Chapter 2

The Types of Waters to Which Historic Claims May Be Made

1. Historic Title not Confined to Bays

The ICJ, in confirming in the *Tunisia/Libya* case that it is still general international law (i.e. customary law) which governs historic title, affirmed that it seemed clear that “this matter continue[d] to be governed by general international law which does not provide for a single ‘regime’ for ‘historic waters’ or ‘historic bays’, but only for a particular regime for each of the concrete, recognised cases of ‘historic waters’ or ‘historic bays’.”

This ‘no-single-regime’ statement evidences that the doctrine of historic waters is not confined to claims to ‘bays’, with which topic most treatises have dealt in the past. This factor is, however, not clear from the relevant treaty law on the law of the sea. For example, Strohl, amongst other commentators, points out that although the TSC (1958) only refers specifically to an historic claim being made in respect of an “historic...

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1 [1982] ICJ Reports, at pp. 73/74, para. 100 (emphasis added). The Court noted that the draft UNCLOS Convention did not contain “any detailed provisions on the ‘regime’ of historic waters” nor was there “a definition of the concept [or] an elaboration of the juridical regime” of such.

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Bay”,3 there is no reason why an historic claim may not, in appropriate circumstances, be made to other coastal waters where there is at least some evidence of geographical enclosure, or connection with, the adjacent landmass: such as in respect of the waters (as now encloseable) within a coastal archipelago on the basis of Article 4 of the TSC (now, of course, Article 7 of the LOSC).

It seems to be agreed, then, that historic maritime claims – and the same or similar legal rules thereon – may in principle extend to a broad range of territorial waters, and particularly to coastal archipelagoes,4 though strangely actual precedents here are few.5 As Blum comments,6 “it may safely be assumed that the considerations underlying the juridical regime of historic bays do apply to the same extent to historic waters in general”; though, of course, as will be seen, the type of jurisdiction which is enforceable in such waters may differ according to the type of waters historically claimed.7

The UN Memorandum of 19578 stated broadly that historic waters were not limited to bays, but could also be applied “to straits, to the waters within archipelagoes, and generally to the various areas capable of being comprised in the maritime domain of the State”;9 and Norway asserted in the Fisheries case that historic title could apply to any waters – in fact, to “all forms of maritime territory”.10 US caselaw shows a similar pattern (see below). Despite, however, this potentially broad geographical ambit of historic claim in the maritime sphere, undoubtedly the most important application of historic claims in the past has been in respect of bays.

1.1 Reference to historic waters other than bays in US case law

Although the claim by Louisiana in US v. Louisiana was to “historic inland waters” in the context of “historic bays”, the US Supreme Court11 stated that apart from “bays”, inland coastline configurations could also include “other areas of water [apart from bays] closely connected to the shore, although they do not meet any precise geographical test”, which may have achieved the status of “inland waters” by the manner in

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4 See further below section 3.
5 Jessup mentions, for example, the Zuider Zee (The Law of Territorial Waters and Maritime Jurisdiction, (New York, Jennings, (1927) at p. 438)); namely, an inner area of a…closed sea because of fringes of islands which “completely enclose it save for narrow passages”, citing (id.) de Lapradelle (a sea closed by a continuous line of islands).
6 Historic Titles in International Law (1965), at p. 299.
7 See below section 5.
9 Id. at p. 37, para. 199.
10 Agreed to by the UK (Reply, Pleadings of 28/11/52 at p. 643, para. 471), but with the caveat (id., at 644) that an “historic claim to open waters has to be regarded somewhat differently in point of proof” (emphasis added).
11 394 US 11, at p. 23 (1969). Reference was specifically made to Article 4 of the TSC (1958) (so indicating a possible ‘non-bay’ element), though this claim was ultimately to be rejected by the Supreme Court.