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# IS THE GULF OF TARANTO AN HISTORIC BAY?\*

Natalino Ronzitti\*\*

## I. INTRODUCTION

Italy's shores bordering the Ionian Sea, particularly the segment joining Cape Spartivento to Cape Santa Maria di Leuca, form a coastline which is deeply indented and cut into. The Gulf of Taranto is the major indentation along the Ionian coast. The line joining the two points of the entrance of the Gulf (Alice Point—Cape Santa Maria di Leuca) is approximately sixty nautical miles in length. At its mid-point, the line joining Alice Point to Cape Santa Maria di Leuca is approximately sixty-three nautical miles from the innermost low-water line of the Gulf of Taranto coast.

The Gulf of Taranto is a juridical bay because it meets the semi-circular test set up by Article 7(2) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.<sup>1</sup> Indeed, the waters embodied by the Gulf cover an area larger than that of the semi-circle whose diameter is the line Alice Point—Cape Santa Maria di Leuca (the line joining the mouth of the Gulf).

On April 26, 1977, Italy enacted a Decree causing straight baselines to be drawn along the coastline of the Italian Peninsula.<sup>2</sup> A straight baseline, about sixty nautical miles long, was drawn along the entrance of the Gulf of Taranto between Cape Santa Maria di Leuca and Alice Point. The 1977 Decree justified the drawing of such a line by proclaiming the Gulf of Taranto an historic bay.<sup>3</sup> The Decree, however, did not specify the grounds upon which the Gulf of Taranto was declared an historic bay.

Even the report of the Commission which drafted the 1977

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1. Geneva Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964) [hereinafter cited as 1958 Convention on the Territorial Sea].

2. The Italian Decree of April 26, 1977 on straight baselines is reprinted in II WESTERN EUROPE AND THE DEVELOPMENT OF THE LAW OF THE SEA 147-51 (F. Durante & W. Rodino eds. 1979).

3. See WESTERN EUROPE AND THE DEVELOPMENT OF THE LAW OF THE SEA, *supra* note 2, art. 1 at 147-48.

Decree fails to mention the titles which might justify the proclamation of the Gulf of Taranto as an historic bay. Instead, the report seems to imply that Italy has always exerted control over the Gulf by virtue of the Gulf's deep indentation into Italian territory.<sup>4</sup> Moreover, the Commission quotes previous examples of bays which have been enclosed since the Second World War, notwithstanding the fact that their mouths are wider than twenty-four nautical miles, the maximum length allowed for enclosing a juridical bay.<sup>5</sup>

The relevant passage of the report, which is still unpublished, is worth quoting. After recalling Article 7(6) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone,<sup>6</sup> the Commission proceeds as follows:

The provision [Article 7(6)] does not make it clear what is meant by historic bay; neither does an examination of legal literature or the present practice of States give sufficient elements for a definite conclusion.

It is true that the historic bay is defined in the literature of international law as one over which the coastal State can claim to have exercised exclusive rights over a considerable length of time; the classical examples usually cited are the Chaleur, Chesapeake and Delaware Bays, among others. However the examples are not exhaustive and it is evident that when the coasts of a bay belong to only one State, that State will normally have control over it.

The examples of enclosed bays with an entrance more than 24 nautical miles in width which must therefore be considered as "historic", are legion. Some examples are Peter the Great Bay, enclosed by the Soviet Union in 1957, the Gulf of Gabes enclosed by Tunisia, all the enormously wide-entranced bays on the River Plate enclosed by Argentina and Uruguay in 1966, all the Egyptian bays and gulfs closed by Egypt in 1951, all the bays of Gabon enclosed in 1966 and 1968, the bays of Guinea enclosed in 1964, and the Bay of Ungwana closed by Kenya in 1960, the Panama Gulf closed by Panama in 1956 etc.<sup>7</sup>

Clearly, the notion of an historic bay is highly controversial. In fact, at the Third United Nations Conference on the Law of the

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4. Report of the Commission on Straight Baselines (1977) (unpublished document of the Italian Government).

5. *Id.*

6. See 1958 Convention on the Territorial Sea, *supra* note 1, art. 7(6).

7. See Report of the Commission on Straight Baselines, *supra* note 4.

Sea the participating states were not able to reach a viable definition. However, it must be recognized that the notion of an historic bay is linked with a time element. It is a time element which is reflected by both the exercise of sovereign rights over the bay by the coastal state and the acquiescence, or at least the toleration of third states.<sup>8</sup> This premise based on time brings one closer to ascertaining whether the Gulf of Taranto meets with the criteria defining an historic bay. The following analysis illustrates this point.

Since the notion of an historic bay is linked with the element of time, one must first ascertain whether Italy has effectively exercised exclusive rights over the Gulf of Taranto, without challenge by third states, for a considerable period of time. The length of time proposed for this discussion (in relation to both the exercise of sovereignty by the coastal state and the practice of interested states) is that from the proclamation of the Kingdom of Italy in 1861, to the present day. This period will be divided into four segments: (1) from 1861 to the entry into force of the Italian Code of Navigation (1861-1942); (2) from 1942 to August 14, 1974, and the enactment of the Law amending Article 2 of the Italian Code of Navigation to extend the Italian territorial sea to twelve nautical miles (1942-1974); (3) from the 1974 Law amending the Italian Code of Navigation to the 1977 Decree which proclaimed the Gulf of Taranto an historic bay (1974-1977); and (4) from the entry into force of the 1977 Decree to the present (1977-1985).<sup>9</sup>

## II. THE GULF OF TARANTO LEGISLATIVE HISTORY

### A. 1861-1942

During this period Italy did not establish a consistent distance for measuring the breadth of the territorial sea. The extension of

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8. Goldie, *Historic Bays in International Law: An Impressionistic Overview* 11 SYR. J. INT'L L. & COM. 211 (1984).

9. It is unnecessary to trace the status of the Gulf of Taranto back before the proclamation of the Kingdom of Italy (1861), since the length of time that will be scrutinized is fairly extensive. It is worth noting, however, that at the time of the Kingdom of the Two Sicilies, the Kingdom's territorial sea was measured according to the custom of the cannon shot rule. A bay could be closed only if the body of water thus enclosed met the requisites of the cannon shot rule. No exception was made for the Gulf of Taranto, which was mentioned only as a mere geographical expression and not as an example of an historic bay. See C.M. MOSCHETTI, I IL CODICE MARITTIMO DEL 1871 DI MICHELE DE JORIO PER IL REGNO DI NAPOLI: INTRODUZIONE E TESTO ANNOTATI 229 (Giannini ed. 1979); C.M. MOSCHETTI II IL CODICE MARITTIMO DEL 1871 DI MICHELE DE JORIO PER IL REGNO DI NAPOLI: INTRODUZIONE E TESTO ANNOTATI 612 (Giannini ed. 1979).

the territorial sea varied according to the terms of legislation in effect at any given time. For example, Act No. 16 of 16 June 1912—which enacted rules on the passage of merchant ships through Italian coastal waters—fixed the breadth of the territorial sea at ten miles.<sup>10</sup> The Royal Decree of 6 August 1914 (No. 798) on the rights and duties of the neutral powers in wartime established a six mile territorial sea limit.<sup>11</sup> Curiously enough, customs laws of January 26, 1896, employed the kilometer and not the nautical mile as the unit for measuring the territorial sea. The limit was thus established at the kilometers equivalent of 10 nautical miles.<sup>12</sup>

None of the above laws quote the Gulf of Taranto as an historic bay. Even the Decree of 13 June 1915 (No. 899) set up no special proviso for the Gulf of Taranto.<sup>13</sup> For security reasons, the latter Decree prohibited, *inter alia*, anchoring and stopping of foreign merchant ships in the Italian territorial waters of the Ionian Sea, between Santa Maria di Leuca and Capo Passero.<sup>14</sup> The territorial sea, however, remained at ten miles according to the Law of 16 June 1912 (No. 612).<sup>15</sup> The same considerations apply to the Neutrality

10. See WESTERN EUROPE AND THE DEVELOPMENT OF THE LAW OF THE SEA, *supra* note 2, at 1. Cf. Pagliano, *Mare Territoriale e Transito Inoffensivo (A proposito di un recente disegno di legge)*, 5 RIVISTA DI DIRITTO INTERNAZIONALE [RIV. DIR. INT.] 551 (1910).

11. Sandiford, *Il Mare Territoriale Secondo il Diritto Positivo Italiano*, RIVISTA MARITTIMA, (Apr. 1927) at 89.

12. *Id.* at 94.

13. *Id.*

14. *Id.*

15. See SIOI-CNR, III LA PRASSI ITALIANA DI DIRITTO INTERNAZIONALE SECONDA SERIE (1887-1918) 1379-82 (1979). Article 4 of the June 13, 1915 Decree prohibited any nighttime fishing activities in the territorial waters of the Ionian Sea. 160 GAZ. UFF. ITAL. (June 26, 1915) at 3983. The Decree of Aug. 24, 1915 (No. 1312) added further restrictions forbidding navigation in the waters within the line between Cape Trionto and Torre Madonna dell'Alto. 220 GAZ. UFF. ITAL. (Sept. 4, 1915) at 5216. Whether during the day or night, fishing in the waters lying landward of the line joining Cape Trianto and Cape Santa Maria di Leuca was also prohibited. Both lines enclosed a body of water which fell far outside the limit of the territorial sea. However, the wording of the August 24, 1915 Decree does not make it clear whether the prohibitions applied only to Italian vessels or those of foreign nationals as well. However, the former view seems to be the correct view to be inferred from other Italian wartime Decrees. For instance, the Decree of December 23, 1915, (No. 1880) 6 GAZ. UFF. ITAL. (Jan. 10, 1916) at 127, extended the prohibition set up by the Decree of August 24, 1915 to the waters landward of the line Cape Trionto-Fiumara Assi. Since the local fisherman could be compensated for the loss they met in observing the prohibition, one can argue that it applied only to Italian vessels. In fact, the terms "ships flying any flag"—and not those of ships of any type as in Decree No. 1312—would have been employed, had the Italian law covered both Italian and foreign vessels. See Decree of July 11, 1915, (No. 1000) 168 GAZ.

Law of July 8, 1938.<sup>16</sup> That law also did not embody any particular rule for the Gulf of Taranto, notwithstanding the practice of neutral powers to extend the limit of their territorial waters to impede hostilities from occurring in proximity of their coasts.

Legal writers similarly did not include the Gulf of Taranto among historic bays. In the 1937 issue of the "Rivista del diritto della navigazione," R. Ago published an article on the limits of Italy's territorial sea.<sup>17</sup> He did not make any mention of the Gulf of Taranto.<sup>18</sup> Even G. Cansacchi and R. Sandiford, who devoted special attention to the problem of the delimitation of the territorial sea, failed to include the Gulf of Taranto among their list of recognized historic bays.<sup>19</sup> The same is true for earlier writers such as P. Fedozzi<sup>20</sup> or P. Fiore.<sup>21</sup> In the French edition of his manual, P. Fiore listed the Gulf of La Spezia as an historic bay, but he omitted the Gulf of Taranto.<sup>22</sup> The Gulf of Taranto is listed as an example of an historic bay only by the French writer De Cussy.<sup>23</sup>

It is worth noting that the problem of historic bays was dealt with at the 1930 Hague Conference for the Codification of International Law.<sup>24</sup> However, the Italian Government, unlike other delegations, did not make any proposal nor did it claim the territoriality of the Gulf of Taranto.<sup>25</sup>

UFF. ITAL. (July 6, 1915) at 4134, bearing on navigation through the Adriatic Sea and the blockade of the Adriatic coast.

16. See WESTERN EUROPE AND THE DEVELOPMENT OF THE LAW OF THE SEA, *supra* note 2, at 15.

17. Ago, *Sui Limiti del Mare Territoriale*, 3 RIVISTA DEL DIRITTO DELLA NAVIGAZIONE [RIV. DR. NAV.] 370 (1937).

18. *Id.*

19. Sandiford, *supra* note 11, at 79; G. CANSACCHI, L'OCCUPAZIONE DEI MARI COSTIERI, CRITICA DI UNA DOTTRINA DI DIRITTO INTERNAZIONALE 234 (1936).

20. P. FEDOZZI, I CORSO DI DIRITTO INTERNAZIONALE, INTRODUZIONE I 359 (1930).

21. P. FIORE, NUOVO DIRITTO INTERNAZIONALE PUBBLICO SECONDO I BISOGNI DELLA CIVILTÀ MODERNA 174-75 (1865).

22. P. FIORE, NOUVEAU DROIT INTERNATIONAL PUBLIC SUIVANT LES BESOINS DE LA CIVILISATION MODERNE 374 (P. Pradie-Foderé trans. 1868).

23. DE CUSSY, PHASES ET CAUSES CÉLÈBRES DU DROIT MARITIME DES NATIONS 97-98 (1856). On the other hand, the Gulf of Taranto is not listed as an historic bay by T. ORTOLAN, REGLES INTERNATIONALES ET DIPLOMATIE DE LA MER 151 (4th ed. 1864).

24. League of Nations: Acts of the Conference for the Codification of International Law: Territorial Waters, III Minutes of the Second Committee, League of Nations Doc. C. 351(b) M. 145(b) V (1930) [hereinafter cited as Hague Conference of 1930].

25. The Italian representative limited himself to proposing the appointment of a special committee to study the problem of historic bays. Hague Conference of 1930, *supra* note 24, at 112-13.

## B. 1942-1974

In 1942, Italy enacted her Code of Navigation, establishing a unitary limit for the territorial sea. According to Article 2, the territorial sea is fixed at six miles.<sup>26</sup> This is the same proviso which established that bays, the entrance to which is no more than twenty miles, were to be regarded as falling under Italian sovereignty.<sup>27</sup> The last line of Article 2 established that both the six and the twenty mile limit could be derogated for special purposes by other laws or regulations.<sup>28</sup> Since that time, however, the Gulf of Taranto has not been the object of any such particular law or regulation.

It is well known that the United Nations Secretariat prepared two studies on historic bays. The first was part of the material submitted to the First Conference on the Law of the Sea;<sup>29</sup> the second was commissioned by the Conference, after the delegations failed to reach a suitable definition of an historic bay.<sup>30</sup> Both studies contain a list of historic bays. Neither, however, includes the Gulf of Taranto.<sup>31</sup> This is perhaps due to the fact that no claim was ever made by the Italian government over the Gulf, nor was any proposal made to the U.N. Secretariat to include the Gulf of Taranto under the category of historic bays.

The legal doctrine of the period under review also makes no mention of the Gulf among the examples of historic bays. Many examples are found in the manuals of two learned Italian authors who devoted extensive attention to the problem of the Law of the Sea and to the question of historic waters: G. Balladore Pallieri and R. Quadri.<sup>32</sup> There are also two monographic studies: *The Regime of Bays in International Law* (1964) by the Dutch scholar L.J. Bouchez and *Il Regime Giuridico delle Baie e dei Golfi* (1970) by the Italian author F. Lauria. Obviously, these latter two books cite many

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26. Article 2 of the Italian Code of Navigation, *reprinted in* UNITED NATIONS LEGISLATIVE SERIES, LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA, ST/LEG/SER.B/6 (1957), at 162.

27. *Id.*

28. *Id.*

29. *See* Historic Bays: Memorandum by the Secretariat of the United Nations, U.N. Doc. A/CONF. 13/1, *reprinted in* I UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 3 (1958) [hereinafter cited as I UNCLOS OFFICIAL RECORDS (1958)].

30. *Juridical Regime of Historic Waters, Including Historic Bays*, U.N. Doc. A/CN.4/143, *reprinted in* [1962] 2 Y.B. INT'L L. COMM'N 1.

31. *See supra* notes 29-30.

32. G. BALLADORE PALLIERI, DIRITTO INTERNAZIONALE PUBBLICO 425 (8th ed. 1962); R. QUADRI, DIRITTO INTERNAZIONALE PUBBLICO 673 (5th ed. 1968).

examples of historic bays.<sup>33</sup> Neither, however, mentions the Gulf of Taranto.

C. 1974-1977

The Italian Law of 14 August 1974 (No. 359) amended Article 2 of the Code of Navigation in order to extend the breadth of the territorial sea to twelve miles and to proclaim Italian sovereignty over those gulfs or bays whose entrance was no more than twenty-four miles.<sup>34</sup> This law, however, does not embody any particular proclamation concerning the Gulf of Taranto. The Gulf of Taranto is mentioned by B. Conforti in the first edition of his manual.<sup>35</sup> Conforti also rejects the territoriality of the Gulf, and concedes that it might be closed only under the principle of reciprocity.<sup>36</sup> This latter principle refers to states, such as Libya, which have resorted to enclosing bays without having a valid title.<sup>37</sup>

D. 1977-1985

As previously stated, the 1977 Italian Decree proclaimed the Gulf of Taranto as an historic bay.<sup>38</sup> The following elements of state practice support the Italian claim. First, after the enactment of Decree No. 816, Italy gave due publicity to the new baseline system, including the enclosure of the Gulf of Taranto. A chart on which the baselines were shown, as well as the Decree, were notified to the states members of the international community. Besides this, every port authority of the Mediterranean was duly informed by the Ministry of Merchant Navy of the new delimitation of the Italian territorial sea. No one challenged the enclosure of the Gulf of Taranto. Further evidence is this statement by the Minister of Defense before the Italian Parliament in 1982: "[t]he 1977 Italian decision to consider as internal waters the waters of the Gulf of Taranto has neither been challenged or questioned by any State."<sup>39</sup>

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33. See L.J. BOUCHEZ, *THE REGIME OF BAYS IN INTERNATIONAL LAW* (1964); F. LAURIA, *IL REGIME GIURIDICO DELLE BAIE E DEI GOLFI* (1970).

34. See *WESTERN EUROPE AND THE DEVELOPMENT OF THE LAW OF THE SEA*, *supra* note 2, at 115.

35. See B. CONFORTI, *APPUNTI DELLE LEZIONI DI DIRITTO INTERNAZIONALE* 219-20 (1976).

36. *Id.*

37. *Id.*

38. See *supra* note 3 and accompanying text.

39. See *Atti Parlamentari, Camera dei Deputati, VII Legislatura—Discussioni—Seduta del 5 Marzo 1982*, No. 474 RESOCONTO STENOGRAFICO 25 (1982). The statement by Italy's Defense Minister was delivered at the time of the Italian Parliament debate over the intrusion of a Soviet submarine into the Gulf of Taranto. See Ronzitti, *Sommerngibbi non Identificati, Pretese Baie Storiche e Contromisure dello Stato Costiero*, 66 *RIVISTA DI DIRITTO INTERNAZIONALE [RIV. DIR. INT.]* 5 (1983).



Second, on August 24, 1977, Italy and Greece concluded an agreement for the delimitation of the continental shelf.<sup>40</sup> Regarding apportionment, the agreement applies the median line principle. Since every point of the line must be equidistant from the nearest points on the baseline from which the breadth of the territorial sea is measured, the median line between Italy and Greece was drawn by taking into account the new baseline along the Ionian coast.

Third, on February 24, 1982, a Soviet submarine intruded into the Gulf of Taranto. A similar intrusion took place on August 30 of the same year. The Italian Navy tried to intercept the submarine and Italy protested to the Soviet Union. The Soviet response, however, did not challenge the Italian claim over the Gulf of Taranto. Rather, the Soviets only claimed that the intruders had not been Soviet vessels.<sup>41</sup>

Fourth, in 1981, Lord Kenneth asked whether the United Kingdom or NATO recognized the Gulf of Taranto "as Italian internal or historic waters."<sup>42</sup> In his reply, the Foreign Secretary, Lord Carrington, stated as follows: "Italy claims the Gulf of Taranto as internal waters. This is not consistent with our interpretation of the 1958 Geneva Convention on the Territorial Sea. NATO does not take a position on the territorial sea limits of its members."<sup>43</sup> No protest, however, was conveyed by the United Kingdom to Italy, nor did the United Kingdom challenge in any other way the enclosure of the Gulf of Taranto.

### III. AN INTERIM EVALUATION OF THE ITALIAN CLAIM

An historical evaluation and assessment of state practice leads to the following interim conclusion. The enclosure of the Gulf of Taranto as an historic bay has met a considerable degree of acquiescence by third states. This is particularly true if we compare the Gulf of Taranto with other recent enclosures such as that of the Gulf of Sirte, which raised protest from many states and was challenged twice by the U.S. Navy.<sup>44</sup>

In effect, Italy began to claim sovereign rights over the Gulf of Taranto only after the entry into force of the 1977 Decree. Before

40. See U.S. DEPT. OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, *LIMITS IN THE SEAS*, No. 96 (1982) [hereinafter cited as *LIMITS IN THE SEAS*].

41. Both incidents are discussed at Ronzitti, *supra* note 39.

42. 424 PARL. DEB. H.L. (5th ser.) 368 (1981).

43. *Id.*

44. See Francioni, *The Gulf of Sirte Incident (U.S. v. Libya) and International Law*, 5 *ITALIAN Y.B. INT'L L.* 85, 99 (1980-81); Spinnato, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 *OCEAN DEV. & INT'L L.* 65 (1983). See also *infra* text accompanying note 66.

this date it is not possible to trace any significant sign of Italian sovereignty over the Gulf. The same is true for legal writers, since no one, with the single exception of the French author De Cussy,<sup>45</sup> regarded the Gulf as an historic bay. It is worth pointing out, however, that shortly before the enactment of the 1977 Decree, Italy had amended the 1942 Code of Navigation by extending the outer limit of its territorial waters and had proclaimed Italian sovereignty over those bays whose entrances were no more than twenty-four miles in length.

It has been rightly pointed out that the 1974 Law amending the Code of Navigation excludes, by implication, the territoriality of the Gulf.<sup>46</sup> Had the 1974 Law held that the Gulf was an historic bay, Italy would still have not made any such proclamation for another three years. Legal writers who have commented on the 1977 Decree (with the exception of M. Giuliano)<sup>47</sup> hold that the Gulf of Taranto cannot be classified as an historic bay.<sup>48</sup> On the basis of the foregoing, therefore, must one conclude that the enclosure of the Gulf of Taranto is unlawful?

#### IV. RECENT DEVELOPMENTS IN STATE PRACTICE

Before addressing this assertion, it must be ascertained whether the enclosure under review can be justified under a different theory. In the first place, there must be an examination of whether the norm on historic bays has changed. More specifically, there must be regard to recent challenges concerning the need for coastal states to exercise exclusive rights over a long period of time in order to qualify a bay as "historic."

According to one view, since the entry into force of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone,<sup>49</sup> practice demonstrates how states have enclosed bays without undue thought to proving the existence of historic roots for the titles

45. See DE CUSSY, *supra* note 23, at 94-98.

46. Adam, *Un Nuovo Provvedimento in Materia di Linee di Base del Mare Territoriale Italiano*, 62 RIV. DIR. INT. 479 (1978).

47. Giuliano, *Quali Sono i Veri Limiti delle Acque territoriali*, L'UNITA (Sept. 13, 1982) at 4. The Gulf is also considered an historic bay by Fontana, *Le Linee di Base del Mare Territoriale Italiano*, 111 RIVISTA MARITTIMA 78-79 (1978); Bastianelli & Francalanci, *Il Diritto Internazionale del Mare e la Delimitazione della Piattaforma Continentale Italiana*, AGENDA NAUTICA 11, 18 (1980). The latter do not give a clear indication of the historic titles upon which the Italian claim is based.

48. See, e.g., B. CONFORTI, *LEZIONI DI DIRITTO INTERNAZIONALE* 193 (2d ed. 1982); Fusillo, 3 ITALIAN Y.B. INT'L L. 570, 574-75 (1977); Adam, *supra* note 46, at 479-80; L. MIGLIORINO, *FONDI MARINI ED ARMI DI DISTRUZIONE DI MASSA* 68 (1980); Francioni, *supra* note 44, at 99.

49. See 1958 Convention on the Territorial Sea, *supra* note 1.

claimed.<sup>50</sup> These states have justified their enclosures by underlining economic and defense interests.<sup>51</sup> In other words, according to this theory, state practice has transformed the norm on historic bays, so that their existence is no longer tied to the exercise of exclusive rights by the coastal states over a long period of time. The application of this theory to the Gulf of Taranto has led one Italian legal writer to the following conclusions: "Whilst the classification of the Gulf of Taranto as a historic bay cannot be considered as lawful on the basis of the trends prevailing when the Geneva Convention was adopted, nevertheless it appears to form part of the current development in practice."<sup>52</sup>

This theory, suggesting that the notion of an historic bay embodied by Article 7(6) of the Geneva Convention has undergone a radical change, is faulty on two counts. In the first place, Article 10(6) of the United Nations Convention on the Law of the Sea<sup>53</sup> is drafted using the identical wording as Article 7(6) of the 1958 Geneva Convention.<sup>54</sup> Both provisions fail to define the notion of an historic bay. However, it must not be overlooked that when Article 7(6) of the 1958 Geneva Convention was drafted, the drafters had in mind the traditional notion of an historic bay.<sup>55</sup> Had the drafters intended a different meaning for the expression "historic bay" than the one prevalent in 1958, they would certainly have made it clear; they would have made the content of Article 10(6) different. In fact, the opinions expressed at the Third Conference on the Law of the Sea were so varied on the subject of historic bays that no agreement over a definition was possible.<sup>56</sup> Nonetheless the requisite of prolonged exercise of exclusive rights by the territorial sovereign was always present in the proposals put forward for the definition of an historic bay, albeit some states did underline the elements

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50. See, e.g., T. KOBAYASHI, *THE ANGLO-NORWEGIAN FISHERIES CASE OF 1951 AND THE CHANGING LAW OF THE TERRITORIAL SEA* 18-19, 32, 57-58 (Univ. Florida Monographs 1965).

51. See T. KOBAYASHI, *supra* note 50.

52. Fusillo, *supra* note 48, at 575. For a discussion of the theory to which the customary norm on historic bays has been changed, see T. KOBAYASHI, *supra* note 50.

53. See Third United Nations Convention on the Law of the Sea, art. 10(6), *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261, 1272 (1982) [hereinafter cited as 1982 Convention].

54. See 1958 Convention on the Territorial Sea, *supra* note 1, art. 7(6).

55. This may be inferred from the two studies on historic bays drafted by the United Nations Secretary General, *supra* notes 29-30.

56. See M. Nordquist, *A Textual History and Commentary on the Third United Nations Conference on the Law of the Sea, Territorial Sea and Contiguous Zone Draft Articles 72* (1980) (unpublished dissertation U. Va. Sch. L.).

of defense of the coastal state as a justification for the territoriality of their bays.<sup>57</sup>

In the second place, although state practice immediately preceding and following the 1958 Geneva Convention shows that numerous states did not "mince words" when claiming the territoriality of a bay, it must be remembered that their behaviour raised protests from third states. For example, on July 21, 1957, the Soviet Union established, by Decree, the enclosure of the Bay of Peter the Great.<sup>58</sup> The Soviet Decree caused the United States, Japan, the United Kingdom, and Sweden to protest.<sup>59</sup> Some of these states pointed out that the Soviet Union could not claim historic title and, furthermore, that Soviet arguments based on economic and defense requirements could not form a valid title for claiming the territoriality of the Bay.<sup>60</sup>

Similarly, in 1961 Uruguay and Argentina enclosed the estuary of the River Plate.<sup>61</sup> The United Kingdom and the United States protested, claiming among other things that the enclosure could not be justified by Article 7 of the 1958 Geneva Convention.<sup>62</sup> In 1973 Libya enclosed the Gulf of Sirte.<sup>63</sup> Among the protesting States were the United States and Italy.<sup>64</sup> As is widely known, the United States did not merely send a note of protest,<sup>65</sup> but passed through the Gulf with a naval squadron. And, in August 1981, the United States even carried out military exercises in the waters claimed by Libya, with the purpose of demonstrating that the Libyan claims were without legal ground.<sup>66</sup> Italy also challenged the Libyan enclosure on the occasion of the delimitation of the continental shelf between Malta and Libya.<sup>67</sup> Italy, before the International Court of Justice, said that she was "unable to accept" Libya's claims over the Gulf of Sirte.<sup>68</sup>

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57. See c. 2/Blue Paper No. 1 (24 Mar. 1975) reprinted in IV THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DOCUMENTS 121 (Platzöder ed. 1983) [hereinafter cited as IV Platzöder]; c. 2/Blue Paper No. 3/ Rev. 1 (9 Apr. 1975) reprinted in *id.* at 125.

58. L. J. BOUCHEZ, *supra* note 33, at 224-26; Whiteman, IV DIG. INT'L L. 250-58 (1965).

59. See L.J. BOUCHEZ, *supra* note 35, at 225-26; Whiteman, *supra* note 58, at 251-58.

60. See Whiteman, *supra* note 58.

61. See L.J. BOUCHEZ, *supra* note 33, at 165.

62. *Id.* at 165.

63. See A.W. ROVINE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 293-94 (1974).

64. *Id.*

65. *Id.*

66. During the exercises, two Libyan aircraft were shot down. For comments on the incident see Francioni, *supra* note 44, at 85; Spinnato, *supra* note 44, at 65.

67. Case Concerning the Continental Shelf (Libya v. Malta), Doc. CR 84/1, at 43.

68. See *id.* For the Italian protest after the Gulf of Sirte enclosure, see the statement

### V. THE THEORY OF VITAL BAYS

Unconvincing, too, is the theory that a new norm of customary international law has come into existence regarding historic bays beside that embodied in both Article 7(6) of the 1958 Convention<sup>69</sup> and Article 10(6) of the United Nations Convention on the Law of the Sea.<sup>70</sup> This new norm, it is claimed, admits the lawfulness of the enclosure of a bay where the coastal state can claim particular economic and defense interests.<sup>71</sup> If we are to accept this theory (better known as the "theory of vital bays"<sup>72</sup>) the closure of the Gulf of Taranto would be justified, since strategic needs are far from indifferent here, due to the presence in the Gulf of one of Italy's most important naval bases. Nonetheless, the vital bay theory has absolutely no legal ground in international law, as the following considerations will confirm.

The doctrine of vital bays is not in any way new, and was not formulated by states born from the process of decolonization during the 1960's, as it has been suggested.<sup>73</sup> It was first stated by Captain Storni in 1922, on the occasion of the 31st Conference of the International Law Association.<sup>74</sup> Storni suggested that a state could claim the territoriality of a bay in the following two cases: (a) when there was "un usage continu et séculaire" or (b) "dans les cas où les précédents n'existeraient pas . . . [the occupation of a bay derives from] une nécessité ineluctable."<sup>75</sup> Among the possible necessities mentioned by Storni were "les nécessités de défense."<sup>76</sup> Storni's idea was taken up by Portugal at the time of the 1930 Hague Conference on the Codification of International Law.<sup>77</sup> The Portuguese representative pointed out that "if certain States have essential needs . . . those needs are as worthy of respect as usage itself, or even more so."<sup>78</sup>

Nonetheless, the doctrine of vital bays did not meet with sup-

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of Mr. Bensi, Undersecretary for Foreign Affairs, before the Italian Parliament on July 8, 1974. He recalled all the representations made by the Italian Government at the time of the enclosure. Statement of Mr. Bensi, 2 ITALIAN Y.B. INT'L L. 422-23 (1976).

69. See 1958 Convention on the Territorial Sea, *supra* note 1, art. 7(6).

70. 1982 Convention, *supra* note 53, art. 10(6).

71. See Francioni, *supra* note 44, at 98-100.

72. *Id.* at 98.

73. See II INTERNATIONAL LAW ASSOCIATION: REPORT OF THE 31ST CONFERENCE 95 (Buenos Aires 1922).

74. *Id.*

75. *Id.*

76. *Id.*

77. See Juridical Regime of Historic Waters, *supra* note 29, at 20.

78. *Id.* at 20, para. 18.

port in the decisions of the international tribunals. As long ago as 1917, the Central American Court of Justice, in rendering a decision on the status of the Gulf of Fonseca, confirmed that it was necessary to examine the characteristics of the bay "from the threefold point of view of history, geography and the vital interests of the surrounding States."<sup>79</sup> Therefore, although the Court mentioned the "vital" interests of the state, it did not omit consideration of historic titles. Likewise, in the 1951 *Fisheries Case* between Norway and the United Kingdom, the International Court of Justice concluded that Norway's interests had to be taken into account. In the *Fisheries Case*, these interests were not identified with defense but with economic necessities.<sup>80</sup> The Court, however, also underlined how "the reality and importance" of these interests were "clearly evidenced by a *long usage*."<sup>81</sup>

Writers on the subject have made similar observations. In point of fact, as Y.Z. Blum rightly observes:

the so-called 'vital interests' of the coastal State, taken in isolation, do not appear to have been recognized in the past as a sufficient ground for the acquisition of an historic title, and were relied upon only *in conjunction* with all the other considerations which, through their combination, warrant the inference of an international acquiescence.<sup>82</sup>

Blum's observations are confirmed by recent practice of states in the enclosure of bays or gulfs with an entrance exceeding twenty-four nautical miles, as well as by what transpired from the Third Conference on the Law of the Sea. For example, when Libya enclosed the Gulf of Sirte she claimed that it was "crucial to the security of the Libyan Arab Republic."<sup>83</sup> Nonetheless, this Mediterranean state did not fail to underline that "through history and without any dispute, the Libyan Arab Republic has exercised its sovereignty over the Gulf."<sup>84</sup>

Although the Third Conference on the Law of the Sea con-

79. *Judicial Decisions Involving Questions of International Law: The Republic of El Salvador v. The Republic of Nicaragua* (Central American Court of Justice 1917), 11 AM. J. INT'L L. 874, 700 (1917).

80. *Fisheries Case* (U.K. v. Nor.) 1951 I.C.J. 116, 133 (Judgment of Dec. 18, 1951).

81. *Id.*

82. Y.Z. BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* 260 (1965).

83. UNITED NATIONS LEGISLATIVE SERIES, NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, Doc. No. ST/LEG/SER.B/18, at 26 (1976) [hereinafter cited as UNITED NATIONAL LEGISLATIVE SERIES (1976)].

84. *Id.* See Rousseau, *Chronique des Faits Internationaux*, 78 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R. G. DR. INT. P.] 1096, 1177-78 (1974).

cluded by repeating Article 7(6) of the 1958 Geneva Convention,<sup>85</sup> it does emerge from the works that no autonomous proposal was made regarding the institution of vital bays. The Columbian proposal on historic bays gives full consideration to the traditional doctrine, anchored as it is to the prolonged exercise of rights by the coastal states, and the acquiescence of third states, without ever referring to vital interests.<sup>86</sup> Whenever reference was made to "vital interests" within the working committee of the Third Conference (whether for defense or economic purposes), such interests were never considered in isolation from exclusive rights having been exercised for "a long" or a "considerable period of time."<sup>87</sup> In other words, the vital interests of coastal states—such as defense or economic motives—can in fact be the basis of a claim to exercise exclusive rights. Only, however, if this exercise has been for "a long" time, and meets with the acquiescence of third states, does the title come into existence.

#### VI. DRAWING STRAIGHT BASELINES IN JURIDICAL BAYS

There remains a third way of determining whether the enclosure of the Gulf of Taranto is lawful. It consists of examining whether the closing line can be considered a segment of a straight baseline drawn along the whole coastline of the Ionian Sea, under Article 4 of the 1958 Geneva Convention.<sup>88</sup> In order to do this, it is first necessary to ascertain whether in juridical bays (such as the Gulf of Taranto) with an entrance exceeding twenty-four nautical miles, the coastal state is allowed only to draw a straight baseline within the bay, according to Article 7(5), or whether it can choose to draw a longer straight baseline, under Article 4. If the answer is the latter, it will be necessary to ask whether the closing line of the Gulf meets the requisites set forth by Article 4.

In order to answer the first question, Articles 4 and 7 must be read together, because *vis-à-vis* Article 4, Article 7 is *lex specialis* entitling the coastal state to draw a straight baseline, even if the criteria set forth by Article 4(1) are not met. In those places where

85. See 1958 Convention on the Territorial Sea, *supra* note 1, art. 7(6); (1982 Convention, *supra* note 53, art. 1066).

86. Draft Articles Concerning the Territorial Sea: Bays the Coasts of Which Belong to a Single State, Historic Bays or Historic Waters, U.N. Doc. A/CONF. 62/c. 2/L.9, reprinted in V. THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL DOCUMENTS 202 (1976) [hereinafter cited as V UNCLOS III OFFICIAL RECORDS (1976)].

87. See IV Platzöder, *supra* note 57, at 121, 125.

88. See 1958 Convention on the Territorial Sea, *supra* note 1, art. 4.

the coast is flat—that is, where it is not deeply indented or cut into—the coastal state is entitled to enclose a bay if its entrance is not more than twenty-four nautical miles across, and the bay meets the semi-circle test. The coastal state is not only entitled to draw a straight baseline, although the bay penetrates a flat coastline, it is also entitled to draw the line without meeting the requirements established in Article 4(2).

If the inlet should happen to be a juridical bay, in that it meets the semi-circle test, but has an entrance exceeding twenty-four nautical miles, Article 7 embodies another special proviso *vis-à-vis* Article 4.<sup>89</sup> The coastal state may draw a straight baseline of twenty-four nautical miles in length within the bay, although it penetrates a flat coastline and the straight baseline does not meet the requirements of Article 4(2). Article 7, however, does not set forth that a coastal state is necessarily required to observe the specifications outlined herein if it wishes to draw a straight baseline. Even when the inlet is a juridical bay, the state can draw a straight baseline according to the criteria established in Article 4(2), if the inlet penetrates a coast deeply indented and cut into. If this were not so, the exception embodied in Article 7(6), according to which the provisions set forth for legal bays would not apply where a straight baseline is drawn in accordance with the system established by Article 4, would not have any practical meaning.

It is clear that a coastal state with a coastline which is deeply indented and cut into will prefer to apply Article 4 rather than Article 7 if the juridical bay has an entrance exceeding twenty-four nautical miles. In point of fact, by applying Article 4 the state can close the whole mouth in such a way that the enclosure takes the form of a segment of the longer straight baseline which is drawn along the coastline. This choice, however, does require a price to be paid: if a straight baseline is drawn within the bay under Article 7, the coastal state is free to adopt a straight baseline of twenty-four nautical miles, even when the closing line does not meet the conditions laid down in Article 4(2). Furthermore, the waters of the bay lying landward of the baseline will be subject to the usual regime of internal waters.<sup>90</sup> On the other hand, if the state intends

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89. *Id.* art. 7.

90. Article 7(4) sets forth that the waters within the straight baseline drawn across a bay "shall be considered as internal waters." *Id.* art. 7(4). Since this proviso does not contain any reservation (it is not said that art. 5(2) must be applied), the waters within the bay are "genuine" internal waters, where the right of innocent passage is no longer in force. See L.J. BOUCHEZ, *supra* note 33, at 109-10.



to close the whole bay, the straight baseline will have to meet the requirements set forth by Article 4(2). In this case Article 5(2) will also apply, requiring the coastal state to grant the right of innocent passage in those internal waters which formerly were subject to either the regime of territorial waters or that of the high sea.

The interpretation of the relationship between Articles 4 and 7 of the 1958 Geneva Convention on the Territorial Sea suggested here is supported by the opinion of a learned authority<sup>91</sup> and is confirmed by the Convention, as well as by state practice. It must not be overlooked, on the subject of the *travaux préparatoires*, what the legal expert of the Secretariat of the Geneva Conference, Professor François, explicitly stated to be the object of the exception embodied in Article 7(4) (later Article 7(6)) on straight baselines:

It covered [stated François] the possibility that certain coasts to which the straight baseline system might be applied contained bays; in that case the straight baseline would have to be drawn in such a way as to include the entire bay in the area of internal waters. In short, the International Law Commission has considered that, should a straight baseline be drawn covering the coast of the bay, the *special rules* relating to bays would no longer be applicable.<sup>92</sup>

This statement by Professor François was approved by Denmark,<sup>93</sup> and an amendment whereby the exception on historic bays was to be maintained and the second exception to Article 7 (concerning cases where the straight baseline system is adopted) was to be deleted, was withdrawn by the United Kingdom.<sup>94</sup>

Regarding state practice, one must recall the instances of enclosing juridical bays with entrances wider than twenty-four nautical miles, according to the straight baseline system, which were carried out after the entry into force of the Convention on the Territorial Sea. Madagascar has closed the Bay of Antongil with a 25.9 mile long line.<sup>95</sup> Portugal has drawn a line 31.25 miles long from Cabo Espichel and Cabo de Sines to enclose the inlet into which the Sado River flows.<sup>96</sup> This could be a juridical bay if the waters

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91. Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 INT'L & COMP. L.Q. 73, 78-85 (1959).

92. U.N. Doc. A/CONF. 13/39, reprinted in III UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 147, para. 1 (1958) [hereinafter cited as III UNCLOS OFFICIAL RECORDS (1958)].

93. *Id.* at 147, para. 2.

94. *Id.* at 147, para. 3.

95. LIMITS IN THE SEAS, *supra* note 40, No. 15 (1970).

96. *Id.*

of the Sado estuary are included.<sup>97</sup> The conduct of the Australian Government is also illuminating. In a statement delivered on October 31, 1967, regarding policy over the enclosure of Australian bays, Mr. Bowen, Commonwealth Attorney-General, stated as follows:

The Convention [the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone] authorizes the drawing of straight baselines up to 24 miles in length across bays that meet the criteria specified in the Convention, and the Government has decided to apply this principle wherever relevant, around the coasts of Australia and of the Territories. Three deep indentations around the Australian coast—Shark Bay, St. Vincent Gulf and Spencer Gulf—all of which are “bays” under the criteria specified in the Convention would not be completely enclosed by baselines 24 miles in length. Shark Bay, at least, is probably already under Australian sovereignty as an “historic” bay. But in any event the Convention authorizes the drawing of straight baselines exceeding 24 miles in length, where a coastline is deeply indented or cut into, provided that no appreciable departure from the general direction of the coast is involved. Straight baselines will accordingly be drawn across the entrances to Shark Bay and the two South Australian Gulfs.<sup>98</sup>

#### VII. THE GULF OF TARANTO CLOSING LINE AS A SEGMENT OF THE STRAIGHT BASELINE DRAWN ALONG THE IONIAN COAST

Once it has been established that a state is entitled to enclose a juridical bay under Article 4, providing it penetrates a coast that is deeply indented and cut into, it must be ascertained whether the closing line of the Gulf of Taranto conforms to the criteria set forth in this proviso. It is important as well to remember that the line enclosing the Gulf of Taranto can be regarded as a segment of the longer straight baseline which is about 154 nautical miles long and which covers a deeply indented coast with six segments.

It is beyond all doubt that three of these segments (Alice Point—Mouth of the River Neto; Mouth of the River Neto—Northern Cape Colonna; Southern Cape Colonna—Cape Cimiti), which are all short, do meet the prescriptions of the 1958 Geneva Convention. Clearly, they do not depart from the general direction of the coast, as a glance at the charts will show. The same can be

97. LIMITS IN THE SEAS, *supra* note 40, No. 27 (1970).

98. Mr. Bowen's statement is quoted by Edeson, *The Validity of Australia's Possible Maritime Historic Claims in International Law*, 48 AUSTL. L. J. 295, 297 (1974).

said for the segment from the Allaro Mouth to 37 56' .75—16 05' .45 (near Cape Spartivento), although the straight baseline in this instance is rather longer than the others. This author is of the opinion that the Cape Rizzuto—Stilaro Mouth (right bank) segment, which closes the Gulf of Squillace, does not depart to any appreciable extent from the general direction of the coast and encloses a relatively small body of water. In short, this Gulf has been closed according to the 1958 Geneva Convention, and is recognized even by those who expressed grave doubts as to the conformity of the Geneva Convention to the system of straight baselines adopted by Italy under Decree No. 816 (1977).<sup>99</sup> The problem arises over the segment closing the Gulf of Taranto, which is about 60 miles long, and which joins the two extremities of the Gulf with a diagonal line. This enclosure subjects a considerable body of water to the regime of "internal waters," although it does recede on the western side.

It must not be overlooked that Article 4(2) of the Geneva Convention sets forth two criteria which must be met when drawing a straight baseline or a segment: (a) the baseline "must not depart to any appreciable extent from the general direction of the coast;" and (b) "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters."<sup>100</sup> Criterion (a), which is in agreement with that established by the International Court of Justice in the *Fisheries Case*,<sup>101</sup> does not set forth precise limits regarding the length of baselines.<sup>102</sup> Rather, it is important because it states that the baseline should not depart to any appreciable extent from the general direction of the coast.<sup>103</sup> The Convention, however, does not indicate any meaning for the phrase "the general direction of the coast." It is, however, reasonable to suppose that "the general direction of the coast" in a gulf or bay is represented by the entrance points of the inlet, or by those promontories closest to the entrance. If this were not so, the Geneva Convention on the Territorial Sea would not have chosen "the general direction of the coast" as a stan-

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99. See Adam, *supra* note 48, at 474.

100. Article 4(4) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone enables the coastal state to take into account "in determining particular baselines, [the] economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage." 1958 Convention on the Territorial Sea, *supra* note 1, art. 4(4). However, it seems that this method of territorial sea delimitation is not particularly relevant for the Gulf of Taranto, even if one considers the interests based on fisheries exploitation. See Adam, *supra* note 46, at 486.

101. *Fisheries Case*, *supra* note 80.

102. See Fitzmaurice, *supra* note 91, at 77.

103. *Id.*

dard, but rather would have chosen sinuosity instead.<sup>104</sup> If our premise on the notion of "the general direction of the coast" is correct, it follows that the baseline for the Gulf of Taranto does not depart from "the general direction of the coast" to any appreciable extent. On the contrary, the baseline follows "the general direction of the coast" and even recedes inward towards the West. This is because instead of drawing a line from Cape Santa Maria di Leuca to Cape Colonna, Italy has drawn it from Cape Santa Maria di Leuca to Alice Point.

After the entry into force of the 1958 Geneva Convention,<sup>105</sup> state practice shows how the criterion prohibiting departure to any appreciable extent from "the general direction of the coast" has been interpreted much more freely than it has been by the Italian legislature. Suffice it to mention a few examples regarding the enclosure of gulfs which can be classified as neither juridical bays nor claimed as historic bays by the coastal states. Apart from the rather peculiar case of Guinea, which drew a straight baseline of 120 nautical miles,<sup>106</sup> there are many other precedents. When Ireland set forth her system of straight baselines, under the 1929 Maritime Jurisdiction Act,<sup>107</sup> she drew two segments exceeding twenty-four nautical miles in length. These closed the Bay of Cork (24.25 miles) and the Bay of Durgavan (25.20 miles).<sup>108</sup> In 1967, Mauritania drew a straight baseline of eighty-nine nautical miles, enclosing the Banc d'Arguin.<sup>109</sup> At its furthest point the baseline is 34.2 miles off the coast. In 1968, Venezuela enclosed the Gulf of the Orinoco River by a baseline of 98.9 nautical miles.<sup>110</sup> Similarly, Haiti enclosed the Gulf of Gonave, which has an entrance of ninety-five nautical miles. The central point of this latter closing line is about forty nautical miles from the coast.<sup>111</sup> Finally, in 1972, Iceland drew a system of straight baselines with segments which in some points diverge quite clearly from the general direction of the coastline. An example is

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104. See generally, T. GIHL, *The Baseline of the Territorial Sea*, in SCANDINAVIAN STUDIES IN LAW 121 (1967); Cf. D.H.N. Johnson who writes that baselines drawn across well-defined bays must be presumed to "follow the general direction of the coast." Johnson, *The Anglo-Norwegian Fisheries Case*, 1 INT'L & COMP. L.Q. 168 (1952).

105. See 1958 Convention on the Territorial Sea, *supra* note 1.

106. See LIMITS IN THE SEAS, *supra* note 40, No. 40 (1972).

107. LIMITS IN THE SEAS, *supra* note 40, No. 37 (1970).

108. *Id.*

109. LIMITS IN THE SEAS, *supra* note 40, No. 8 (1970).

110. LIMITS IN THE SEAS, *supra* note 40, No. 21 (1970).

111. LIMITS IN THE SEAS, *supra* note 40, No. 31 (1970).

the line joining Geirfuglasker and Eldeyardrangur, which is 70.30 nautical miles.<sup>112</sup>

The second criterion which a straight baseline must meet sets forth that "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters."<sup>113</sup> This is a largely tautological criterion,<sup>114</sup> borrowed from the judgment of the International Court of Justice in the *Fisheries Case*<sup>115</sup> and repeated word for word by Article 7(3) of the United Nations Convention on the Law of the Sea.<sup>116</sup> Although this criterion agrees with the former in restricting the freedom of the coastal state, it is not easy to give it a precise significant meaning. In point of fact, if the waters lie within the baselines, they are, by definition, internal waters.

Two points are raised by the second criterion embodied in Article 4(2). These two points are similar to those on which the rule on the enclosure of juridical bays is grounded.<sup>117</sup> The first circumstance is connected with the appurtenance of the waters within the baseline with the land domain. This is a purely geographical consideration, proven by the fact that landward waters are lying within the general direction of the coast. The general direction of the coast in the Gulf of Taranto is determined by an ideal line from Cape Santa Maria di Leuca to Cape Colonna. Therefore, since a segment enclosing the bay has been drawn from Cape Santa Maria di Leuca to Alice Point (which falls within the western side, as has already been observed), there can be no doubt that the body of waters within the baseline are lying within the general direction of the coast.

The second circumstance concerns the reasonableness of the enclosure. This must be assessed in relation to both the change in the regime of the waters which takes place because of enclosure, and to the interests of the coastal state and third states. In the first place, the navigation interests of third states are to be considered. The importance of the internal waters of the Gulf of Taranto as a highway of international communication is nil. This

112. LIMITS IN THE SEAS, *supra* note 40, No. 34 (1974).

113. 1958 Convention on the Territorial Sea, *supra* note 1, art. 4(2).

114. See, e.g., Nordquist, *supra* note 56, at 43.

115. Fisheries Case, *supra* note 80, at 133.

116. 1982 Convention, *supra* note 53, art. 7(3).

117. See Evensen, *The Anglo-Norwegian Fisheries Case and Its Legal Consequences*, 46 AM. J. INT'L L. 609, 622 (1952); Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-1954: Points of Substantive Law—I: Maritime Law*, 31 BRIT. Y.B. INT'L L. 406-08 (1954); cf. McDougal & Burke, *THE PUBLIC ORDER OF THE OCEANS* 333-36 (1962); Edeson, *Australian Bays*, 4 AUSTL. Y.B. INT'L L. 49 (1968-69).

is due to the fact that shipping coming from the Sicilian Canal and bound for the Adriatic or the Aegean Sea (and vice versa) does not have to cross it—entry into the waters of the Gulf would only waste time. Nevertheless, should it be deemed necessary, or even only preferable to enter the Gulf, the regime of innocent passage would apply.

Second, the interests of third states, which in this case are scarcely noticeable, should be weighed against those of the coastal state, which are much more substantial. The most important is the necessity of defense, more so than economic considerations.<sup>118</sup> The former made it impossible to delay the enclosure of the Gulf. For example, military exercises outside territorial waters but in proximity of the coast could represent an opportunity for planning strategies in the event of armed conflict. The simple entry and stoppage of foreign war vessels, whether ships or submarines, could enable an accurate assessment of coastal defense, and even the placing of military devices. Unless the coastal state can take measures to preclude any such activity, its safety is in peril. It is beyond all doubt that the enclosure of the Gulf of Taranto has the object of ensuring Italian defense. One only has to remember that one of the largest naval bases vital for Italian defense, the strategy of the NATO southern flank, and Italy's military commitments under the treaty which binds Italy to guarantee Malta's neutrality,<sup>119</sup> lies within this bay. Furthermore, the shelter offered by the Ionian coast, could enable foreign warships or submarines to loiter in the entrance of the Gulf interfering with Italian peacetime military exercises.

### VIII. CONCLUSION

Whereas the characterization of the Gulf of Taranto as an historic bay under Decree No. 816 (1977) is open to contest, it is beyond all doubt that the baseline enclosing the entrance to this bay is in compliance with Article 4 of the 1958 Geneva Convention on the Territorial Sea.<sup>120</sup> It follows that the waters within the

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118. As a matter of fact, Italy may acquire exclusive rights over fisheries by the proclamation of an EEZ off the Ionian coast without enclosing the Gulf of Taranto with a system of straight baselines.

119. See the exchange of notes between Italy and Malta of September 15, 1980 which is discussed in, Ronzitti, *Malta's Permanent Neutrality*, 5 ITALIAN Y.B. INT'L L. 171 (1980-81); Ronzitti, *Lo Scambio di Note Tra Italia e Malta del 15 Settembre 1980 e i Problemi di Diritto Internazionale Sollevati Dagli Aspetti Militari del Sistema di Garanzia della Neutralità Maltese*, in SCRITTI IN MEMORIA DI DOMENICA BARILLARO 471 (1982).

120. See 1958 Convention on the Territorial Sea, *supra* note 1, art. 4.

baseline are internal waters, where the right of innocent passage must be granted according to Article 5(2) of the 1958 Geneva Convention.<sup>121</sup> This regime applies to the waters of the Gulf that were high seas before the enclosure, as well as to those which had the *status* of territorial waters before the entry into force of Decree No. 816 (1977). Since previous to this the baseline of the Gulf was the low-water mark, this means that in practice the whole body of the waters of the Gulf is subject to the regime of innocent passage.

While innocent passage can be exercised, overflying the Gulf's super-adjacent waters is not permitted. In fact, Article 5(2) of the 1958 Geneva Convention<sup>122</sup> mentions the right of innocent passage in relation only to waters which before the drawing of straight baselines had the status of territorial or internal waters. Therefore, as far as the overflight regime is concerned, the status of the waters of the Gulf of Taranto is equated to that of territorial waters *in toto*.

Although the closing line of the Gulf of Taranto can be justified under Article 4 of the 1958 Geneva Convention,<sup>123</sup> there is nothing to impede the straight baseline being lawful under a different theory. That theory is the "historic bays doctrine," provided that the process which is at present underway lasts long enough to give birth to an historic title. The 1977 Presidential Decree<sup>124</sup> may be regarded as the starting point of such a process which will reach its conclusion only when Italy has exercised exclusive rights over the Gulf of Taranto without protests and with the acquiescence of third states.

Finally, practice shows that Italy's exercise of sovereignty over the Gulf of Taranto has continued without interruption. Italy asserted its exclusive rights at the time of the Soviet submarine intrusion. No one, until now, has challenged the Italian claim, not even the United Kingdom, since Lord Carrington's reply before the House of Lords is only a parliamentary statement and cannot be regarded as a true act of protest. Moreover, the new straight baseline was accepted by Greece at the time of the 1977 Italo-Greek Treaty on the delimitation of the Continental shelf between the two countries.<sup>125</sup>

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121. *See id.* art. 5(2).

122. *Id.*

123. *Id.* art. 4.

124. *See supra* note 2 and accompanying text.

125. *Id.*