

# OPPENHEIM'S INTERNATIONAL LAW

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*Volume I*

## PEACE

PARTS 2 TO 4

*Edited by*

**SIR ROBERT JENNINGS QC**

*President of the International Court of Justice;  
Sometime Whewell Professor of International Law in the University of Cambridge;  
Hon. Bencher of Lincoln's Inn; Former President, Institute of International Law*

*and*

**SIR ARTHUR WATTS KCMG QC**

*Sometime Legal Adviser to the Foreign and Commonwealth Office; of Gray's Inn,  
Barrister-at-Law; Associate Member, Institute of International Law*



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extensive waters where the national vital interest has been the dominant factor is the Canadian claim to Arctic Waters, promulgated in the Canadian Arctic Waters Pollution Prevention Act 1970.<sup>2</sup>

§ 209 **Pluristatal bays** Bays and gulfs that are bordered by two or more states present problems different from those bordered by only one state; and this is so whether they are also historic bays or juridical bays. For in the pluristatal bay there may well be problems of access, as for example where one state controls the entrance points of the bay and another, or others, have ports situated on the interior of the bay.<sup>1</sup> Neither the 1958 Geneva Convention, nor the Reports of the International Law Commission, nor yet again the 1962 Convention on the Law of the Sea,<sup>2</sup> afford much help on this matter. Former editions of the present volume took the view that, 'all gulfs and bays enclosed by the land of more than one littoral State, 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'.<sup>3</sup> But it would seem anomalous if the coastal states of a pluristatal bay should thus be supposed jointly to enjoy markedly inferior powers of jurisdiction and control over the waters of their bay than might be enjoyed by the littoral

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including historic bays. See Drago's dissenting opinion in the *North Atlantic Coast Fisheries Arbitration* (1910) when he added to historic titles the circumstance that, 'particular circumstances such as geographical configuration, immemorial usage and above all, the requirements of self-defence, justify such a pretension'; (1910) RIAA, xi, p 167, at p 206. See also UNCLOS I, *Official Records* (vol I), I, para 151; and Bourquin, *Mélanges Georges Sauser-Hall* (1952), p 51; and O'Connell, *The International Law of the Sea* (ed Shearer, vol 1, 1982), pp 435-38; also Mendez Silva, *Boletín del centro de relaciones internacionales*, 18 (1972), pp 74-82, 'The Sea of Cortes, Vital Bay'. The term 'vital' was used in the Gulf of Fonseca Judgment, see n 4, p 633.

<sup>2</sup> See Can YBIL, 9 (1971), pp 289-94.

<sup>1</sup> This is so in the Gulf of Fonseca, whose entrance points belong to El Salvador and Nicaragua respectively, but the Honduran coast is interior to the bay. Another controversial example is Peter the Great Bay, which leads to Vladivostok; see Bouchez, *op cit*, pp 224-26; Nikolaev, *International Affairs*, 2 (1958), pp 38-43; Ohira, *Japanese Annual of Law and Politics*, 6 (1958), pp 63-6; also RG, 62 (1958), pp 159-62; for British protest, see ICLQ, 7 (1958), p 112, where there is the text of a British protest against the Soviet decree of 1957, which enclosed 'internal' waters on the basis of a line of 102 miles drawn across the bay, and so also extending territorial sea. The protest said there was no evidence of this being an historic bay. In many ways the most difficult is the Gulf of Aqaba: see Hammed, *Revue Egyptienne de droit international*, 15 (1959), pp 118-51; Melamid, AJ, 53 (1959), pp 412-13; Bloomfield, *Egypt, Israel and the Gulf of Aqaba in International Law* (1957). See Bouchez, *The Regime of Bays in International Law* (1963), pp 116ff, and Cáceres, *Juridical Status of the Gulf of Fonseca and the Regime of its Adjacent Zones* (1974); also for a list of pluristate bays, gulfs and estuaries, at pp 124-30. See also Kennedy, *A Brief Geographical and Hydrographical Study of Bays and Estuaries the Coasts of which Belong to Different States*, UN Doc A/CONF 13/15 (1957).

The question of access may, of course, come within Art 45 of the 1982 Convention. See also Art 16.4 of the 1958 Geneva Convention.

For the very difficult question of state succession (see § 60) that may arise in respect of a pluristatal bay, see Verzijl, *Mélanges Basdevant* (1960), pp 505-6.

<sup>2</sup> Article 10 'relates only to a bay the coasts of which belong to a single State'; see Art 7.1 of the 1958 Geneva Convention.

<sup>3</sup> See the 8th ed of this vol, p 508. To much the same effect, see Gidel, *Le Droit international public de la mer* (vol iii, 1934), pp 595-6. The whole matter is thoroughly discussed in Blum, *Historic Titles in International Law* (1965), ch VI. See also YBILC (1962), ii, at p 20.



state of a single-state bay.<sup>4</sup> The rationale of the view that pluristatal bays are 'non-territorial' is presumably that there might otherwise be difficulties over access. Some access is, however, now provided for in Article 45 of the Convention of the Law of the Sea, which applies the rules of innocent passage to straits, '(b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State'.<sup>5</sup>

## STRAITS

Hill, Hag R, 45 (1933), iii, pp 475-556 Brüel, *International Straits* (2 vols), 1947 translation of a 1940 thesis Parry, BDIL, 33(2b) (1967), pp 3-51 Rodolfo, 'Le Golfe Persique', *Politique Etrangère* 34 (1969), pp 631-65; Verzijl, *International Law in Histor-*

<sup>4</sup> The anomaly would be the greater in a pluristatal bay like the Gulf of Fonseca which formerly was a bay surrounded only by a single state. See however Verzijl, *International Law in Historical Perspective*, vol 3, at p 294.

'There is no general imperative rule in existence and the coastal States are, at least to a certain extent, free to regulate the status of such inlets in common accord as they deem fit. They are, in particular, under no international obligation *vis a vis* third States to treat a common bay with a closing line of less than twenty four-miles and a wider pocket of water inside as open sea for the only reason that it is surrounded by more than one State. Although this has sometimes been asserted in legal literature to be the case, the assertion is unsupported by actual State practice.'

Also Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed, vol I, 1945), p 475; Bouchez, *op cit*, p 196; Suy, *Friedenswarte*, 54 (1957) 58, p 115; Fitzmaurice, ICLQ, 8 (1959), at p 82.

Some light may be seen to be shed on this question by the 1982 Convention which, in pt IX (consisting of only two articles), deals with 'Enclosed or Semi-Enclosed Seas', which are defined in Art 122 as, 'a gulf, basin, or sea surrounded by two or more States and connected to the open seas by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States'. This could comprise gulfs and bays very much larger than those coming within the 24-mile closing-line rule; but the provision says nothing about the limits, if any, of internal waters in such sea areas. Article 123 provides in general terms for cooperation of states bordering enclosed or semi-enclosed seas, 'in the exercise of their rights and in the performance of their duties under this Convention; and in particular are mentioned, management, conservation, exploration and exploitation of the living resources; protection and preservation of the environment; scientific research; and cooperation with 'other interested States or international organizations'.

See the *Gulf of Fonseca Case*, AJ, 11 (1917), p 674, before the former Central American Court of Justice, where that Gulf was held by the Court to be an 'historic bay possessed of the characteristics of a closed sea', because 'the three riparian States of El Salvador, Honduras and Nicaragua are ... recognized as co-owners of [the gulf's waters], except as to the littoral marine league which is the exclusive property of each'. It may also be relevant that the Gulf of Fonseca was, prior to 1822, a bay subject to historical claims by only one state: Spain. The position in the Gulf of Fonseca was again raised in pluristatal form when, in 1989, Nicaragua applied to intervene in the case between El Salvador and Honduras pending before a Chamber of the Court; see ICJ Rep (1990), p 3. The judgment in the *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)*, which requires a decision on the present status of the Gulf of Fonseca, is expected early in 1992.

<sup>5</sup> See Herrera Caceres, *Juridical Status of the Gulf of Fonseca and Regime of its Adjacent Zones* (1974).

See also Art 16.4 of the 1958 Geneva Convention, which provision was drafted having in mind the problems that arose regarding the Straits of Tiran, the only sea access to the Gulf of Aqaba, at the head of which is the Israeli port of Eilat.

There may, of course, be a particular convention regime applying to a strait leading to an inland sea; for the Black Sea, see § 213.