

59. It follows that also the problem of the elements constituting title to "historic waters" and the question of proof have to be considered independently and not on the assumption that the title to "historic waters" constitutes an exception to general international law. In particular, the question if, or to what extent, a claim by a State to "historic waters" is subject to the acquiescence of other States has to be studied without being prejudiced by the *a priori* postulate that this is an exceptional claim.

60. Some authors who consider that the régime of "historic waters" is an exception to the general rules of international law regarding the delimitation of bays and other maritime areas use the existence of "historic bays" as conclusive proof of the existence of such general rules. Gidel says:

"The simple existence of this category of 'historic bays', which is not questioned by anyone, is of itself enough to demonstrate conclusively the existence of customary international law in the matter."⁵⁵

This argument seems based on a *petitio principii*, for only if it is already assumed that the régime of "historic bays" is an exception to certain general rules does the existence of "historic bays" imply the existence of such general rules. Sir Gerald Fitzmaurice places the argument on a more practical level:

"... it must be assumed that the historic principle remains—and if this is admitted, it follows at once that international law, even if it does not impose a ten-mile limit [for bays], must still impose *some* limit, for if there were no legal limitation on the size of bays all reason for claiming a bay on historic grounds would disappear."⁵⁶

There would, however, be a practical reason for claiming an historic title to bays or other maritime areas even if there is no generally accepted legal limitation on the size of bays or the breadth of the territorial sea. It is sufficient that the claiming State itself or other States

⁵⁴ Cf. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pages 355 *et seq.*

⁵⁵ Gidel, *op. cit.*, page 537. See also the reply of the United Kingdom in the *Fisheries* case, *International Court of Justice, Pleadings, Oral Arguments, Documents, Fisheries Case*, vol. II, page 607.

⁵⁶ *British Year Book of International Law*, 1954, page 416.

⁵² *I.C.J. Reports*, 1951, page 133.

⁵³ See below, paragraphs 72-79.

hold that there is such a limitation to make it understandable that a State may wish to base its claim on historic grounds. Only if there existed general and absolute agreement among the States that there was no limitation, would it be pointless to claim a maritime area on historic grounds. It could even be asserted that it is the *uncertainty* of the legal situation, not the certainty that general rules of international law on the matter exist, which has given rise to the claims which form the factual basis of the theory of "historic waters".

61. Intimately connected with the view that the régime of "historic waters" forms an exception to general international law is the idea that the title to "historic waters" is a kind of prescriptive right. This thought is clearly expressed in some of the statements quoted above. It may therefore be of interest briefly to examine that idea.

3. Is the title to "historic waters" a prescriptive right?

62. There has been much debate regarding the existence of prescription in international law.⁵⁷ Of the two main forms of prescription, "extinctive prescription" (*prescription libératoire*), or loss of a claim by failure to prosecute it within a reasonable time, has no application in the present context. In connexion with "historic waters" it is the other form of prescription, namely "acquisitive prescription" (*prescription acquisitive*), which may be of interest.

63. "Acquisitive prescription" means that a title to something, e.g., a territory, is acquired by prescription, i.e., by the lapse of time under certain circumstances. Within the category of "acquisitive prescription" two sub-categories can be distinguished. One is acquisitive prescription based on "immemorial possession". In this case the original title is uncertain. It may have been a valid title or not; in any case the long lapse of time makes it impossible to establish what the original legal situation was. This uncertainty is cured and a valid title is considered to be acquired by "immemorial possession". The existence in international law of this kind of "acquisitive prescription" does not seem to be disputed. More controversial is the question whether the other sub-category of "acquisitive prescription" has a place in international law. In this case, which is said to be akin to the *usucapio* of Roman law, the original title of the possessor is known to be defective. But because the possessor has enjoyed uninterrupted possession for a period of time under conditions which are considered to imply acquiescence (in any case tacit consent) on the part of the rightful title owner, the possessor is held to have acquired through prescription a full and complete title. Some authors have denied that this sort of acquisitive prescription exists in international law, because no fixed time for the necessary possession can be found there, in contrast to the situation in municipal law where precise time-limits are prescribed. The majority of writers, however, consider this to be a detail which should not prevent the acceptance in international law of this kind of prescription which they find necessary for the preservation of international order and stability. Some even think that no distinction should be made

between the two sub-categories of "acquisitive prescription", because the "immemorial possession" cannot in practice be required to be literally "immemorial" and that therefore, as far as the lapse of time is concerned, the two sub-categories tend to merge.⁵⁸

64. This argument for the assimilation of the two sub-categories is, however, hardly sufficient. There is another important difference between them, namely, a difference with respect to the original title. In one case the original title is uncertain, in the other case it is known to be defective. It would seem that the requirements for remedying uncertainty should be less stringent than those necessary to cure known illegality.

65. To what extent can the concept of prescription be applied to "historic waters"? This problem has to be approached with some circumspection, for although there seems to be no reason why prescription should not apply to maritime areas as well as to areas of land, that does not necessarily mean that acquisitive prescription in both its forms is applicable to "historic waters". If, for instance, there is a dispute between two States regarding the sovereignty over a certain area of water, it is thinkable that one of the parties to the dispute might base its case on a prescriptive right to the area. But that would hardly be a case of "historic waters". The theory of "historic waters" is not used to decide whether a maritime area belongs to one State or another. "Historic waters" are not waters which originally belonged to one State but now are claimed by another State on the basis of long possession. They are waters which one State claims to be part of its maritime territory while one or more other States may contend that they are part of the high seas. To what extent then is prescription applicable to this latter situation?

66. As far as the first form of acquisitive prescription is concerned, i.e., prescription based on "immemorial possession", this kind of prescriptive right does not seem to differ much from the historic title envisaged in the theory of "historic waters". It refers to a situation where the original title is uncertain and is validated by long possession. It is approximately the same situation as in the case of "historic waters". If nothing more is implied in the term "prescriptive right", its application to "historic waters" seems innocuous, although not particularly useful.

67. If, on the other hand, the term "prescriptive right" refers to the second sub-category of acquisitive prescription, mentioned above, it is more difficult to accept the concept of prescription as applicable to "historic waters". In this case, prescription would mean that an originally *defective* or *invalid* title is cured by long possession. If applied to "historic waters" that would imply the assumption that according to the general rules of international law the waters were originally high seas, but that through the effect of time (in the proper circumstances) an exceptional historic title to the waters had emerged in favour of the coastal State. In other words, to consider the title to "historic waters" as a prescriptive right in this latter sense would really be to embrace the idea that the title to "historic waters" is an exception to the general rules of international law regarding the delimitation of maritime areas.

68. It is to be feared that this is usually what is implied when the term "prescriptive right" is used in connexion with "historic waters". In order to avoid that by the use of that term unwarranted assumptions are

⁵⁷ See, for instance, Oppenheim, *International Law*, vol. I, 8th ed. (1955), pages 575-578; Vervikios, *La prescription en droit international public* (1934); Söressen in *Acta Scandinavica Juris Gentium*, vol. 3 (1932), pages 145-170; Johnson in *British Year Book of International Law*, vol. 27 (1950), pages 332-354; Pinto "La prescription en droit international", in *Recueil des Cours de l'Académie de Droit International*, vol. 87 (1955-I), pages 391-449.

⁵⁸ Cf. Johnson, *op. cit.*, pages 339-340.

brought into the argument, it would therefore be preferable not to refer to the concept of prescription in connexion with the régime of "historic waters".

4. Relation of "historic waters" to "occupation"

69. Another term which is occasionally used in connexion with "historic waters" is "occupation", and it may therefore be useful briefly to examine whether there is a significant relation between these two concepts.

70. As is well known, occupation is an original mode of acquisition of territory. It is defined by Oppenheim as follows:

"Occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State."⁵⁹

A similar definition is given by Fauchille:

"Generally speaking, occupation is the taking by a State, with the intention of acting as the owner, of something which does not belong to any other State but which is susceptible of sovereignty."⁶⁰

Both authors agree that because of the freedom of the high seas, those seas cannot be the object of occupation.⁶¹

71. This doctrine that occupation is an original mode of acquisition of territory but one which is not applicable to the high seas seems to be generally accepted at the present time. A State could therefore hardly claim an area of water on the basis of occupation unless it affirmed that the occupation took place before the freedom of the high seas became part of international law. In that case the State would claim acquisition of the area by an occupation which took place long ago. Strictly speaking, the State would, however, not assert an historic title but rather an ancient title based on occupation as an original mode of acquisition of territory. The difference may be subtle but should in the interest of clarity not be overlooked: to base the title on occupation is to base it on a clear original title which is fortified by long usage.

5. "Historic waters" as an exception to rules laid down in a general convention

72. The difficulties inherent in the conception that the régime of "historic waters" is an exception to customary law have been discussed above. What is the situation when the customary rules of international law regarding the delimitation of the maritime domain of the State are codified? Does the régime of "historic waters" then become an exceptional régime in the sense that strict requirements regarding the establishment of an area as "historic waters" are justified? To give an answer, it is necessary to study the content of the codified rules, the circumstances in which the rules were adopted and the intention of the parties accepting them.

73. As the nearest approach to a codification of the rules of international law regarding the territorial sea, the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone is of particular interest. As mentioned above, references to historic title occur in articles 7 and 12 of that Convention. Article 7, which deals with bays the coasts of which belong to a single State,

contains a final paragraph stating that the foregoing provisions of the article shall not apply to so-called "historic bays". In paragraph 1 of article 12, regarding the delimitation of the territorial seas of States whose coasts are opposite or adjacent, there is a clause saying that the provisions of the paragraph shall not apply where by reason of historic title it is necessary to delimit the territorial seas in a different manner.

74. It seems to be clear both from the texts and from the relevant discussions at the Conference, related above in the first section of this paper, that the purpose of these exception clauses in articles 7 and 12 was to maintain with respect to the historic titles mentioned the *status quo ante* the entry into force of the Convention. As was indicated previously in this paper, the Second Committee of the 1930 Hague Codification Conference took the position in its report that the proposed codification of the rules of international law regarding territorial waters should not affect the historic rights which States might possess over certain parts of their coastal sea. Articles 7 and 12 show that the 1958 Geneva Conference on the Law of the Sea took the same position regarding historic rights in relation to bays bordered by a single State or the delimitation of the territorial seas of States whose coasts are opposite or adjacent to each other.

75. The question arises, however, what the situation is in cases where the historic title has not been expressly reserved in the Convention. In principle, it seems that the answer must be: if the provisions of an article should be found to conflict with an historic title to a maritime area, and no clause is included in the article safeguarding the historic title, the provisions of the article must prevail as between the parties to the Convention. This seems to follow *a contrario* from the fact that articles 7 and 12 have express clauses reserving historic rights; articles without such a clause must be considered not to admit an exception in favour of such rights.

76. Obviously the situation is different where a certain subject-matter has not been regulated by the Convention. Such is the case with respect to bays, the coasts of which belong to two or more States, and also in regard to the breadth of the territorial sea. Here the subject-matter is left completely untouched by the Convention; and as the Convention contains no relevant general rules, it would of course be pointless to reserve historic rights in this respect.⁶²

77. Three hypotheses may therefore be envisaged:

(i) The historic title relates to maritime areas not dealt with by the Convention and the Convention has consequently no impact on the title;

(ii) The historic title relates to areas dealt with by the Convention but is expressly reserved by the Con-

⁵⁹ Oppenheim, *International Law*, volume I, 8th ed. (1955), page 555.

⁶⁰ Fauchille, *Traité de droit international public*, vol. 1, part 2, 8th ed. (1925), pages 680-681.

⁶¹ Oppenheim, *op. cit.*, page 556; Fauchille, *op. cit.*, page 702.

⁶² It may be interesting to note that while various proposals for regulating the breadth of the territorial sea were submitted at the two Geneva Conferences on the Law of the Sea, none of these proposals contained clauses reserving historic titles to certain areas of the sea. It was also fairly apparent from the discussion that the aim of the proposals was to arrive at rules which would have universal application. If any of the proposed regulations of the breadth of the territorial sea had been accepted, such regulation would then have prevailed over conflicting historic titles to maritime areas. In view of the fact that none of the proposals acquired the necessary majority, it might perhaps be worth while, if and when the question of the breadth of the territorial sea is again taken up for solution, to consider whether an agreement on a proposal might be facilitated if it contained a clause reserving historic rights.

vention. Also in this case the Convention has no impact on the title;

(iii) The historic title is in conflict with a provision of the Convention and is not expressly reserved by the Convention. In that case, the historic title is superseded as between the parties to the Convention.

78. One can, of course, say in a certain sense that an historic title which is expressly reserved, as is the case in articles 7 and 12 of the Convention, thereby is implicitly qualified as an exception. But it must not be forgotten that the whole purpose of making the historic title an exception from the general rules contained in the main provisions of the relevant article is to *maintain* the historic title. It is not the intention, by excepting it, to subject the historic title to stricter requirements but to maintain the *status quo ante* with respect to the title. It would therefore be a fallacy if, from the fact that the Convention in certain cases excepts historic rights, one would draw the conclusion that the Convention requires stricter proof of the historic title than was the case before the conclusion of the Convention. In reality, the Convention simply leaves the matter, both regarding the existence of the title and the proof of the title, in the state in which it was at the entry into force of the Convention.

79. The above discussion of the general aspects of the concept of "historic waters", its relation to general international law and to certain other concepts such as prescription and occupation, has cleared the way for a more concrete study of the juridical régime of "historic waters". The first problem to be taken up is the question, what conditions must be fulfilled in order that an historic title to water areas may arise or, in other words, the question of the elements constituting a title to "historic waters".

C. ELEMENTS OF TITLE TO "HISTORIC WATERS"

80. There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient.

81. Besides the three factors just referred to a fourth is sometimes mentioned. It has been suggested that attention should also be given to the question whether the claim can be justified on the basis of economic necessity, national security, vital interest or a similar ground. According to one view, such grounds should even be considered to form the fundamental basis for a right to "historic waters", so that they would be sufficient to sustain the right even if the historic element were lacking.

82. These various factors will be examined below. In order not to complicate the discussion unnecessarily, it is assumed that there is only one coastal

State claiming historic title to the area. In a separate sub-section, the situation will thereafter be studied which arises when "historic waters" are bordered by two or more States.

83. The method to be used will be an analysis of problems and principles rather than a discussion of cases. For a more detailed presentation of both case law and opinions of writers reference may be made to the Secretariat memorandum on "historic bays" (A/CONF.13/1).

1. *Exercise of authority over the area claimed*

84. Various expressions are used in theory and practice to indicate the authority which a State must continuously exercise over a maritime area in order to be able validly to claim the area on the basis of an historic title. As examples may be mentioned: "exclusive authority", "jurisdiction", "dominion", "sovereign ownership", "sovereignty".⁶³ The abundance of terminology does not, however, mean that there is a great and confusing divergence of opinion regarding the requirements which this exercise of authority would have to fulfil. On the contrary there seems to be rather general agreement as to the three main questions involved, namely, the scope of the authority, the acts by which it can be exercised and its effectiveness.

(a) *Scope of the authority exercised*

85. There can hardly be any doubt that the authority which a State must continuously exercise over a maritime area in order to be able to claim it validly as "historic waters" is sovereignty. An authority more limited in scope than sovereignty would not be sufficient to form a basis for a title to such waters. This view, which does not seem to be seriously disputed, is based on the assumption that a claim to an area as "historic waters" means a claim to the area as part of the maritime domain of the State. It is logical that the scope of the authority required to form a basis for a claim to "historic waters" will depend on the scope of the claim itself. If, therefore, as is the generally accepted view,⁶⁴ a claim to "historic waters" means a claim to a maritime area as part of the national domain, i.e., if the claim to "historic waters" is a claim to sovereignty over the area, then the authority exercised, which is a basis for the claim, must also be sovereignty.

86. This interrelationship between the scope of the claim and the scope of the authority which the claiming State must exercise, and also the soundness of the assumption that the claim to "historic waters" is a claim to sovereignty over the waters, may be illustrated by an example. Suppose that a State asserted, on a historical basis, a limited right related to a certain maritime area, such as the right for its citizens to fish in the area. This would not in itself be a claim to the area as "historic waters". Nor could the State, even if it so wanted, claim the area as its "historic waters" on the basis of the fact that its citizens had fished there for a long time. The claim would in such case not be commensurate with the factual activity of the State or its citizens in the area. Suppose on the other hand that the State has continuously

⁶³ For other examples see pages 4-7, 14, 15, 16-20, 32-33 of the Secretariat memorandum on "historic bays" (A/CONF.13/1).

⁶⁴ See Gidel, *op. cit.*, pages 625 *et seq.* and the Secretariat memorandum on "historic bays" (A/CONF.13/1), pages 21 *et seq.*

asserted that its citizens had the exclusive right to fish in the area, and had, in accordance with this assertion, kept foreign fishermen away from the area or taken action against them. In that case the State in fact exercised sovereignty over the area, and its claim, on a historical basis, that it had the right to continue to do so would be a claim to the area as its "historic waters". The authority exercised by the State would be commensurate to the claim and would form a valid basis for the claim (without prejudice to the condition that the other requirements for the title must also be fulfilled).

87. The reasoning may be summarized as follows. A claim to "historic waters" is a claim by a State, based on an historic title, to a maritime area as part of its national domain; it is a claim to sovereignty over the area. The activities carried on by the State in the area or, in other words, the authority continuously exercised by the State in the area must be commensurate with the claim. The authority exercised must consequently be sovereignty, the State must have acted and act as the sovereign of the area.⁶⁵

88. This does not mean, however, that the State must have exercised all the rights or duties which are included in the concept of sovereignty. The main consideration is that in the area and with respect to the area the State carried on activities which pertain to the sovereignty of the area. Without venturing to present a catalogue of such activities, some examples may be given to illustrate the kind of acts by which the authority required as a basis for the claim might be established.

(b) *Acts by which the authority is exercised*

89. It may be useful to begin by quoting the opinions of some prominent writers on the subject. Gidel, in discussing what he calls the *actes d'appropriation* to which the claiming State must have proceeded, states as follows:

"It is hard to specify categorically what kind of acts of appropriation constitute sufficient evidence: the exclusion from these areas of foreign vessels or 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 evidence. In the *Grisbarna* dispute between Sweden and Norway, the judgement of 23 October 1909 mentions that 'Sweden has performed various acts . . . 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'.⁶⁶

90. Regarding the kind of acts mentioned in the first part of the above quotation, Bourquin is virtually in agreement with Gidel. Bourquin says:

"What acts under municipal law can be cited as expressing its desire to act as the sovereign? That is a matter very difficult, if not impossible, to

determine *a priori*. There are some acts which are manifestly not open to any misunderstanding in this regard. 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."⁶⁷

He is more doubtful or flexible with respect to the measures of assistance to navigation mentioned in the second part of Gidel's statement.

"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."⁶⁸

91. Bustamante, in a draft convention prepared by him with a view to assisting the 1930 Hague Codification Conference, included an article relevant to the question now discussed. It reads as follows:

"There are expected from the provisions of the two foregoing articles, in regard to limits and distance, 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."⁶⁹

92. Substantially the same article was included in the "project" submitted in 1933 to the Seventh International Conference of American States by the American Institute of International Law.⁷⁰

93. In the *Fisheries* case, Norway stated in its Counter-Memorial:

"It cannot seriously be questioned that, in the application of the theory of historic waters, acts under municipal law on the part of the coastal State are of the essence. Such acts are implicit in an historic title. It is the exercise of sovereignty that lies at the basis of the title. It is the peaceful and continuous exercise thereof over a prolonged period that assumes an international significance and becomes one of the elements of the international juridical order."⁷¹

And having asked how sovereignty is asserted, the Counter-Memorial replies:

"Above all, by action under municipal law (laws, regulations, administrative measures, judicial decisions, etc.)."⁷²

94. The United Kingdom Government, while emphasizing that they were not in itself sufficient to establish the title, agreed that such acts by the State under municipal law (*actes d'ordre interne*) were essential to the establishment of an historic title to a maritime territory.⁷³

95. These examples furnish some guidance as to the kind of acts which are required. In the first place

⁶⁷ Bourquin, *op. cit.*, page 43.

⁶⁸ *Ibid.* See also the statements emanating from the Ministry of Foreign Affairs of the Netherlands in 1848 and quoted by Gidel, *op. cit.*, page 633, footnote 3.

⁶⁹ Bustamante, *The Territorial Sea* (1930), page 142.

⁷⁰ See the Secretariat memorandum on "historic bays" (A/CONF.13/1), page 14.

⁷¹ *International Court of Justice, Pleadings, Oral Arguments, Documents, Fisheries Case*, vol. I, pages 567-568.

⁷² *Ibid.*, page 568.

⁷³ *Op. cit.*, vol. II, page 648. See also the Secretariat memorandum on "historic bays" (A/CONF.13/1), page 32.

⁶⁵ Cf. Johnson, *op. cit.*, pages 344-345 regarding the exercise of authority necessary as a basis for acquisitive prescription.

⁶⁶ Gidel, *op. cit.*, page 633.

the acts must emanate from the State or its organs. Acts of private individuals would not be sufficient—unless, in exceptional circumstances, they might be considered as ultimately expressing the authority of the State. As Sir Arnold McNair said in his dissenting opinion in the *Fisheries* case:

“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.”⁷⁴

96. Furthermore, the acts must be public; they must be acts by which the State openly manifests its will to exercise authority over the territory. The acts must have the notoriety which is normal for acts of State. Secret acts could not form the basis of a historic title; the other State must have at least the opportunity of knowing what is going on.⁷⁵

97. Another important requirement is that the acts must be such as to ensure that the exercise of authority is effective.

(c) *Effectiveness of authority exercised*

98. On this point there is full agreement in theory and practice. Bourquin expresses the general opinion in these words:

“Sovereignty must be effectively exercised; the intent of the State must be expressed by deeds and not merely by proclamations.”⁷⁶

99. This does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken.

100. The first requirement to be fulfilled in order to establish a basis for a title to “historic waters” can therefore be described as the effective exercise of sovereignty over the area by appropriate action on the part of the claiming State. We can now proceed to the second requirement, namely, that this exercise of sovereignty continued for a time sufficient to confer upon it the quality of usage.

2. *Continuity of the exercise of authority: usage*

101. A study of the extensive material included in the Secretariat memorandum on “historic bays” (A/CONF.13/1) and drawn from State practice, arbitral and judicial cases, codification projects and opinions of learned authors, provides ample proof of the dominant view that usage is required for the establishment of title to “historic waters”. This view seems natural and logical considering that the title to the

area is an *historic* title.⁷⁷ A great variety of terms is used in describing and qualifying the usage required. A few of the terms employed in the codification projects mentioned in the memorandum⁷⁸ may illustrate this variety: “continuous usage of long standing” [*usage continu et séculaire*] (Institute of International Law 1894), “international usage” (Institute of International Law 1928), “established usage” (Harvard draft 1930), “continued and well-established usage” (American Institute of International Law 1925), “established usage generally recognized by the nations” (International Law Association 1926), “immemorial usage” (Japanese International Law Society 1926), “continuous and immemorial usage” (Schücking draft 1926).

102. The term “usage” is not wholly unambiguous. On the one hand it can mean a generalized pattern of behaviour, i.e., the fact that many persons behave in the same (or a similar) way. On the other hand it can mean the repetition by the same person of the same (or a similar) activity. It is important to distinguish between these two meanings or “usage”, for while usage in the former sense may form the basis of a general rule of customary law, only usage in the latter sense can give rise to a historic title.

103. As was established above, a historic title to a maritime area must be based on the effective exercise of sovereignty over the area by the particular State claiming it. The activity from which the required usage must emerge is consequently a repeated or continued activity of this same State. The passage of time is therefore essential; the State must have kept up its exercise of sovereignty over the area for a considerable time.

104. On the other hand, no precise length of time can be indicated as necessary to build the usage on which the historic title must be based. It must remain a matter of judgement when sufficient time has elapsed for the usage to emerge. The addition of the adjective “immemorial” is of little assistance in this respect. Taken literally “immemorial” would be a wholly impractical notion;⁷⁹ the term “immemorial” could, therefore, at the utmost be understood as emphasizing, in a vague manner, the time-element contained in the concept of “usage”. It will anyhow be a question of evaluation whether, considering the circumstances of the particular case, time has given rise to a usage.

105. Usage, in terms of a continued and effective exercise of sovereignty over the area by the State claiming it, is then a necessary requirement for the establishment of a historic title to the area by that State. But is usage in this sense also sufficient? There seems to be practically general agreement that besides this national usage, consideration must also be given to the international reaction to the said exercise of sovereignty. It is sometimes said that the national usage has to develop into an “international usage”. This may be a way of underlining the importance of the attitude of foreign States in the creation of an historic title; in any case, a full understanding of the matter requires an analysis of the question how and to

⁷⁴ *I.C.J. Reports, 1951*, page 184. Cf. *Pleadings*, vol. II, page 657.

⁷⁵ The question of knowledge on the part of foreign States is further discussed below in paragraph 125 *et seq.*

⁷⁶ *Op. cit.*, page 43.

⁷⁷ Regarding the opinion which pays less attention to the passage of time and lays more emphasis on the vital interests of the State claiming the area, see below paragraphs 134 *et seq.*

⁷⁸ Pages 14-15.

⁷⁹ Cf. Johnson, *op. cit.*, page 339.

what extent the reaction of foreign States influences the growth of such a title.

3. *Attitude of foreign States*

106. In essence, this is the problem of the so-called acquiescence of foreign States. As was indicated above, according to a widely held opinion acquiescence in the exercise of sovereignty by the coastal State over the area claimed is necessary for the emergence of an historic title to the area. The connexion between this requirement of acquiescence and the opinion that "historic waters" are an exception to the general rules of international law governing the delimitation of maritime areas was also pointed out above. It might be recalled that the argument was on the following lines. The State which claims "historic waters" in effect claims a maritime area which according to general international law belongs to the high seas. As the high seas are *res communis omnium* and not *res nullius*, title to the area cannot be obtained by occupation. The acquisition by historic title is "adverse acquisition", akin to acquisition by prescription, in other words, title to "historic waters" is obtained by a process through which the originally lawful owners, the community of States, are replaced by the coastal State. Title to "historic waters", therefore, has its origin in an illegal situation which was subsequently validated. This validation could not take place by the mere passage of time; it must be consummated by the acquiescence of the rightful owners.

107. The argument seems logically to imply that acquiescence is a form of consent. However, here a difficulty arises. If acquiescence is a form of consent, acquiescence would amount to *recognition* of the sovereignty of the coastal State over the area in question and reliance on a historic title would be superfluous. If the continued exercise of sovereignty during a length of time had to be validated by acquiescence in the meaning of consent by the foreign States concerned, the lapse of time, i.e., the historical element, would be immaterial.

108. Some of the defenders of the concept of acquiescence, on the one hand, desiring to avoid a confusion with recognition and, on the other hand, unwilling to concede that the continued exercise of sovereignty by the coastal State over the area claimed could in itself constitute a historic title to the area, have endeavoured to vindicate the idea of acquiescence by interpreting it as an essentially negative concept. The term "acquiescence" is said to "describe the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights",⁸⁰ or to mean that the foreign States "have simply been inactive".⁸¹ The historic title would then be based on the continued effective exercise of sovereignty by the coastal States over the area in question combined with the inaction of the other States. In this view,

"the true role of the theory [of historic rights] is to compensate for the lack of any evidence of express or active consent by States, by creating a presumption of acquiescence arising from the facts of the case and from the inaction and toleration of States."⁸²

⁸⁰ McGibbon, "The Scope of Acquiescence in International Law", in *British Year Book of International Law*, vol. 31 (1954), page 143.

⁸¹ Fitzmaurice in *British Year Book of International Law*, vol. 30 (1953), page 29.

⁸² Fitzmaurice, *ibid.*, page 30.

109. It is interesting to note that the protagonists of the concept of acquiescence, if they reduce this concept to mean merely inaction or toleration, arrive at a position which is very near to the one taken by those who oppose the idea that the régime of "historic waters" is an exceptional régime and the consequent idea that the acquiescence of foreign States is necessary to acquire a title to historic waters. Bourquin, who as was seen above, is a spokesman for the latter opinion, states the following:

"While it is wrong to say that the acquiescence of these States is required, it is true that if their reactions interfere with the peaceful and continuous exercise of sovereignty, no historic title can be formed.

"In such cases the question to be asked is not whether the other States consented to the claims of the coastal State but whether they interfered with the action of that State to the point of divesting it of the two conditions required for the formation of an historic title.

"Obviously only acts of opposition can have that effect. So long as the behaviour of the riparian State causes no protest abroad, the exercise of sovereignty continues unimpeded . . .

"The absence of any reaction by foreign States is sufficient."⁸³

110. The similarity of the final positions arrived at, both by some of the proponents and some of the opponents of the notion of acquiescence is striking: both seem to agree that inaction on the part of foreign States is sufficient to permit the emergence of a historic right. This would seem to suggest that the term "acquiescence" is ambiguous. In these circumstances, it might perhaps be better, in the interest of clarity, not to use the term "acquiescence" in this context. The term seems at least *prima facie* to convey the idea of consent and its use can therefore result in the conclusion that a historic title can arise only if concurrence on the part of foreign States has been demonstrated in a positive way. If the proponents of the necessity of acquiescence really have in mind only the negative aspect, i.e., toleration on the part of the foreign States, it would be preferable to use the term "toleration" which better expresses their thoughts. Moreover, there should be no difficulty in dropping the term "acquiescence" once the dubious theory that title to "historic waters" constitutes an exception to general international law has been discarded.

111. "Toleration" is furthermore the expression used by the International Court of Justice in the *Fisheries* case when discussing Norway's historic title to the system of delimitation which was an issue in the dispute. The Court said, *inter alia*:

"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. 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 . . .

⁸³ Bourquin, *op. cit.*, page 46. Bustamante is also against the idea of consent, see *op. cit.*, page 100.

"The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact."⁸⁴

The Court continued further on in its judgement:

"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."⁸⁵

In the Court's opinion, the consistent and prolonged application of the Norwegian system combined with the general toleration of foreign States gave rise to a historic right to apply the system. This opinion seems to correspond fairly well to the final positions taken both by the proponents and the opponents of the concept of "acquiescence", as set out in paragraphs 108 and 109.

112. However, even if it may be said that, whether the term "acquiescence" or the term "toleration" is used, there is substantial agreement that inaction on the part of foreign States is sufficient to permit an historic title to a maritime area to arise by effective and continued exercise of sovereignty over it by the coastal State during a considerable time, all difficulties in this respect are not solved. It is true, of course, that if there has been no reaction at any time from any foreign State, then there is no difficulty. But what happens if at any one time or another opposition from one or more foreign States occurred? Does any kind of opposition by any one State at any time preclude the historic title? It is *prima facie* highly improbable that the terms "inaction" or "toleration" would have to be interpreted so strictly. Before attempting a more precise answer, it would, however, be useful to examine more closely the three points which seem to be involved, namely, (i) what kind of opposition would prevent the historic title from emerging, (ii) how widespread in terms of the number of opposing States must the opposition be, and (iii) when must the opposition occur.

113. With regard to the first point, it is obvious that the opposition ending the inaction must be expressed in some kind of action. In the passage quoted above in paragraph 109, Bourquin states that:

"...if their reactions [i.e., of foreign States] prevent the peaceful and continuous exercise of sovereignty, no historic title can be formed."⁸⁶

Indeed, it is hardly doubtful that opposition by force on the part of foreign States would be a means of interrupting the process by which a historic title is formed. On the other hand it cannot be assumed that Bourquin, despite the use of the word *paisible*, would consider only opposition by force as effectively preventing the creation of a historic title. He also says in the passage quoted above that:

"...so long as the behaviour of the riparian State causes no protest abroad, the exercise of sovereignty continues unimpeded."⁸⁷

This seems to imply also a protest could be a means of hindering the emergence of a historic right.

114. If that is so, Bourquin's view would not be far from the opinion expressed by Fitzmaurice in these words:

"Protest, in some shape or form or equivalent action, is necessary in order to stop the acquisition of a prescriptive right."⁸⁸

In a footnote Fitzmaurice goes on to describe the action in question as follows:

"Apart from the ordinary case of a diplomatic protest, or a proposal for reference to adjudication, the same effect could be achieved by a public statement denying the prescribing country's right, by resistance to the *enforcement* of the claim, or by counter-action of some kind."⁸⁹

115. These are some of the acts by which the opposition of foreign States could be expressed, and there are, no doubt, other means which could be used. More important than establishing a list of acts, is to emphasize that whatever the acts they must effectively express a sustained opposition to the exercise of sovereignty by the coastal State over the area in question. To quote Fitzmaurice again:

"Moreover the protest must be an effective one depending on what the circumstances require. A simple protest may suffice to begin with, but this may not be enough as time goes on."⁹⁰

Should despite the protest the coastal State continue to exercise its sovereignty over the area, the opposition on the part of the foreign State must be maintained by renewed protests or some equivalent action.

116. The second point to be examined is how wide the opposition must be, to prevent the creation of a historic title. Is it sufficient that a single State effectively expresses its opposition? Hardly anybody would go as far as that. Gidel says on this point:

"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."⁹¹

Bourquin⁹² agrees with Gidel that one opposing State would not be sufficient to invalidate the usage. This seems, moreover, to be a generally accepted opinion. If the total absence of opposition is not a necessary requirement for the emergence of a historic right, it would seem to be a matter of judgement, subject to the circumstances in the particular case, how widespread the opposition must be to prevent the historic title from materializing.

117. In this connexion it is interesting to note, in the above quotation, that Gidel is not willing to place all the opposing States on the same level. The opposition of one State may according to circumstances carry more weight than the opposition of another State.

⁸⁷ *Ibid.*

⁸⁸ *British Year Book of International Law*, vol. 30 (1953), page 42. A historic right to a maritime area is in Fitzmaurice's opinion a prescriptive right, see op. cit., pages 27-28

⁸⁹ Op. cit., page 42, footnote 1.

⁹⁰ Op. cit., page 42, see also pages 28-29.

⁹¹ Gidel, op. cit., page 634.

⁹² Bourquin, op. cit., pages 47-48.

⁸⁴ Fisheries case, Judgement of 18 December 1951, *I.C.J. Reports*, 1951, page 138.

⁸⁵ *Ibid.*, page 139.

⁸⁶ Bourquin, op. cit., page 46.

Fitzmaurice follows the same line of reasoning when he says:

"It is obvious that, depending on the circumstances, the acquiescence of certain States must be of far greater weight and moment in establishing the existence of a prescriptive or historic right than that of others. Thus the consent, either expressly given or reasonably to be inferred, of those States which, whether on account of geographical proximity, or commercial or other interest in the subject-matter, etc., are directly affected by the claim, may be almost enough in itself to legitimize it; while a clear absence of consent on the part of such States would certainly suffice to prevent the establishment of the right. Equally, acquiescence or refusal on the part of States whose interest in the matter, actual or potential, is non-existent, or only slight, may have little practical significance."⁹³

118. The position, outlined in the passages quoted from Gidel and Fitzmaurice, that the same weight need not be accorded to the attitude of each State, seems to be reasonable and realistic. It may, perhaps, be pointed out, however, that this position is hardly consonant with the assumption that the right to "historic waters" is an exception to the general rules of international law. If that assumption were correct, if the State claiming "historic waters" were really claiming a part of the high seas, a part of a *res communis*, unless a historic title could be established, it would seem that any State, any member of the community of States, should be able to prevent by its opposition the emergence of the historic title. How could in such case some States be entitled to give away rights which belong to all States and how could in the matter of acquiescence or opposition greater weight be given to one State than to the other? On the other hand, if it is admitted that the legal situation regarding the delimitation of the maritime territory of States is not clear, that the customary international law in this respect is in doubt, and that it is against that background that the existence or non-existence of historic rights to particular areas has to be considered, then the view seems sensible and practical that this question of opposition is a question of appreciation, not a question of arithmetic, and that the opposition of one State in view of the circumstances in the particular case may well be of greater importance than that of another State.

119. In this connexion, it may be useful to try to visualize how a dispute with respect to "historic waters" is most likely to arise. Although it is theoretically possible, it is not probable that a dispute will arise because all or most foreign States refuse to recognize the historic right of a coastal State to a certain maritime area. Many States may have no great interest in the question and would therefore have no reason to go out of their way to antagonize the coastal State. The dispute would be most likely to arise through the opposition of neighbouring States or of those States which have a particular interest in the area. It would therefore be only natural if the arbitrator or tribunal having to settle the dispute paid particular attention to the previous attitude of those States and, in determining the existence of an historic title, gave special weight to the fact that these States, in the formative period of the disputed title, had or had not effectively

opposed the exercise of sovereignty by the coastal State over the area in question.

120. With regard to point two, relative to the question how wide-spread the opposition must be to preclude the emergence of an historic title, it may therefore be said that this is a matter of appreciation in the light of the circumstances in each case. How this appreciation may be made, can be illustrated by the last part of the statement of the International Court of Justice in the *Fisheries* case, referred to above in paragraph 111:

"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."⁹⁴

121. It remains to deal with the third point, namely, the question at what time the opposition must occur in order to prevent the creation of an historic title. It is evident that the opposition must have been effectively expressed before the historic title came into being. After a State has exercised sovereignty over a maritime area during a considerable time under general toleration by the foreign States, and an historic right to the area has thus emerged, it is not possible for one or more States to reverse the process by coming forward with a protest against the accomplished fact. The historic title is already in existence and stands despite the belated opposition.

122. However, by this general and rather obvious statement the problem is not solved. There are in any case two questions which need to be discussed in this connexion. The first question is: how long is the considerable time during which sovereignty has to be exercised and tolerated? The second question is: from what moment does this time start to run?

123. Regarding the first question it can only be said that the length of time necessary for a historic right to emerge is a matter of judgement; no precise time can be indicated. However, as the exercise of sovereignty has to develop into a usage the length of time must be considerable. Reference may be made in that respect to the explanations given above in paragraphs 101-104.

124. The second question has several aspects. In the first place the time cannot begin to run until the exercise of sovereignty has begun. As was said above, the exercise of sovereignty must be effective and public and the time can therefore not begin to run until these two conditions have been fulfilled.

125. Here a problem arises: is it sufficient that the exercise of sovereignty is public or is it also necessary that the foreign States actually have knowledge of this exercise of sovereignty? In other words, can a foreign State offer as a valid excuse for its inaction, the fact that it had no actual knowledge of the situation, and demand that the time within which it must manifest its opposition should be construed to run only from the moment it received such knowledge?

126. Those who consider the right to "historic waters" to be an exception to general international law and therefore have a tendency to require at least tacit or presumed consent on the part of foreign States, are also inclined to require knowledge of the situa-

⁹³ Fitzmaurice, *op. cit.*, pages 31-32.

⁹⁴ *I.C.J. Reports, 1951*, page 139.

tion by these States, in order that absence of opposition may be held against them. For instance Fitzmaurice states:

"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 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."⁹⁵

127. The preference is evident in the quotation for a system according to which consent or acquiescence on the part of foreign States is required and consequently also their knowledge of the situation. On the other hand, the language used seems to indicate that also implied consent and presumed knowledge would be sufficient. The requirement of knowledge and consent seems to be more theoretical than real; in the end the author seems to be satisfied with notoriety from which knowledge may be presumed.

128. In any case, nobody seems to demand that the coastal State must formally notify each and all of the foreign States that it has assumed sovereignty over the area, before the time necessary to establish a usage will begin to run. If that is so, the notoriety of the situation, the public exercise of sovereignty over the area, would in reality be sufficient. It may, moreover, be recalled that in the *Fisheries* case, the International Court of Justice referred to

"the notoriety essential to provide the basis of an historic title."⁹⁶

129. Against this opinion that notoriety is sufficient, the objection has been made that its effect would be to place an excessive burden of vigilance on States, as they would be forced to follow the activities of the legislative and executive organs of other States more closely than is usually the case.⁹⁷ It is, however, doubtful if this objection is justified. It may be argued that if a State had a real interest in a maritime area it would be natural for that State to follow closely what was going on there, and that the fact that the State was unaware of the situation was a good indication that its interest in the area was slight or non-existent. It might happen that at a later stage the State developed an interest in the area and so became aware of the circumstance that the coastal State for a long time had exercised sovereignty over it. If the newcomer State now found that this was against its interests, is it really a justifiable view to assert that this State could validly object to the coastal State's claim to an historic title to the area on the ground that it did not know until recently what was going on in the area?

⁹⁵ *British Year Book of International Law*, vol. 30 (1935), page 33.

⁹⁶ *I.C.J. Reports*, 1951, page 139.

⁹⁷ Cf. *British Year Book of International Law*, vol. 30 (1953), page 42.

130. In conclusion therefore, there seem to be strong reasons for holding that notoriety of the exercise of sovereignty, in other words, open and public exercise of sovereignty, is required rather than actual knowledge by the foreign States of the activities of the coastal States in the area.

131. Assuming now that the time necessary for the formation of a historic title has begun to run, sufficient opposition to block the title may not be forthcoming immediately. One or two States may protest, but still the over-all situation may be one of general toleration on the part of the foreign States. Opposition may build up successively and finally reach a stage where it no longer can be said that the exercise of sovereignty of the coastal State over the area is generally tolerated. Thereby the emergence of the historic title will be prevented, provided that this stage is not reached too late, i.e., at a time when the title has already come into existence because sufficient time under the condition of general toleration has already elapsed. There would therefore be a kind of race taking place between the lapse of time and the building up of the opposition. The outcome of the race is necessarily a matter of judgement as there are no precise criteria to be applied to either of the two competing factors. There is no precise time limit for the lapse of time necessary to allow the emergence of the historic right, and there is no precise measure for the amount of opposition which is necessary to exclude "general toleration".

132. This concludes the discussion of the three factors which according to the dominant opinion have to be taken into consideration in determining whether a right to "historic waters" has arisen. The result of the discussion would seem to be that for such a title to emerge, the coastal State must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration of the community of States.

133. It remains to study the fourth factor which is sometimes referred to, namely, the question of the vital interests of the coastal State in the area.

4. *Question of the vital interests of the coastal State in the area claimed*

134. The Secretariat memorandum on "historic bays" (A/CONF.13/1), paragraphs 151 *et seq.*, describes a view taken by some authors and Governments, according to which a right to "historic bays" may be based not only on long usage, but also on other "particular circumstances" such as geographical configuration, requirements of self-defence or other vital interests of the coastal State. The origin of this idea is usually ascribed to Dr. Drago's dissenting opinion in the North Atlantic Coast Fisheries Arbitration (1910) where he stated 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 pretention."⁹⁸

The basis for Dr. Drago's statement is evidently that in the classical cases of "historic bays" such as Chesapeake Bay and Delaware Bay, such "particular circumstances" were put forward in justification of the claims.

135. The significance of this line of thought is not so much that usage may have to be fortified by other reasons such as geographical configuration or vital interest in order to form a firm basis for a claim to "historic bays". It is rather that these other "particular circumstances" may justify the claim without the necessity of establishing also "immemorial usage". This is in any case the direction in which the idea developed, as may clearly be seen from the information given in the Secretariat memorandum.

136. Illuminating in this respect is article 7 of the draft international convention submitted at the Buenos Aires Conference of the International Law Association in 1922 by Captain Storny, reading as follows:

"A State may include within the limits of its territorial sea the estuaries, gulfs, bays or parts of the adjacent sea in which it has established its jurisdiction by continuous and immemorial usage or which, when these precedents do not exist, are unavoidably necessary according to the conception of 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."⁹⁹

137. Also important is the statement of the Portuguese representative at the 1930 Hague Codification Conference:

"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."¹⁰⁰

138. There is undoubtedly some justification for this view, and it is also understandable that it appeals to States which reached independence rather late and therefore are not able to base these claims on long usage.¹⁰¹

139. On the other hand it hardly seems appropriate to deal with the problem of these vital needs in the context of "historic bays". Bourquin, who otherwise appreciates the importance of the vital interests of the State with regard to bays, says in this respect:

"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."¹⁰²

It is difficult to disagree with that opinion.

⁹⁸ See quotation in A/CONF.13/1, paragraph 92.

⁹⁹ *Ibid.*, paragraph 152.

¹⁰⁰ *Ibid.*, paragraph 155.

¹⁰¹ See the statement by Mr. García-Amador in the International Law Commission and referred to in the footnote to paragraph 7 above.

¹⁰² Bourquin, *op. cit.*, page 51, quoted and translated in A/CONF.13/1, paragraph 158.

140. Attention may also be drawn to another aspect of the matter, which seems worth considering. In a convention on the territorial sea, it makes good sense to reserve the position of "historic bays". On the contrary, giving the parties the right to claim "vital bays" would come near to destroying the usefulness of any provision in the convention regarding the definition or delimitation of bays.

5. Question of "historic waters" the coasts of which belong to two or more States

141. In the foregoing discussion, it has been assumed that there was only one riparian State bordering the area in question and that therefore one State alone was interested in claiming it. What is the situation if there are two or more States bordering the area? Will that circumstance materially change the requirements discussed above for the emergence of an historic title to the area? Without pretending to deal with the matter exhaustively, a few considerations may be offered with respect to this problem.¹⁰³

142. These questions may be discussed in regard to two different geographical settings both of which are in some way related to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

143. Article 12 of the Convention deals with the situation where the coasts of two States are opposite or adjacent to each other, and paragraph 1 of the article provides as follows:

"Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision."¹⁰⁴

144. It does not seem that in this case the fact that there is more than one coastal State would materially change the requirements for the establishment of an historic title. There is no doubt that an historic title can arise in that situation; at least this is assumed by the wording of the article. In other words, the emergence of an historic title for one of the coastal States is not prevented by the mere existence of another coastal State. On the other hand, in evaluating the attitude of the foreign States regarding the claim to an historic title,¹⁰⁵ it would seem reasonable to pay special attention to the attitude of the other coastal States.

145. The second geographical situation of relevance is the case of a bay bordered by two or more States.¹⁰⁶ This situation is related to the above-mentioned Geneva Convention in a negative way, as its article on bays (article 7) deals only with bays the coasts of which

¹⁰³ The question is also dealt with in the Secretariat memorandum on "historic bays" A/CONF.13/1, paras. 44-47 and 131-136.

¹⁰⁴ *United Nations Conference on the Law of the Sea, Official Records*, vol. II, page 133.

¹⁰⁵ Cf. above paragraphs 117-119.

¹⁰⁶ Cf. Gidel, *op. cit.*, pages 626-627.

belong to a single State. The reason for this limitation on the scope of the article was that the International Law Commission, which prepared the text forming the basis of the Convention, considered that it did not have enough information regarding bays surrounded by two or more States to include provisions regarding them. The question of such bays was therefore left open as far as the Convention is concerned, and it would, indeed, seem to be a problem which could be discussed in depth only after additional information on the matter has been received from Governments. The few remarks which are made below in this paper are therefore of a very preliminary character.

146. Historic claims to a bay bordered by two or more States might be envisaged in two different circumstances. The claim may be made jointly by all the bordering States or it may be presented by one or more, but not all of these States.

147. If all the bordering States act jointly to claim historic title to a bay, it would seem that in principle what has been said above regarding a claim to historic title by a single State would apply to this group of States. One problem which might be raised in this connexion, without any attempt being made to solve it, is whether sovereignty over the bay must during the required period have been exercised by all the States claiming title or whether it is sufficient that during that period one or more of them exercised sovereignty over the bay.

148. The second hypothesis in which a claim to a bay bordered by two or more States might be envisaged arises where only one or several of them jointly, but not all of them, claim the area. In this case, it is rather improbable that a historic title to the bay could ever arise in favour of the claiming State or States. For it must be expected that an attempt to exercise sovereignty over the bay on the part of one or some of the riparian States would cause immediate and strong opposition on the part of the other riparian State or States. It would therefore be difficult to imagine that the requirement of toleration by foreign States could in these circumstances be fulfilled. It must be emphasized in this connexion that, when it was said above that the opposition of one or two foreign States would not necessarily exclude the existence of a general toleration on the part of foreign States, this statement referred to waters bordered by a single coastal State. In the case of a bay surrounded by several States, the persistent opposition by one or more of the riparian States to the exercise of sovereignty over the bay by one or more of the other riparian States must naturally be of great if not decisive importance in evaluating whether or not the requirement of toleration had been fulfilled.

D. BURDEN OF PROOF

149. As the existence of a right to "historic waters" is to such a large extent a matter of judgement, the question of proof and in particular the problem of the burden of proof would seem to be of a rather secondary interest. The task of the parties to a dispute seems to be less to establish certain facts than to persuade the judges to follow their respective opinions regarding the evaluation of the facts. Still the question of the burden of proof cannot be ignored, in particular since it is one of the problems usually raised in connexion with the right to "historic waters".

150. In the memorandum of the Secretariat on "historic bays" (A/CONF.13/1), paragraphs 164-166, attention was drawn to certain significant statements in doctrine and practice regarding the onus of proof with respect to "historic waters". Gidel is quoted as follows:

"The onus of proof rests on the State which claims that certain maritime areas close to its coast possess the character of internal 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 seas, 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."¹⁰⁷

151. Reference is also made to Basis of Discussion No. 8 submitted to the 1930 Hague Codification Conference and reading:

"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 providing such usage is upon the coastal State."¹⁰⁸

152. Finally it is pointed out that in the *Fisheries* case, the United Kingdom and Norway agreed that the onus of proof was on the State claiming a historic title, although they disagreed regarding the conditions and nature of the proof.

It may be interesting to quote the parties themselves in that respect. The Norwegian Government stated in its Counter-Memorial under the title "the proof of an historic title":

"The usage must be proved by the State which invokes it. Regarding this principle the Norwegian Government agrees with the United Kingdom Government. But it does not agree with it regarding the conditions of proof to be met and especially regarding the nature of the elements of proof to be produced."¹⁰⁹

The United Kingdom Government said:

"The Norwegian Government... while disputing the contentions of the United Kingdom Government in regard to the conditions and nature of the proof of an historic title, agrees that the burden of proof lies upon the State which invokes the historic title. This admission that the burden of proof lies upon the claimant State was only to be expected in view of the abundant authority to that effect. The role of the historic element being to validate what is an exception to general rules and therefore intrinsically invalid, it is natural that the burden of proof should so emphatically be placed upon the coastal State. . . ."¹¹⁰

153. There is doubt that there is abundant authority for the view that the burden of proof lies upon the

¹⁰⁷ Gidel, *op. cit.*, page 632.

¹⁰⁸ *Acts of the Conference for the Codification of International Law*, vol. III: Meetings of the Second Committee, page 179; also cited in the aforesaid memorandum by the Secretariat (A/CONF.13/1), para. 87.

¹⁰⁹ *International Court of Justice, Pleadings, Oral Arguments, Documents, Fisheries Case*, vol. I, page 566.

¹¹⁰ *Op. cit.*, vol. II, pages 645-646.

claimant State. Some who hold that view are mainly influenced, as is evident from the statements of Gidel and of the United Kingdom, by their belief that the historic title is an exception to the general rules of international law and that "historic waters" is an encroachment on the freedom of the high seas. The difficulties involved in this line of reasoning have been referred to above and may be borne in mind also with respect to the question of the burden of proof. Others who say that the burden of proof lies upon the claimant may do so merely because it seems to restate a widely accepted procedural rule. It can, however, be doubted that the rule that the State claiming historic title has the burden of proof is equal to the procedural rule that the claimant must prove his case. The meaning of the former rule is evidently that the burden of proof lies on the State claiming the title whether that State is the claimant or the defendant in a dispute.

154. Moreover, the statement that the burden of proof is on the State claiming the historic title does not have a very precise meaning. It is significant in that respect that it could be accepted by both parties in the *Fisheries* case although they disagreed sharply as to what had to be proved and how. For the purpose of a useful discussion of the question, it is necessary to relate the burden of proof to the various factors which must be present to create an historic title to a maritime area.

155. As was pointed out above, the first requirement for the development of an historic right to a maritime area is the effective exercise of sovereignty over the area by the State claiming the right. There seems to be no doubt that the State claiming the area has to show that it has exercised the required sovereignty. To do that it would have to prove certain facts such as for instance that in certain instances it enforced its laws and regulations in or with respect to the area. These facts the State must prove to the satisfaction of the arbitrator (or Court or whoever has to decide whether the title exists or not). The opposing State (or States) might perhaps allege other facts intended to show that the required exercise of sovereignty did not take place, and the latter State must then show these facts to the satisfaction of the arbitrator. Each of the opponents therefore bears the burden of proof with respect to the facts on which they rely. On the basis of the facts which he considers to be proved, the arbitrator then decides whether it has been demonstrated that the required sovereignty was exercised. Obviously, this involves an evaluation not only of the evidence presented regarding the facts but also of the importance of these facts as signs of the alleged exercise of sovereignty. If the arbitrator finds that effective sovereignty has not been exercised, the State claiming the historic title loses this necessary basis for its claim. In that sense the burden of proof with respect to the exercise of sovereignty is undoubtedly on the State claiming the title.

156. In order to give rise to an historic title, the exercise of sovereignty, as was seen above, must not only be effective but also prolonged, continued. It must develop into a national usage. To persuade the arbitrator that this is the case, the State claiming title would again bring forward certain facts such as the fact that the enforcement of its laws and regulations had gone on for a number of years. These facts the State would have to prove. The opposing State (or States) might again allege other facts which in its opinion indicated

that the claiming State had not been able to maintain its authority over the area uninterruptedly and that therefore, no prolonged, continued exercise of sovereignty had taken place. The opposing State would have to prove the facts on which its contentions were based. The arbitrator would then again have to evaluate the facts which he considers as established in order to decide whether or not an effective exercise of sovereignty by the State claiming title had taken place continuously during a sufficient period for a usage to have developed. If he finds that this was not the case, the State claiming title would have lost a necessary basis for its claim and in that sense it therefore carries the burden of proof regarding this point.

157. The third factor to take into consideration in relation to the emergence of an historic title is the attitude of the foreign States. The problem of the burden of proof is slightly more complicated with respect to this factor, because of the two views opposing each other in this respect: one, that "acquiescence" in the meaning of tacit or presumed consent by the foreign States is required for the emergence of the historic title, and the other, that "general toleration" on the part of these States is sufficient. The general pattern of proof will, however, be the same as in regard to the previous factors. Whether the State claiming the title endeavours to prove "acquiescence" or "toleration", it will assert certain facts in support of its contention that "acquiescence" (or "toleration") existed, and these facts the State would have to prove to the satisfaction of the arbitrator. And similarly the opponent (or opponents) would bring forward certain facts in support of his assertion that "acquiescence" (or "toleration") did not exist; for these facts, the opponent would have the burden of proof. The facts upon which the claiming State and the opposing State (or States) rely may not be the same, if they attempt to prove (or disprove) "acquiescence" as if they attempt to prove (or disprove) "toleration", but in either case they have the burden of proof for the facts which they allege. Whether "acquiescence" or "toleration" is required is not a question of fact but a question of law, and each of the parties will no doubt try to persuade the arbitrator that its view in this respect is correct, but this is not a question of evidence. Finally the arbitrator will decide whether "acquiescence" or "toleration" is the necessary requirement and on the basis of the facts he will also decide whether the requirement of "acquiescence" (or "toleration") was fulfilled. If he comes to the conclusion that this was not the case, the State claiming title loses an indispensable basis for its claim of title, and in that sense it bears the burden of proof.

158. In summarizing this discussion of the problem of the burden of proof, it may be said that the general statement that the burden of proof is on the State claiming historic title to a maritime area is not of much value. If the statement means that, should the arbitrator (or whoever has to decide) not find that all the elements of the title (all the requirements for the existence of the title) are present, the State claiming the title will lose, then the statement simply asserts the obvious. The elements of the title have evidently to be proved to the satisfaction of the arbitrator, otherwise he will not accept the title. And this holds true whether or not the title is considered to be an exception to the general rules of international law, so that burden of proof is not *really* a logical consequence of the allegedly exceptional character of the title. In a dispute, each

party has to prove the facts on which he relies, otherwise the arbitrator will not take these alleged facts into account. Furthermore, as regards the interpretation of the law and the evaluation of the facts in the light of this interpretation, each party will naturally try to persuade the arbitrator to adopt the party's views in this respect; to the extent that the party does not succeed in this, it will obviously have to bear the burden of his failure.

159. On the basis of what has just been said, it is submitted that it would be unnecessary, and possibly misleading, to include in a regulation of the régime of "historic waters" a general statement regarding the burden of proof. It would seem preferable to leave that question to be solved by the procedural rules which may be applicable in a particular case.

E. LEGAL STATUS OF THE WATERS REGARDED AS "HISTORIC WATERS"

160. The main question to be discussed in this section is whether "historic waters" are internal waters of the coastal State or are to be considered as part of its territorial sea. The importance of this problem lies in the fact that, according to the international law of the sea, the coastal State must allow the innocent passage of foreign ships through its territorial sea, but has no such obligation with respect to its internal waters.

161. As far as "historic bays" are concerned, the matter was dealt with in paragraphs 94-136 of the Secretariat memorandum on "historic bays" (A/CONF.13/1), and reference is made to the material and discussion which may be found there.

162. In paragraph 101 of the memorandum it is pointed out that, until the International Law Commission in its drafts on the law of the sea made a clear distinction between the "territorial sea" and "internal waters", the terminology used both in the doctrine and in State practice was ambiguous. "Territorial waters" could be used as a term comprehending both the "territorial sea" and "internal waters"; what is now known as "internal waters" was therefore often referred to as "territorial waters". In attempting to ascertain the opinions of authors and Governments in this field, one has therefore to take care not to be misled by the uncertain terminology used.

163. If allowance is made for this problem of terminology, the dominant opinion, as gathered from the statements assembled in the memorandum, seems to be that "historic bays" the coasts of which belong to a single State are internal waters. This was to be expected, for it is generally agreed that the waters inside the closing line of a bay are internal waters and that the territorial sea begins outside that line.

164. On the other hand, it should be recalled that the right to "historic bays" is based on the effective exercise of sovereignty over the area claimed, together with the general toleration of foreign States. The sovereignty exercised can be either sovereignty as over internal waters or sovereignty as over the territorial sea. In principle, the scope of the historic title emerging from the continued exercise of sovereignty should not be wider in scope than the scope of the sovereignty actually exercised. If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the

area would be territorial sea. For instance if the claimant State allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to these waters as internal waters, only as territorial sea.

165. The seeming contradiction between the statement that "historic bays" are internal waters, and the conclusion that waters claimed on the basis of the exercise of sovereignty as over the territorial sea cannot be internal waters but only part of the territorial sea, is really one of terminology. In the latter case, it would be preferable not to speak of an "historic bay" but of "historic waters" of some other kind.

166. What was said above refers to "historic waters", the coasts of which belong to a single State. The principle set out in paragraph 164 would, however, apply in the case of bays bordered by two or more States as well. Whether the waters of the bay are internal waters or territorial sea would depend on what kind of sovereignty was exercised by the coastal States in the formative period of the historic title to the bay.

167. The same principle also applies to "historic waters" other than "historic bays". These areas would be internal waters or territorial sea according to whether the sovereignty exercised over them in the course of the development of the historic title was sovereignty as over internal waters or sovereignty as over the territorial sea.

F. QUESTION OF A LIST OF "HISTORIC WATERS"

168. It is easy to see that claims to "historic waters" may be a source of considerable uncertainty regarding the delimitation of the maritime domain of States. As was shown above, the determination of the question whether or not such a claim is legitimate depends to a large extent on the evaluation of the circumstances in the particular case. Even if general agreement was reached on the principles involved, the application of these principles would not be without complications. The question how to avoid or reduce this uncertainty has held the attention of both authors and Governments, especially in connexion with the attempts to codify the rules of international law regarding the territorial sea.¹¹¹

169. In the course of the preparatory work for the 1930 Hague Codification Conference, Schücking, the rapporteur of the sub-committee dealing with problems connected with the law of the territorial sea, suggested the establishment of an International Waters Office which would register rights possessed by the riparian States outside the proposed fixed zone of their territorial seas, including rights to "historic waters". Applications for registration of such rights could be made within a time limit and application could be opposed by other States within a time limit. A procedure was also provided for settling disputes arising in case of such opposition.¹¹² The idea of an International Waters Office was however later dropped by the rapporteur.¹¹³

170. Bustamante in his "project of convention", prepared in order to help the work of the 1930 Codification Conference, suggested a similar scheme, with the Secretariat of the League of Nations playing a role corre-

¹¹¹ See for instance references in Gidel, *op. cit.*, pages 636-638.

¹¹² League of Nations document C.196.M.70.1927.V, pages 38-41 and 58.

¹¹³ *Ibid.*, page 72.

sponding to that of the International Waters Office in the Schücking proposal.¹¹⁴

171. In the discussions at the 1930 Codification Conference, the representative of Greece stated that it would be useful to adopt Schücking's proposal

"that an international organ should be established to draw up in advance a list of historic bays".¹¹⁵

172. The representative of Great Britain said:

"May I add one other thing? It is quite clear that neither this Conference nor any Committee nor Subcommittee of it could possibly undertake to draw up a list of historic bays. Yet the matter is one of great importance, and some machinery ought to be devised by which the various nations of the world can exchange views on this point, with the object ultimately of obtaining a list of historic bays agreed internationally.

"At a later stage, I shall propose that the Conference should suggest, before its work is completed, the setting up of some small body which might examine the claims of the various nations to historic bays with a view to making a report and possibly recommendations on the subject at a later date, to Geneva or elsewhere. The subject is one which has caused much friction and much dispute in the past and this seems to be a golden opportunity first of all to settle the principles on which the classification is to be based, and then, having settled the principles, to agree upon some list which will be binding for the future."¹¹⁶

173. Finally the representative of Portugal spoke in the same sense as follows:

"In the considerations it adduced today, the British delegation spoke of the establishment of an international organization. I venture to remind you that article 3 of Professor Schücking's draft speaks of the creation of an International Waters Office. After discussion by the Committee, Professor Schücking agreed to omit that article. I brought it forward again, but it was not taken into account either by the Committee of Experts or by the Preparatory Committee.

"This idea has now been put forward once again. On behalf of the Portuguese delegation, I wish to say that, from the general point of view, I am prepared to agree to the establishment of such an organization, provided that the character and functions with which it is endowed are satisfactory."¹¹⁷

174. The Second Committee of the Codification Conference in its report referred to the question of "historic waters" and, as was seen above, stated that the work of codification could not affect such rights. The Committee thereafter added:

"On the other hand, it must be recognized that no definite or concrete results can be obtained without determining and defining those rights. The Committee realizes that, in this matter too, the work of codification will encounter certain difficulties."¹¹⁸

175. While it no doubt would be convenient and desirable from the point of view of clarity and certainty

¹¹⁴ The relevant provisions of the Bustamante procedure may be found in the Secretariat memorandum on "historic waters", paragraph 209.

¹¹⁵ *Acts of the Conference for the Codification of International Law*, vol. III, page 105.

¹¹⁶ *Ibid.*, pages 104-105.

¹¹⁷ *Ibid.*, page 107.

¹¹⁸ *Ibid.*, page 211.

to establish an agreed list of "historic waters", it is doubtful whether a practicable approach to the problem would be to ask Governments to register their claims within a certain time and likewise request opponents of the claims to register their objections within a certain time. The advantage would, of course, be, after the expiration of the deadlines, that the unopposed claims would be considered as accepted, that no new claims could be made and that only the opposed claims would have to be settled. One weakness of such a scheme is, however, that it would be binding only on the States adhering to it, so that its effectiveness would depend upon how many and perhaps which States accepted it. Unless adherence by the totality of the States could be achieved, new claims could, in any case, not be excluded. Moreover, the scheme would involve the obvious danger that it might provoke a number of unnecessary disputes, as States would be tempted, in order to be on the safe side, to overstate both their claims and their objections. The net result might be less rather than more certainty.

176. It could therefore be argued that little advantage would be achieved by undertaking the rather formidable task of establishing a list of "historic waters". It might also be said that such an enterprise would be pointless as long as the question of the breadth of the territorial sea has not been settled. Under these circumstances the question is, whether it would not be preferable to limit the study to the principles of the matter and leave particular cases to be settled if and when they become the object of an actual dispute.

G. SETTLEMENT OF DISPUTES

177. Should a dispute arise, it would, however, be useful if means for the settlement of disputes were already agreed upon. It might therefore be desirable to supplement any agreement on substantive rules or principles relating to "historic waters" by provisions for the settlement of disputes regarding the interpretation or application of such rules or principles. As to the procedure to be followed in regard to such settlement, one might use as a pattern either the machinery set up by the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas¹¹⁹ or the methods outlined in the Optional Protocols concerning the Compulsory Settlement of Disputes adopted at the 1958 Geneva Conference on the Law of the Sea¹²⁰ and at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities.¹²¹

178. In the former case, disputes would be referred to a special commission, unless the parties agreed to seek a solution by another method of peaceful settlement, as provided for in Article 33 of the Charter of the United Nations. The members of the commission would be named by agreement between the States in dispute or, failing agreement, by the Secretary-General of the United Nations.

179. If on the other hand the pattern of the optional protocols is followed, disputes would be brought before the International Court of Justice by the application of one of the parties. The parties could agree to resort to

¹¹⁹ *United Nations Conference on the Law of the Sea, Official Records*, United Nations publication, Sales No.: 58.V.4, vol. II, page 140.

¹²⁰ *Ibid.*, page 145.

¹²¹ Document A/CONF.20/12, in *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, United Nations publication, Sales No.: 62.X.1, vol. II, page 89.

an arbitral tribunal instead of the Court, and they could also agree to adopt a conciliation procedure before going to the Court.

180. The settlement of disputes regarding rights to "historic waters" is complicated by a peculiar difficulty. If the final decision in a dispute goes against the State claiming the area, it might be expected that the State would give up its claim and the matter would be settled once and for all. On the other hand, should the decision be in favour of the State claiming the area, this decision would bind only the other party to the dispute, and other States might later return to the charge and open up new disputes regarding the claim. The same could of course happen when the claiming State loses, if that State, while respecting the decision in its relations with the other party to the dispute continued to exercise sovereignty over the area in relation to other States or their citizens. In other words, although a dispute regarding an area of "historic waters" was finally settled between the State claiming the area and an opposing State, the matter whether this area is "historic waters" could be reopened by other States, which would not be bound by the first settlement. Even if the dispute was decided by the highest international court in existence, the International Court of Justice, its decision would be binding only on the parties to the dispute, as stipulated in Article 59 of its Statute. A third State would still be legally free to dispute the claim, and a final decision of the question whether an area is or is not "historic waters" would therefore be hard to obtain. Naturally, if in one dispute it decided that the area was "historic waters" of a certain State, the International Court of Justice in all probability would come to the same conclusion in another dispute; similarly, a decision by a special commission or an arbitral decision on the matter in one case would probably carry considerable weight in another case. Still, the question would not be legally settled once and for all, and the possibility of new disputes would remain.

181. The experience of the two above-mentioned conferences indicates that it would probably be practical to embody the provisions for the settlement of disputes in a separate optional protocol. Some States might be willing to accept certain substantive rules or principles on "historic waters", but not to submit themselves to a compulsory procedure for the settlement of disputes. By including the substantive and the procedural rules in separate instruments, these States would be able to adhere to the former although they could not subscribe to the latter.

III. Conclusions

182. The above discussion of the principles and rules of international law relating to "historic waters, including historic bays" would seem to justify a number of conclusions, provided that it is understood that some of these must necessarily be highly tentative and more in the nature of bases of discussion than results of an exhaustive investigation of the matter.

183. In the first place, while "historic bays" present the classic example of historic title to maritime areas, there seems to be no doubt that, in principle, a historic title may exist also to other waters than bays, such as straits or archipelagos, or in general to all those waters which can form part of the maritime domain of a State.

184. On the other hand, the widely held opinion that the régime of "historic waters" constitutes an exception

to the general rules of international law regarding the delimitation of the maritime domain of the State is debatable. The realistic view would seem to be not to relate "historic waters" to such rules as an exception or not an exception, but to consider the title to "historic waters" independently, on its own merits. As a consequence one should avoid, in discussing the theory of "historic waters", to base any proposed principles or rules on the alleged exceptional character of such waters.

185. In determining whether or not a title to "historic waters" exists, there are three factors which have to be taken into consideration, namely,

(i) The authority exercised over the area by the State claiming it as "historic waters";

(ii) The continuity of such exercise of authority;

(iii) The attitude of foreign States.

186. First, effective exercise of sovereignty over the area by the claiming State is a necessary requirement for title to the area as "historic waters" of that State. Secondly, such exercise of sovereignty must have continued during a considerable time so as to have developed into a usage. Thirdly, the attitude of foreign States to the activities of the claiming State in the area must have been such that it can be characterized as an attitude of general toleration. In this respect the same weight need not be given to the attitude of all States. Particularly, it would seem reasonable, in the case of a State (or States) claiming historic title to waters bordered by two or more States, to accord special importance to the attitude of the other riparian State (or States).

187. It is apparent from this description of the requirements which must be fulfilled for a title to "historic waters" to emerge, that the existence of such a title is to a large extent a matter of judgement. A large element of appreciation seems unavoidable in this matter, but it is possible that Government comments on the three factors listed above could yield a number of concrete examples which might serve as illustration and guidance.

188. The burden of proof of title to "historic waters" is on the State claiming such title, in the sense that, if the State is unable to prove to the satisfaction of whoever has to decide the matter that the requirements necessary for the title have been fulfilled, its claim to the title will be disallowed. In a dispute both parties will most probably allege facts in support of their respective contentions, and in accordance with general procedural rules each party has the burden of proof with respect to the facts on which he relies. It is therefore doubtful whether the general statement that the burden of proof is on the State claiming title to "historic waters", although widely accepted, is really useful as a definite criterion.

189. The legal status of "historic waters", i.e., the question whether they are to be considered as internal waters or as part of the territorial sea, would in principle depend on whether the sovereignty exercised in the particular case over the area by the claiming State and forming a basis for the claim, was sovereignty as over internal waters or sovereignty as over the territorial sea. It seems logical that the sovereignty to be acquired should be commensurate with the sovereignty actually exercised.

190. The idea of establishing a definitive list of "historic waters" in order to diminish the uncertainty which claims to such waters might cause has serious

drawbacks. An attempt to establish such a list might induce States to overstate both their claims and their opposition to the claims of other States, and so give rise to unnecessary disputes. Moreover, it would in any case be extremely difficult, not to say impossible, to arrive at a list which would be really final.

191. On the other hand, it would be desirable to establish a procedure for the obligatory settlement of disputes regarding claims to "historic waters". As a pattern for such a procedure one might use the relevant provisions of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas; in that case disputes would be referred to a special commission, unless the parties agreed on another method of peaceful settlement. Or one could

follow the optional protocols adopted at the 1958 Geneva Conference on the Law of the Sea and the 1961 Vienna Conference on Diplomatic Intercourse and Immunities; disputes would then lie within the compulsory jurisdiction of the International Court of Justice, subject to the possibility of having recourse also to a conciliation procedure or to arbitration.

192. For practical reasons, an agreement on the settlement of disputes might preferably be included in a protocol separate from any instrument containing substantive rules on "historic waters". In that way, States which would be unwilling to subscribe to a procedure for the compulsory settlement of disputes could adhere to the substantive rules agreed upon.