NEW CRITICISM ON THE GULF OF TARANTO CLOSING LINE: A RESTATEMENT OF A DIFFERENT VIEW

Natalino Ronzitti*

The legal nature of the Gulf of Taranto and the lawfulness of its enclosure by Italy is still attracting considerable attention among international law scholars. My position on the Gulf's closing line was made quite clear in an article published in the *Syracuse Journal of International Law and Commerce* last year.[1] It can be summed up as follows: a) At present, Italy cannot claim the Gulf of Taranto is an historic bay. However, the 1977 Italian proclamation[2] affirming her rights over those waters is to be seen as a starting point of a process that might lead to the birth of an historic title, provided the proper conditions are met; b) Although Italy cannot claim any historic right over the Gulf of Taranto, its enclosure can be justified under Article 4 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone[3] and the closing line of the Gulf can be seen as a segment of a longer baseline drawn along the Ionian coast that joins Cape Spartivento to Cape Santa Maria di Leuca. This conclusion is reached after having pointed out the theory of special relations between Article 4 and Article 7 of the Geneva Convention and having applied it to the Gulf of Taranto, an indentation that meets the semi-circle test, notwithstanding the fact that the distance between its entrance points far exceeds twenty-four miles.[4]

While international scholars, with the single but notable exception of Mario Giuliano,[5] agree in negating present validity to

---

*Professor of International Law and Director, "D. Anzilotti" Institute of International Law, University of Pisa. Prof. Ronzitti is also a member of the Syracuse Journal of International Law and Commerce Board of Advisors.

1. Ronzitti, *Is the Gulf of Taranto an Historic Bay,?* 11 SYR. J. INT'L L. & COM. 275 (1984)

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

3. Convention on the Territorial Sea and the Contiguous Zone, 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].

4. *Id.* arts. 4 and 7.

5. Giuliano, *Quali sono i veri limiti delle acque territoriali*, L'UNITA' (Sept. 13, 1982) at 4. However, Giuliano does not take a definite stance on the legal nature of the Gulf of Taranto in the second edition of his manual of international law, written with Scovazzi and Treves. *See* M. GIULIANO, T. SCOVAZZI, T. TREVES, 2 DIRITTO INTERNAZIONALE (GLI ASPETTI

Italy's historic claim, the second proposition submitted above has raised criticism. It has been attacked on two different lines of reasoning: 1) The Ionian coast is not a coastline "deeply indented and cut into" under the conditions spelled out by Article 4(1) of the 1958 Geneva Convention. Consequently, the method of straight baselines cannot be applied; 2) It is not possible to read Articles 4 and 7 of the Geneva Convention[6] together and arrive at the conclusion, as I do, that a State has the choice either to draw a twenty-four mile straight baseline within the bay under Article 7(5), or to close the entire bay under Article 4, even if all the other conditions set forth by Article 4 are present.[7]

The first criticism is raised by T. Scovazzi in a forthcoming essay on straight baselines.[8] He points out that on the Ionian coast there are the Gulf of Taranto and four other indentations. The Gulf of Taranto is an indentation whose characterization as *deep* under the criterion embodied in Article 4 of the 1958 Geneva Convention[9] is doubtful. The other indentations are less deep than the Gulf of Taranto; therefore, they are not deep at all, according to the criterion set forth by Article 4.[10] Consequently, if one accepts Scovazzi's premise, the conclusion is that the Italian baseline joining Cape Spartivento to Cape Santa di Leuca is not in keeping with Article 4 of the 1958 Geneva Convention.[11]

The present writer is ready to concede that the Ionian coast is not a coastline deeply indented and cut into, if one only relies on the judgment of the ICJ in the *Fisheries Case*[12] and the drafting history of Article 4.[13] As a matter fact, the 1951 Fisheries judgment relates to the northern part of Norway, featuring an irregularity which, though not unique, can however be traced out only in a few places in the world. The "travaux preparatoires" for Article 4 show that the expression "deeply indented and cut into" was retained notwithstanding its repetitive meaning,[14] probably to signify that

---

GIURIDICI DELLA COESISTENZA DEGLI STATI) 156 (2d ed. 1983).

6. *See* 1958 Convention on the Territorial Sea, *supra* note 3, at arts. 4 and 7.

7. *Id.* arts. 4 and 7(5).

8. LA LINEA DI BASE DEL MARE TERRITORITALE, Parte I (T. Scovazzi ed. 1986).

9. *See* 1958 Convention on the Territorial Sea, *supra* note 3, at art. 4.

10. *Id.*

11. *Id.*

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

13. *See* 1958 Convention on the Territorial Sea, *supra* note 3, at art. 4.

14. In tabling an amendment to the ILC Draft on Straight Baselines the United States pointed out the following: "The International Law Commission phrase 'deeply indented or cut into' is a *repetitive* and relative one, without legal meaning." *See* U.N. Doc. A/CONF.13/C.1/l.86 *reprinted in* 3 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OF-

the drawing of straight baselines could only be possible in a coastline featuring great irregularities such as that of Norway.

However, this strict interpretation—which goes so far as to draw in geometrical terms the depth of coastal indentation notwithstanding that the 1958 Convention set out a geometrical reference only for bays[15]—is neither the only possible reading of Article 4[16] nor the one most in keeping with the test of subsequent practice.

The authority of D.P. O'Connell can be quoted first of all. The learned writer, after having reviewed state practice, came to the conclusion, that "(t)he notion of 'deeply indented' has thus been liberalized . . . ." and that "it is evident from this practice that the attempt to restrict the straight baseline technique to coasts which are at least as complicated as that of Norway has failed."[17]

In his recent work on straight baselines, V. Prescott admits that "there is no reliable test on which all would agree to determine whether a coast is deeply indented and cut into or simply indented and cut into . . .,"[18] even though he mentions Italy as a possible example of a state that has drawn straight baselines along a coast which is not deeply indented and cut into.[19] On the other hand, I find quite erroneous a criterion measuring each single indentation, stating that they are not deep enough, and concluding that a straight baseline cannot be drawn. This is so for two reasons: first, because Article 4 does not indicate any geometrical reference; secondly, because the coastline must be appreciated in its entirety without breaking it up according to each single feature. In effect, Article 4 begins by stating: "In localities where the coastline is deeply indented and cut into . . . ."[20]

A strict interpretation of the expression "deeply indented and cut into" cannot resist the test of subsequent practice that Article

---

FICIAL RECORDS, 235 (1958) (emphasis supplied).

15. *See* for instance R. Hodgson and L. Alexander, *Toward an Objective Analysis of Special Circumstances*, LAW OF THE SEA INSTITUTE OCCASIONAL PAPER No. 13, 27 (1973); SCOVAZZI, *supra* note 8. These authors point out that to be deep, under the meaning of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, an indentation should feature a proportion of 5 to 3, with 5 being the distance between the innermost low-water line and the baseline and 3 being the length of the baseline.

16. *See* 1958 Convention on the Territorial Sea, *supra* note 3, at art. 4

17. D.P. O'CONNELL, 1 THE INTERNATIONAL LAW OF THE SEA, 214 (1982). *See* also R.R. CHURCHILL AND A.V. LOWE, THE LAW OF THE SEA, 30 (1983).

18. *See* V. Prescott, *Straight Baselines: Theory and Practice* 6 (1958) (paper presented to the Nineteenth Annual Conference on The Law of the Sea Institute).

19. *Id.* at 7.

20. *See* 1958 Convention on the Territorial Sea, *supra* note 3, at art. 4.

31(3)(a) of the Vienna Convention on the Law of Treaties mentions among the general rules of treaty interpretation.[21] A number of countries have drawn straight baselines along coasts that are in no way comparable with those of Norway.[22] It is assumed that the drafters of Article 7 of the Montego Bay Convention had knowledge of this practice. However, they did not change the proviso on straight baselines, and the opening of Article 7 of the Montego Bay Convention[23] restates Article 4 of the 1958 Convention verbatim.[24] Had the states wished to rule out the practice relating to liberal interpretation of Article 4, they would have done so by taking recourse to a geometrical device for measuring the indentation of the coastline.

Dr. Gayl Westerman, for her part, asserts that the Ionian coast "is neither deeply indented nor cut into, at least not in the sense represented by coasts, such as those of Sweden and Finland to which the drafters intended Article 4 to apply."[25] However, she ends by wondering if such strict interpretation is still in keeping with prevailing practice nowadays.[26]

Nor do I attach much importance to the argument according to which the Italian government, having claimed the historic nature of the Gulf of Taranto, has implicitly excluded that its enclosure could be justified under Article 4 of the 1958 Geneva Convention.[27] International law avoids the legal technicalities of domestic systems. It is not unimaginable that an act of will exerts an effect under a rule different from that chosen by the sovereign as the one most proper for yielding legal consequences, provided, obviously, that these are in keeping with the State's will. In the case in point,

---

21. Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/CONF.39/27, *reprinted in* 63 AM. J. INT'L L. 875 (1969), 8 I.L.M. 679 (1969), art. 31.

22. The following is a non-exhaustive list of countries that have drawn straight baselines along coasts that in whole or in part are not 'deeply indented and cut into' as is Norway's: Albania (VII NEW DIRECTIONS IN THE LAW OF THE SEA 1, M. Nordquist, S. Houston, K.R. Simmonds eds. 1980); Spain (*Id.* at 62); Burma (U.S. DEPT OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, LIMITS IN THE SEAS, No. 14, 1970); Cuba (*Id.*, No. 76, 1977); Guinea (*Id.*, No. 40, 1972); Haiti (*Id.*, No. 51, 1973); Iceland (*Id.*, No. 34 1970); Ireland (*Id.*, No. 3, 1970); Madagascar (*Id.*, No. 15, 1970); Mauritania (*Id.*, No. 8, 1970); Senegal (*Id.*, No. 54, 1973). For the practice subsequent to the adoption of the Montego Bay Convention *see* Vietnam (*Id.*, No. 99 1983) and Colombia (*Id.*, No. 103, 1985).

23. United Nations Convention on the Law of the Sea, art. 7, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982).

24. *See* 1958 Convention on the Territorial Sea, *supra* note 3, at art. 4

25. Westerman, *The Juridical Status of the Gulf of Taranto: A Brief Reply*, 11 SYR. J. INT'L L. & COM. 297, 305 (1984).

26. *Id.* at 306.

27. *See* Scovazzi, *supra* note 8.

what matters, is Italy's determination to enclose a particular body of waters, and it does not make any difference, from the standpoint of the international community, whether this result is attained under Article 4 of the 1958 Geneva Convention,[28] since the bay does not meet the requirements set forth by the last paragraph of Article 7.[29] As an instance of an enclosure proclaimed under a given rule, but also justified on a different legal ground, the closing line of the Gulf of Gabes can be quoted. Tunisia proclaimed the indentation to be an historic bay; later, however, it justified the enclosure under the doctrine of straight baselines.[30]

The second criticism outlined above is voiced by Dr. Westerman,[31] who questions my interpretation of Articles 4 and 7 of the 1958 Geneva Convention.[32] Dr. Westerman, starts by defining a juridical bay as an indentation which meets the semi-circle test and has natural entrance points that are not more than twenty-four miles distant from each other.[33] On the contrary, I also include in the concept of "bay proper" indentations that meet the semi-circle test even though they feature an entrance wider than twenty-four miles.[34] Since I assume that this nominalistic disagreement is not the decisive argument for a proper interpretation of the relations between Articles 4 and 7 of the 1958 Geneva Convention, I do not find it necessary to elaborate on this point.

In order to justify the enclosure of the Gulf of Taranto, I rely on a *lex generalis-lex specialis* interpretative criterion of Articles 4 and 7 of the 1958 Geneva Convention,[35] which brings me to the following conclusion: whenever an indentation that meets the semi-circle test, but whose entrance exceeds twenty-four miles, penetrates a coastline deeply indented and cut into (i.e., meeting Article 4 of the 1958 Geneva Convention[36] standard), the coastal state has the choice either of closing the bay by drawing a straight baseline along the coastline in which the bay lies (so that the bay

---

28. *See* 1958 Convention on the Territorial Sea, *supra* note 3, at art. 4.

29. *Id.* art. 7.

30. For the relevant practice see A. Gioia, *Tunisia's Claims Over Adjacent Seas and the Doctrine of "Historic Rights,"* 11 SYR. J. INT'L L. & COM. 327, 345 (1984).

31. Westerman, *supra* note 25, at 306-09.

32. *See* 1958 Convention on the Territorial Sea, *supra* note 3, at arts. 4 and 7.

33. Westerman, *supra* note 25, at 302-303.

34. For instance L.J. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW, 19 (1964) assumes the semi-circle test is the only criterion for determining whether an indentation is a bay in a legal sense. *See also* CHURCHILL and LOWE, *supra* note 17, at 31.

35. *See* 1958 Convention on the Territorial Sea, *supra* note 3, at arts. 4 and 7.

36. *Id.* at art. 4.

closing line would appear as a segment of the longer baseline drawn along the coast into which the bay penetrates), or of drawing a straight baseline not exceeding twenty-four miles within the bay (in the latter case it is assumed that the coastal state has not adopted a straight baseline system along the coast in which the bay is indented but is only willing to draw a closing line within the bay). To support my assertion, I rely, *inter alia*, on the last paragraph of Article 7 that states that the provisions regulating the enclosure of bays "shall not apply . . . in any case where the straight baseline system provided for in Article 4 is applied."[37] According to Dr. Westerman, the last paragraph of Article 7 was drafted having in mind "the possibility that certain coasts to which states might apply the straight baseline system of Article 4 would also contain bays." She continues, "[in] that case, the straight baseline would per force be drawn in such a way as to subsume the entire bay within the larger area of internal waters created under Article 4."[38] Since Dr. Westerman defines a bay as an indentation that meets the semi-circular test and which is no more than twenty-four miles wide at its entrance, the result is that the regime of this particular bay is governed by rules on straight baselines and not by those on bays. Should this premise be accepted, the consequence would be that Article 5(2)[39] must be applied and the right of innocent passage granted in those waters which had previously been subject to the regime of territorial waters or of high seas. Such an interpretation, however, would not only deprive Article 7(6)[40] of any practical meaning and makes it superfluous, since coastal states can always enclose bays that are not more than twenty-four miles wide at their entrance, but would also lead to an absurd result, i.e., the application of Article 5(2) to juridical bays. One can quote the authority of Sir Gerald Fitzmaurice, who can be assumed to properly interpret the *travaux preparatoires* of the 1958 Geneva Convention, having been one of its most distinguished drafters. In direct oppostion to Dr. Westerman's position, that learned writer states that the object of Article 7, paragraph 6, is to make clear that "where a general baseline system *is* justified because of the general configuration of the coast, baselines may legitimately be drawn across certain indentations, formations or curvatures that

37. *Id.* at art. 7.
38. Westerman, *supra* note 25, at 308.
39. *See* 1958 Convention on the Territorial Sea, *supra* note 3, at art. 5(2).
40. *Id.* at art. 7(6).

would *not* rank as bays."[41] The object of Article 7, paragraph 6, continues Sir Gerald, "is . . . also, of course, to make it clear by implication that the limit of twenty-four miles applicable to the closing line of a bay as such, does not apply where a longer line can be justified as part of a baseline system on a coast possessing the configuration warranting the use of such system."[42] A careful reading of the subsequent passage of his article warrants the conclusion that he was referring to bays whose entrance is wider than twenty-four miles.

> This paragraph [Article 7 (6)] is not entirely free from ambiguity, and could perhaps be read simply as meaning that the mere fact that a curvature or indentation is not actually a bay proper . . . does not prevent a baseline being drawn across it where the general configuration of the coast justifies it. If this were *all* the paragraph meant, then it could be maintained that when the formation *is* a bay proper, the twenty-four mile limit of closing line applies in all cases, on whatever kind of coast the bay is situated. This interpretation would, however, be difficult to reconcile with the generality of the phrase "The foregoing provisions" with which paragraph 6 opens, and which must include the one on the twenty-four mile limit. In short, where a baseline-justifying situation exists, it is governed by baseline principles: where such a situation does not exist, but there are nevertheless configurations that are bays according to the proper definition of that term, these are governed by the rules for bays.[43]

Having said this, I do not believe that my interpretation of the relations between Articles 4 and 7 of the 1958 Geneva Convention[44] makes Article 7, to quote Dr. Westerman's words, "completely superfluous,"[45] with the consequence that my analysis is inconsistent with the principle *ut res magis valear quam pereat.* This would happen if the application of Article 4 or of Article 7[46] entailed the same legal consequences. However, this is not the case in point. For if the coastal state is entitled to enclosed a bay under Article 7, the landward waters are internal waters in every respect and they are not subject to the regime of innocent passage. Should Article 4 be applied, the coastal State would be obliged to grant

---

41. Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 INT'L & COMP. L. Q. 73, 80 (1959).

42. *Id.*

43. *Id.* at 80-81.

44. *See* Geneva Convention on the Territorial Sea, *supra* note 3, arts. 4 and 7.

45. Westerman, *supra* note 25, at 309.

46. *See* Geneva Convention on the Territorial Sea, *supra* note 3, at arts. 4 and 7.

the right of innocent passage in those internal waters that were formerly subject to either the regime of territorial waters or to that of the high seas. In effect, Article 5(2),[47] as its location in the 1958 Geneva Convention suggests, is deemed to apply only to inland waters enclosed by a straight baseline drawn under Article 4 and not to those landward waters delimited by having recourse to Article 7.

47. *Id.* at art. 5(2).