

HISTORIC TITLES
IN
INTERNATIONAL LAW

by

YEHUDA Z. BLUM

M. JUR. (JERUS.), PH. D. (LOND.)

*Lecturer in International Law, Hebrew University of Jerusalem
Assistant Legal Adviser, Israel Ministry for Foreign Affairs
Member of the Israel Bar*

FOREWORD BY

D. H. N. JOHNSON

*Professor of International and Air Law
University of London*



MARTINUS NIJHOFF / THE HAGUE / 1965

ISBN 978-94-015-0201-6
DOI 10.1007/978-94-015-0699-1

ISBN 978-94-015-0699-1 (eBook)

Copyright, 1965, by Martinus Nijhoff, The Hague, Netherlands
Softcover reprint of the hardcover 1st edition 1965
All rights reserved, including the right to translate or to
reproduce this book or parts thereof in any form

Nations General Assembly was requested "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."¹

Following the adoption of this resolution, the Sixth Committee of the United Nations General Assembly, on December 4th, 1959, unanimously recommended to the General Assembly the adoption of a resolution which requested 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."² On December 7th, 1959, the General Assembly unanimously adopted this draft resolution.³

For the sake of completeness it must be added, however, that article 7 of the *Territorial Sea Convention*, in its entirety, refers solely to bays "the coasts of which belong to a single State."⁴ This introductory remark of the article raises an important problem, namely, the question whether an historic claim may be asserted in respect of a "multinational" bay, that is to say, a bay which is enclosed by the territories of more than one littoral State.

65. *Can multinational bays be claimed as historic bays?*

As to the "historicity" of bays which are enclosed by more than one littoral State, doctrine and practice alike seem, on the whole, to uphold the view that such bays are incapable of acquiring the status of historic bays and cannot be appropriated by the littoral States or any of them, irrespective of the width of their entrances or other geographic, economic or strategic considerations. Thus, the Swiss-Belgian writer Rivier stated as early as 1896:

Where there are several coastal States, the gulf is an open sea regardless of the width at the entrance.⁵

And Oppenheim seems to echo this view when he maintains that as a rule, all gulfs and bays enclosed by the land of more than one littoral State,

¹ *Ibid.*, p. 50.

² *United Nations, General Assembly, Official Records, 14th Session, 1959, Sixth Committee*, p. 241. For the text of the draft resolution see Document A/4333, para. 11.

³ *Resolution 1453 (XIV)*, adopted at the 847th plenary meeting, December 7th, 1959.

⁴ *Cmnd. 584 (1959)*, p. 21.

⁵ Rivier, *op. cit.*, pp. 154-155. Quoted after U.N. Doc. A/CONF. 13/1, p. 17.

however narrow their entrance may be, are non-territorial. They are parts of the open sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated.¹

To understand the reason why multinational bays are generally regarded as being incapable of acquiring the status of historic bays, it is as well to remember that one of the main motives usually advanced in support of an historic claim to a bay is that the bay in question "does not lead from the sea to the dominions of any foreign nation."² This argument was resorted to by the Second Court of Commissioners of Alabama Claims in the *Alleghanean* case, where the arbitral tribunal had to pronounce on the territorial status of Chesapeake Bay and found that it constituted United States internal waters. Amongst the reasons given by the tribunal for this finding was the fact that the bay

is entirely encompassed about by... [United States] territory.... It cannot become an international commercial highway; it is not and cannot be made a roadway from one nation to another.³

Thus, it becomes evident that one of the major considerations which permit a given bay to be turned into an historic bay is the fact that by its incorporation into the national domain of the littoral State no harm is done, or is likely to be done, to another State and that the rights of such a State are not affected thereby. It is, however, abundantly clear that these considerations do not hold good in those cases where the shores of a bay are possessed by more than one littoral State. In such cases it can hardly be maintained that the bay "is not and cannot be made a roadway from one nation to another." This seems to account to a very large extent for the fact that multinational bays have generally come to be regarded as parts of the open sea, except the marginal belt to which each of the littoral States is entitled in accordance with the general rules of international law.⁴ This consideration, which seems to

¹ Oppenheim, *op. cit.*, p. 508.

² See Attorney-General Randolph's opinion as regards the juridical status of Delaware Bay, in connection with the naval incident of 1793 between the British vessel *The Grange* and the French vessel *L'Embuscade*. (Moore, *Digest of International Law*, vol. I, 1906, pp. 735-739).

³ Moore, *International Arbitrations*, vol. IV, pp. 4332-4341, at p. 4339.

⁴ In some narrow bays the marginal belts of the various coastal States are likely to overlap. The solution in such cases would be usually an agreement between the parties concerned, failing which article 12, paragraph 1, of the *Territorial Sea Convention* provides that the territorial seas of the participants should not extend 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 States is measured. (*Cmd.* 584 (1959), p. 22). The paragraph adds, however, that these general provisions shall not apply "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." (*Ibid.*)

be implicit in all those cases where multinational bays are involved, was given explicit recognition in an arbitration case which arose as a consequence of the seizure in 1843 of the United States vessel *Washington* by a British vessel within the Bay of Fundy. Umpire Bates rejected the British contention, according to which the bay was British domain, and explained his decision, *inter alia*, by the fact that

one of the headlands of the Bay of Fundy is in the United States, and ships bound to Passaquamoddy must sail through a large space of it.¹

Commenting on this decision, Dana took the view that

the real ground [for this decision] was that one of the assumed headlands belonged to the United States and it was necessary to pass the headland in order to get to one of the ports of the United States.²

Fauchille appears to take the same view when he asserts that

la sentence arbitrale ... relative à la baie de Fundy a considéré que cette baie était une mer libre ... surtout parce que *ses côtes n'appartenaient pas tous au même Etat*.³

The only instance in which a claim to historic rights over a multinational bay seems to have been recognized by an international tribunal appears to be the *Gulf of Fonseca* case.⁴ As has already been pointed out above, this gulf is bounded by the territories of Nicaragua, Honduras and El Salvador.⁵ Its entrance is nineteen and a half miles wide. By a treaty concluded in 1914 between the United States of America and Nicaragua (the Bryan-Chamorro Treaty), the United States were granted for a period of 99 years certain rights in portions of Nicaraguan territory bordering on the Gulf of Fonseca, as well as rights concerning the construction of an inter-oceanic canal. The validity of this treaty was disputed by El Salvador which instituted proceedings against Nicaragua before the Central American Court of Justice. On behalf of El Salvador it was contended that Nicaragua was not entitled to grant any rights to the United States in the Gulf of Fonseca, since the Gulf constituted, on historical grounds, the common property of the three riparian countries.

In its judgment of March 9th, 1917, the Court upheld the contentions of El Salvador and unanimously held that the gulf was "a historic bay

¹ Moore, *International Arbitrations*, vol. IV, 1898, p. 4344.

² Quoted by Phillimore, *op. cit.*, vol. I, pp. 287-289.

³ Fauchille, *op. cit.*, vol. I, part II, p. 384. (Italics added).

⁴ Reported in 11 *AJIL* (1917), p. 674 *et seq.*

⁵ During the period from 1522 down to 1821 the gulf formed part of the royal patrimony of the Crown of Castille. From 1821 down to 1839 it was part of the Federal Republic of Central America. This Republic was dissolved in 1839 and the three successor States of Nicaragua, Honduras and El Salvador took its place.

possessed of the characteristics of a closed sea.”¹ The Court then proceeded to enumerate the considerations which led it to this conclusion and found, by a majority vote, that

the three riparian States of El Salvador, Honduras and Nicaragua are ... recognized as coöwners of [the gulf’s waters], except as to the littoral marine league which is the exclusive property of each.²

The *Gulf of Fonseca* case, however, rather than conforming with the rules of international law, seems to be a deviation from them. This apparently isolated case of the recognition of a multinational bay as an historic bay has come ever since under severe fire from doctrinal sources and, as far as can be ascertained, has not been followed since by any other tribunal. Gidel considers this decision as “une anomalie tout à fait notable dans le système logique des baies historiques.”³

More recently the question of the “historicity” of a multinational bay arose once more with regard to the Gulf of Aqaba, which has been claimed by the various Arab States as forming part of “regional Arab waters.” According to this view, the gulf in its entirety constitutes a “closed Arab gulf” and consequently its waters are to be regarded as “Arab territorial waters.”⁴ It has also been contended by Saudi Arabia that the gulf “is of the category of historical gulfs that fall outside the sphere of international law,”⁵ on the ground that it forms “the historical route to the holy places in Mecca. Pilgrims from different Muslim countries have been streaming through the Gulf, year after year, for fourteen centuries. Ever since, the Gulf has been an exclusively Arab route under Arab sovereignty.”⁶

The Gulf of Aqaba – with an approximately six-mile entrance – is about ninety-six miles long and its breadth at no point exceeds fifteen miles. The islands of Tiran and Sanafir, in the approach of the Gulf, reduce the navigable routes at the entrance of the gulf to two narrow passages of a few hundred yards each.⁷ In approximately 700 A.D. the

¹ 11 *AJIL* (1917), p. 716.

² *Ibid.*

³ Gidel, *op. cit.*, vol. III, p. 627. He also calls the judgment rendered in this case “un accident qui ne saurait en altérer la ligne.” (*Ibid.*)

⁴ See e.g. the official statement of the Saudi Arabian Government as published on March 17th, 1957, in the Mecca daily *Al-Bilad al-Saudiyah*, as cited in an article by Charles B. Selak Jr. on “A Consideration of the Legal Status of the Gulf of Aqaba,” 52 *AJIL* (1958), p. 660 *et seq.*, at p. 676.

⁵ *United Nations, General Assembly, Official Records, 12th Session, 1957, Plenary Meetings*, p. 233.

⁶ *Ibid.*

⁷ For the geographical and hydrographical details relating to the gulf, see *United Nations Conference on the Law of the Sea, Official Records*, vol. I, *Preparatory Documents*, U.N. Document A/CONF. 13/15, pp. 208–209.

gulf came under Arab domination as a result of the conquest of the entire area by the Arabs. In 1517 the Turks conquered the whole district surrounding the gulf and until the end of the First World War it formed an integral part of the Ottoman Empire. At present, the gulf washes the shores of four States: the United Arab Republic (a coastline of about 100 miles), Saudi Arabia (a coastline of about 100 miles), the Hashemite Kingdom of Jordan (a three-and-a-half-mile coastline) and Israel (a six-mile coastline). The first two States possess the shores overlooking the entrance of the gulf, while each of the latter two possesses a small coastal strip at the head of the gulf.

When the status of the gulf was discussed during the twelfth session of the United Nations General Assembly, the representative of Saudi Arabia, Mr. Shukairy, claimed that

the Gulf of Aqaba is a national inland waterway, subject to absolute Arab sovereignty. The geographical location of the Gulf is conclusive proof of its national character.... Thus, by its configuration the Gulf is in the nature of a *mare clausum* which does not belong to the class of international waterways. ... The Gulf is so narrow that the territorial areas of the littoral States are bound to overlap. ... The Gulf of Aqaba is of the category of historical gulfs that fall outside the sphere of international law. ... Israel ... has no right to any part of the Gulf. ... The area under Israel is nothing but military control without sovereignty whatsoever.¹

It is difficult to conceive how this last assertion, namely, that Israel has no sovereignty over any part of the gulf's coastline, but only military control – an assertion which in itself is at least dubious – can in any way advance the historic claim put forward by the Saudi Arabian delegate. Even without the presence of Israel, the gulf would still be enclosed by three different States. These States have, in fact, some important features in common, notably, that the majority of their subjects are of the Arab racial stock, speak the same language and adhere to the Moslem faith. These common features, however, do not appear to be of any *legal* relevance, since international law – being a law of *nations* and not of religious creeds, languages or races – recognizes as its subjects *States* and not religions, races or linguistic groups. Thus, it is difficult to follow the line of argument adopted by the Saudi Arabian representative when he stresses the allegedly strong historical link existing between

¹ *United Nations, General Assembly, Official Records, 12th Session, 1957, Plenary Meetings*, p. 233. (Italics added). A statement to the same effect was made by Mr. Shukairy in the Sixth Committee of the General Assembly at its 14th session. (See *United Nations, General Assembly, Official Records, 14th Session, 1959, Sixth Committee*, p. 227 *et seq.*). See also Mr. Shukairy's statement in the First Committee of the 1958 *United Nations Conference on the Law of the Sea, Official Records*, vol. III, p. 3.

Islam and the Gulf of Aqaba.¹ At the present stage of international law the Saudi Arabian claim is likely to strike one as an utter innovation, in support of which there do not seem to be any authorities. Thus, the term "Arab territorial waters" or any similar expression must be regarded as being devoid of any legal significance.

The only part of the Saudi Arabian delegate's statement which seems to rest on more traditional legal ground is the passage where it is claimed that, owing to the peculiar geographical configuration of the gulf, it does not belong to the class of international waterways, and that its narrowness causes rival national claims to overlap, thus eliminating the possibility of its being regarded as part of the high seas.

One of the main deficiencies inherent in this line of argument is, of course, the fact that the allegedly peculiar configuration of the gulf (namely, its narrow entrance which is dominated by two of the littoral States) does not lead the Saudi Arabian delegate to the conclusion that it is only those two littoral States that enjoy privileged rights at the entrance of the gulf. While Saudi Arabia is apparently willing to recognize the right of Jordan to innocent passage through the entrance of the gulf, she is denying the same right to Israel, which, like Jordan, possesses only a small coastal strip at the head of the gulf. The apparent contradiction in the rights suggested by Saudi Arabia for Jordan and Israel, respectively, cannot be explained away simply by the fact that the first happens to have a Moslem majority, while in the other the Moslems are the minority of the local population.

The assertion, according to which the legal status of a gulf is determined by the legal status which is presumed to prevail at its entrance, is equally fallacious. It is precisely the other way round: the juridical status of the gulf determines the rules governing the rights of passage through its entrance and the rights of the littoral State or States therein. If a given body of water is part of the open sea, then the strait linking this body of water with another part of the open sea cannot be blocked in time of peace² even if the waters within the strait constitute part of the

¹ Here again, there is considerable doubt whether the past history of the gulf does, in fact, bear out the assertions of Mr. Shukairy. According to Melamid, "due to the prevalence of strong northerly winds, the confined waters of the Gulf are very difficult to navigate by north-bound sailing vessels. As a result, the Gulf was rarely used by ships prior to the advent of steam navigation.... For the same reason, Moslem pilgrim sailing ships do not appear to have used the Gulf." (Melamid, "Legal Status of the Gulf of Aqaba," 53 *AJIL* (1959), p. 412).

² It is not intended here to go into the argument, according to which there is no peace at present between Israel and her neighbours, because the Armistice Agreements concluded between the Arab States and Israel do not deprive the parties of their belligerent rights. This argument does not seem to affect the juridical status of the gulf as such, which is the question with which we are concerned here.

littoral State's territorial sea.¹ This rule has now found express recognition in article 16, paragraph 4, of the *Territorial Sea Convention*, which provides that

there shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.²

However, this provision of the Convention is not an innovation of the Conference, but merely the restatement of a rule of law which had already been in force prior to the adoption of the Convention. Thus, Oppenheim maintains that a strait which connects two parts of the open sea cannot be blocked for innocent passage even if it is a territorial strait, i.e. when its width does not exceed twice the width of the marginal belt. He goes on to say that "it is irrelevant that the strait is not a necessary but only an alternative route between two parts of the high seas. It is sufficient that it has been a useful route for international maritime traffic."³

Thus, the most that can be achieved by putting forward an historic claim to the Gulf of Aqaba is to turn those parts of the gulf, which are outside the territorial sea of any of the littoral States, into the common property of *all* the coastal States, in accordance with the decision rendered in the *Gulf of Fonseca* case.⁴ However, for the reasons given above, such a course would not appear to be commendable at all. The mere fact of the overlapping in certain parts of the gulf of various

¹ See the *Corfu Channel* case, *ICJ Reports*, 1949, p. 28.

² *Cmd.* 584 (1959), p. 23. The adoption of article 16, paragraph 4, was vigorously opposed by the delegates of Saudi Arabia and the United Arab Republic (see *United Nations Conference on the Law of the Sea, Official Records*, vol. III, pp. 93-94; *ibid.*, vol. II, p. 65), who were well aware of the legal implications involved in the adoption of this paragraph.

According to Sørensen, "what was in everybody's mind, without being officially stated, was the Strait of Tiran at the entrance to the Gulf of Aqaba, giving access from the Red Sea to Israel's port of Eilat. A decision on the abstract question, which had been left open by ILC, would therefore also involve an expression of opinion as to the legality of Egyptian measures amounting to a blockade of this port. In this specific context, the vote became a test not only of attitudes toward the principle of free maritime communications but also of attitudes toward the Arab-Israel conflict. In committee, as well as in plenary, the more inclusive view, advocated by Israel, prevailed. An attempt was made in plenary to have a separate vote on the words describing straits of the Tiran type as distinct from straits between two parts of the high seas, but no majority could be mustered for a division of the vote. The whole rule, including the reference to straits of both types, was then adopted by a two-thirds majority." (Sørensen, *Law of the Sea, International Conciliation* No. 520, 1958, p. 236). See also to the same effect McDougal and Burke, *op. cit.*, pp. 211 and 440.

³ Oppenheim, *op. cit.*, p. 512. This rule has also found recognition in the judgment rendered by the International Court of Justice in the *Corfu Channel* case. (*ICJ Reports*, 1949, p. 28).

⁴ Cf. McDougal and Burke, *op. cit.*, p. 444, where the authors state that "one state or a group of states may not claim the waters of a bay or gulf to the exclusion of another bordering state."

national claims to marginal belts does not alter in the least the juridical status of the gulf. The general provisions for such an eventuality are to be found in article 12, paragraph 1, of the *Territorial Sea Convention*.¹

The correct legal position as regards the juridical status of the Gulf of Aqaba seems to have been stated in 1957 by the various leading maritime Powers of the world, when at the 11th session of the U.N. General Assembly they rallied to the concept that the gulf was an international waterway, by reason of its being possessed by more than one littoral State. The delegate of the Netherlands asserted that

inasmuch as the Gulf of Aqaba is bordered by four different States and has a width in excess of the three miles of territorial waters of the four littoral States on either side, it is, under the rules of international law, to be regarded as part of the open sea. ... The Straits of Tiran consequently are, in the legal sense, straits connecting two open seas, normally used for international navigation.²

Earlier in the debate the delegate of France had observed that, in the view of his Government,

the Gulf of Aqaba, by reason partly of its breadth and partly of the fact that its shores belong to four different States, constitutes international waters.³

The United Kingdom delegate associated himself with this view when he declared that "the Gulf of Aqaba is not only bounded at its narrow point of entry ... by two different countries, Egypt and Saudi Arabia, but contains at its head the ports of two further countries: Jordan and Israel."⁴ According to the United Kingdom delegate, this fact in itself suffices for putting the Gulf of Aqaba into a different category from those instances in which historic claims have been recognized in the past.⁵

On behalf of the United States of America Ambassador Cabot Lodge referred to a United States *aide-mémoire* to Israel of February 11th, 1957,⁶ in which it had been stated that

¹ For the text of this paragraph, see above, p. 270, n. 4; true, the article does not apply "where it is necessary, by reason of historic title..., to delimit the territorial seas of the two States in a way which is at variance with this provision." (*Ibid.*). A careful perusal of the article's wording would, however, indicate that it excludes from its scope merely those cases where historic claims have already been recognized. It surely is not meant to apply to those cases in which an historic claim is based on the difficulty of delimiting the territorial seas.

² *United Nations, General Assembly, Official Records, 11th session, 1957, Plenary Meetings*, p. 1288.

³ *Ibid.*, p. 1280.

⁴ *Ibid.*, p. 1284.

⁵ *Ibid.*

⁶ U.N. Doc. A/3563 of February 26th, 1957.

the United States believes that the Gulf comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto.¹

A similar view was taken up by the delegates of Italy,² Belgium,³ Sweden,⁴ Denmark⁵ and Canada.⁶

It is also worth mentioning in this connection that in the *Memorandum on Historic Bays* prepared by the United Nations Secretariat for the First Geneva Conference on the Law of the Sea, the Gulf of Aqaba does not appear among the bays which have been recognized as historic bays or are claimed as such.⁷ This ominous omission – following closely the debate in the United Nations General Assembly on the status of the Gulf of Aqaba – cannot be regarded as devoid of any meaning.

The International Law Commission has in the past declined to put forward any suggestions as to the “historicity” of gulfs surrounded by more than one littoral State on the ground that “the Commission has not sufficient data at its disposal concerning the number of cases involved or the regulations at present applicable to them.”⁸

Having regard to Resolution 1453 (XIV) adopted by the United Nations General Assembly on December 7th, 1959, in which it requested the International Law Commission “to undertake the study of the question of the juridical régime of historic waters, including historic bays,”⁹ it is to be expected that the Commission will have to concern itself with the problem whether or not multinational bays are capable of being turned into historic bays.¹⁰

¹ *United Nations, General Assembly, Official Records, 11th session, 1957, Plenary Meetings*, pp. 1277–1278.

² *Ibid.*, p. 1287.

³ *Ibid.*, p. 1296.

⁴ *Ibid.*, p. 1303.

⁵ *Ibid.*, p. 1303.

⁶ *Ibid.*, p. 1296.

⁷ See *United Nations Conference on the Law of the Sea, Official Records*, vol. I, *Preparatory Documents*, p. 1. See to the same effect Malek, “La théorie dites des “baies historiques,” 6 *Revue de Droit International pour le Moyen Orient* (1957), p. 100.

⁸ *ILC Yearbook*, 8th session, 1956, vol. II, p. 269.

⁹ *Resolution 1453 (XIV)*, adopted on December 7th, 1959.

¹⁰ Recent publications regarding the legal status of the Gulf of Aqaba include Bloomfield, *Egypt, Israel and the Gulf of Aqaba in International Law*, 1957; Selak, “A Consideration of the Legal Status of the Gulf of Aqaba,” 52 *AJIL* (1958), p. 660 *et seq.*; Gross, “The Geneva Conference on the Law of the Sea and the Right of Innocent Passage through the Gulf of Aqaba,” 53 *AJIL* (1959), p. 564 *et seq.*; Hartwig, “Der israelisch-ägyptische Streit um den Golf von Akaba,” 9 *Archiv des Völkerrechts* (1961–1962), p. 27 *et seq.*; Strohl, *op. cit.*, pp. 389–397. For a presentation of this case by an Egyptian writer see Hammad, “The Right of Passage in the Gulf of Aqaba,” 15 *Revue Egyptienne de Droit International* (1959), p. 118 *et seq.*

66. *The effects of territorial changes along the coast of a bay*

Owing to territorial changes occurring along the coast of a bay, it might well happen that a bay, which was formerly surrounded by a single State, becomes, as a result of such changes, enclosed by the territories of more than one coastal State (e.g. the Gulfs of Fonseca and Aqaba).

Conversely, there exists the possibility that a hitherto multinational bay is brought, as a result of territorial changes along its shores, under the sway of a single littoral State. Thus, the question arises how such changes are likely to affect the juridical status of a given bay.

The authorities available on this point are far from being plentiful. The reason for this dearth of learned authority seems to be the fact that during the last century or so – that is to say, since the crystallization of modern maritime international law – comparatively few instances of such changes have occurred. Thus, the arguments advanced on this point have a rather speculative character and the views expressed are of a purely tentative nature.

As far as the “splitting up” of a formerly “single-national” bay is concerned, the Gulf of Fonseca seems to provide an appropriate example. As will be recalled, this gulf was surrounded down to 1821 exclusively by the dependencies of the Spanish Crown, and in the period 1821–1839 by the Central American Federation. In 1839 this Federation was dissolved and the gulf has ever since been enclosed by three littoral States: Nicaragua, Honduras and El Salvador.

In its judgment relating to the juridical status of the gulf, the Central American Court of Justice held that the portions of water falling outside the marginal belts of the littoral States constituted the joint property of all three of them.¹ Thus, the Court seems – by implication – to have taken the view that the changes which had occurred along the coasts of the gulf did not affect its status at all, and, since the gulf formerly “belonged” to the State which possessed its shores in their entirety, the sole fact that that State was now replaced by a number of *States*, was no sufficient ground for altering the juridical status of the gulf. It also emerges from the Court’s judgment as a matter of course that none of the littoral States was entitled to deprive any of the other littoral States of its rights in the gulf, even though not all the littoral States might enjoy possession over the entry of the bay.²

¹ 11 *AJIL* (1917), p. 716.

² The entrance to the Gulf of Fonseca is possessed by Nicaragua and El Salvador, while Honduras owns a part of the coast inside the gulf.

The decision reached in the *Gulf of Fonseca* case has, however, met with severe criticism and is still regarded as a sort of anomaly in international law, which does not reflect the general rule. According to Selak,

the Gulf of Fonseca situation appears to be unique. Water areas surrounded by the territory of a single coastal State, and thus having the status of 'closed seas,' which subsequently, because of political changes resulting in the establishment of more than one state on their shores, become multinational in character, generally have come to be regarded as essentially parts of the high seas, regardless of the narrowness of their entrances.¹

The change of the character of such water areas from a closed sea into essentially high seas is, however, generally not brought about automatically through the territorial changes along the coast. As a rule, special treaty arrangements provide for the recognition of the new status of the maritime area in question. In this connection, Selak mentions the Black Sea as a case which aptly illustrates this point. From 1484 onwards – when the Turks completed the conquest of its entire littoral – until 1774 – when Russia secured a foothold on its southern coast – the Black Sea was a Turkish lake. By the Treaty of Kutchuk-Kainardji of 1774 Russia was not only recognized as a littoral State, but also obtained rights of navigation in the Black Sea and a right of passage through the Turkish Straits. Later developments culminated in the Montreux Convention of 1936 which provides for "freedom of transit and navigation in the Straits" without limit of time,² for all merchant vessels in time of peace.

Commenting on the significance of this Convention, Brüel observes that

the principle of freedom of navigation was proclaimed in the Montreux Convention as a principle of international law independent of the will of the parties.³

According to the same writer, the insistence on the freedom of navigation through such straits was necessary because

to apply the ordinary rules regarding national waters, territorial waters and the open sea to straits would be to confer upon the littoral state ... privileges in straits that would not seem compatible ... with the interests of sea-traffic in being able to use these waters as ways of communication independently and not subject to the discretion of the littoral state.... It would be all the more serious, as a great number of the commercially most important straits are navigable only in such a way that

¹ Selak, *loc. cit.*, p. 693.

² *League of Nations Treaty Series*, vol. 173, pp. 213-241, at p. 219.

³ Brüel, *International Straits*, 1947, vol. II, p. 425.

shipping is bound to pass through the territorial waters, in one or more places, of one or several littoral states.¹

As to the application of the above-mentioned principle to the Gulf of Aqaba, it would appear that ever since the dissolution of the Ottoman Empire and the emergence of more than one littoral State on the shores of the gulf, it has become an international waterway and its entrance – connecting as it does two parts of the open sea – cannot be blocked to the international maritime traffic on the ground that the navigable passage of the Strait of Tiran falls within the territorial sea of one or two of the littoral States. It also follows that the Palestine hostilities of 1948 and the establishment of the State of Israel in that year are immaterial facts from the point of view of the legal status of the gulf, as its juridical regime as an international waterway had already been determined some thirty years earlier and the succession of Israel to the former mandated territory of Palestine as one of the coastal States of the gulf in no way altered that regime.²

It is more difficult to speculate on the possible legal implications of territorial changes whereby a formerly multinational bay becomes surrounded by one State only. In fact, the general trend of the territorial changes that have taken place during the past 150 years has not been in this direction. The number of States has been steadily on the increase rather than on the decrease and year after year more new members have been seeking admission into the international community. On a purely academic basis two possible solutions suggest themselves:

(a) It may be argued that, since the waters of such a bay formerly constituted a part of the international maritime domain, no single State will be allowed to deprive the international community of this possession and to incorporate it into its own maritime domain. This principle has now also found expression in article 2 of the 1958 Geneva *Convention on the High Seas*, which stipulates that “the high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty.”³ Thus, it may be argued that the territorial changes along the shores cannot *eo ipso* alter the legal status of the water area and the littoral State will have to acquire an historic (adverse) title to these

¹ *Ibid.*, vol. I, p. 37.

² Cf. McDougal and Burke: “It would no doubt be argued,... that even if the claim to historic rights were justified the emergence of a new state bordering on the gulf altered the scope of authority normally associated with historic waters.” (McDougal and Burke, *op. cit.*, p. 444). See also *ibid.*, p. 440.

³ *Cmd.* 584 (1959), p. 27.

waters, in compliance with the requirements laid down for the establishment of such a title.

(b) On the other hand, it may validly be maintained that the coastal State – which now possesses the whole of the bay's littoral – ought not to be put in a worse position than any other nation possessing the coast of a bay in its entirety merely by virtue of the fact that its possession is of comparatively recent standing.

These two conflicting points of view do, in fact, represent different approaches to the problem of the relationship between purely national and international interests. Those favouring the hegemony of international law would in all probability subscribe to the first suggestion, while others, more preoccupied with the specific interests of the littoral State, might prefer the latter concept. No clear-cut answer to this question is attempted here. Suffice it to say that the possible clash of opinions on this point may be regarded as yet another illustration of the strong impact which interests reaching far beyond the purely legal sphere are likely to have on the process of shaping the juridical rules governing international life.

67. *Historic waters other than historic bays – Historic rights of delimitation*

Following the emergence of the theory of historic bays, the doctrine of historic waters began to be applied also to other water areas which seemed to fulfil the requirements similar to those on which the claims to historic bays had been founded.

Generally speaking, it may be said that the various claims to historic waters are, in fact, claims to an *historic right of delimiting* territorial waters in a manner which constitutes a departure from the normal method of delimitation.¹

¹ According to Johnson, "as regards the basic question of methods of delimiting territorial waters... three methods are theoretically possible...:

(a) The Norwegian method of using straight base lines connecting the headlands of bays and the outermost islands, islets and reefs, and of measuring the territorial sea from these base lines. ... This method may generally be described as the 'headland theory'....

(b) A method known as the *courbe tangente* or 'arcs of circles method'....

(c) A method, known as the *tracé parallèle*, which consists of drawing on the chart an exact replica of the coast-line so many miles out to sea from that coast-line." (See Johnson, "The Anglo-Norwegian Fisheries Case," 1 *ICLQ* (1952), p. 145, at pp. 151-152; italics in original). Commenting on the applicability of the various methods of delimitation, Johnson remarks that "the so-called *tracé parallèle* method, although theoretically feasible along a very straight coast-line, becomes progressively impracticable along a very indented coast-line such as that of northern Norway.... The arcs of circles method of delimiting the territorial sea is really the inverse of the process used by a ship to discover whether she is inside or outside territorial waters.... Any person on the coast, wishing to draw the limit of territorial waters on a chart, draws arcs of four miles radius [assuming the breadth of the territorial sea to be