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Chairman: Mr. Alberto HERRARTE (Guatemala).

AGENDA ITEM 58

Question of initiating a study of the juridical régime of historic waters, including historic bays (A/4161) (continued)

GENERAL DEBATE (concluded)

1. The CHAIRMAN invited the Saudi Arabian representative to continue the statement he had begun at the previous meeting.
2. Mr. SHUKAIRY (Saudi Arabia), turning to the main elements which constituted the theory of historic waters, said that there was no general agreement on the subject, either in doctrine or practice. It was clear, however, that usage should be regarded as the main element justifying a historic title, as had been recognized by the Preparatory Committee of the first Conference for the Codification of International Law held at The Hague in 1930, provided, of course, that the usage was of long standing, continuous and well-established. Interruption of the usage, if it was short or resulted from an act, the lawfulness of which was contested, would not affect the continuity. That principle had been explicitly recognized on several occasions, both by various international legal bodies, such as the Institute of International Law and the International Law Association, and in a number of national and international court decisions (for example, in the Delaware Bay and Conception Bay cases). Although still not the subject of a court decision, the Gulf of Aqaba was a vivid illustration of a historic bay which owed its character to well-established use by the riparian States.
3. Contrary to the opinions advanced by certain authorities, usage did not have to be recognized by other States in order to become effective. The historic title stood on its own, and was not subject to the consent of non-user States, as had been confirmed in the past in the case of the Norwegian fjords. Furthermore, there had been no reference to international recognition in the replies of Governments to the Preparatory Committee. The concept of historic waters was purely one of law, and neither an individual State, nor the General Assembly, nor the Security Council, nor the United Nations Secretariat was competent to give advice or adjudicate on questions of law, which could only be decided by the International Court of Justice. For political reasons or security considerations, the Security Council or the General Assembly

could recommend certain measures, but they could not make any pronouncements on the legality or illegality of any claim to historic waters. Thus the decision taken by the General Assembly during its debate on the Suez question should be regarded as a purely political act without legal significance. In his project on historic waters, Bustamante had pointed out that it would be dangerous to make the validity of the right of a State subject to the consent of other States which would be free to contest the right as they wished.

4. The avoidance of every kind of abuse was all the more essential, since historic waters were a deciding factor in the life of a State, as several authorities, including Fauchille, had pointed out. Because of their special configuration, they played a vital role in the life of the people, particularly from the economic and national defence aspects. The Permanent Court of Arbitration, in the Fisheries case of 1910 between the United States and the United Kingdom, had emphasized the importance of legitimate defence requirements as a component element of a title to historic waters, and the International Law Association Conference held in Buenos Aires in 1922 had regarded self-defence as a sufficient basis in itself. Other court decisions in the Gulf of Fonseca case and the Chesapeake Bay case had stressed the importance of the interests of the riparian State, which could not be made subject to the consent of other States, provided, of course, that the State concerned was a lawful riparian State.

5. On the other hand, even if the consent of non-bordering States was necessary, it could be inferred from national usage itself, for prolonged and continuous usage created a presumption of acceptance on the part of the other States, an inference of acquiescence arising from their inactivity. That was the argument advanced by the United Kingdom in the Fisheries case of 1951, and he would recall in that connexion certain observations made by Sir Gerald Fitzmaurice.

6. As to the acquisition of a title by prescription, the length of time required in international law varied from case to case; but, as Bourquin had argued, one could assume that the usage must go back to the most distant past. Again, for the prescription to run, it must be uncontested, and that applied in particular to new States. Although it was not necessary to prove its origin and validity, the prescription would still not give rise to any right, no matter how long it lasted, if it were later proved to have started unlawfully. That had been recognized by the Permanent Court of Arbitration in the case of the Norwegian occupation of Eastern Greenland. The foregoing considerations explained the Arab countries' legal position in regard to Israel's claim in the Gulf of Aqaba.

7. The next question was the evidence required to support a claim to historic waters. Unlike municipal law, international law did not include any hard and

fast rules of evidence; with respect to historic waters, however, two facts were of great weight and could be considered evidence by themselves: the location of historic waters and their configuration. In the Delaware Bay case, the Court had accepted the plea that the bay belonged to the people by whose lands it was encompassed. On the other hand, Chrétien had considered bays which "penetrated into the land domain" integral parts of the territory of the coastal States. In its reply to the Preparatory Committee of the Codification Conference, the Canadian Government had stated that, in the case of bays where the distance from headland to headland was more than ten miles but the bay itself could not be entered without traversing territorial waters, the waters of such bays should be national waters. In the Fisheries case of 1910, the Permanent Court of Arbitration had referred to "the distance by which it [the bay] is secluded from the highways of nations on the open sea". In the Fisheries case of 1951, the International Court of Justice had also stressed the importance of the location and configuration of territorial waters.^{1/} Fauchille had accepted the Zuider Zee as within Netherlands sovereignty because, as in the Gulf of Aqaba, the sea area was enclosed by a continuous fringe of islands separated from each other by narrow passages. Accordingly, location and configuration supplied what was known in common law as primary evidence. That was what Baldoni had acknowledged when he had stated that some of those bays, such as Chesapeake and Delaware, were of such configuration and size that they could so surely be regarded as accessory to the coasts surrounding them that no further inquiry of any kind was necessary to establish that they were not subject to the principles governing the high seas. Baldoni would have been able to classify the Gulf of Aqaba in the same category.

8. Concerning the evidence necessary to prove a historic title, he said that a number of factors were involved. The Central American Court of Justice, in the case of the Gulf of Fonseca, had referred to existing conventions as partial evidence. In the Fisheries case of 1951, Norway had successfully contended that measures taken under municipal law, as well as administrative measures and judicial decisions of the riparian State, could supply all the evidence required. To illustrate the effect of those categories of evidence in a particular case, he recalled that, in its note of October 1914 establishing the limit of its marginal sea, the Ottoman Government had expressly referred to "the Black Sea, the Archipelago, the Red Sea, the Sea of Oman and the Persian Gulf". The omission of the Gulf of Aqaba was a clear indication that the Ottoman Empire had not considered that Gulf as part of the high seas affected by the delimitation of the territorial sea. Again, the International Sanitary Convention of 1912 regarding the Moslem pilgrim traffic through the Suez Canal and the Indian Ocean had not referred to the Gulf of Aqaba, obviously because the waters of the Gulf could not be considered international. Reference could also be made to article X, paragraph 3, of the Constantinople Convention of 1888 for the establishment of a definite system destined to guarantee the free use of the Suez Canal. As to the evidential value of domestic legislation, the Saudi Arabian Royal Decree of May 1949, which proclaimed that the Gulf

of Aqaba belonged under Arab sovereignty, could be cited as an example. Mention could also be made of the arrangements for the safety of Moslem pilgrims in the Gulf. Thus all sorts of evidence—international agreements, laws, administrative measures and judicial decisions—could be adduced to support a historic title.

9. In view of all the preceding arguments, he suggested, without making any final proposal at that stage, that the work of defining historic waters, including historic bays, could be divided into four stages: first, the Sixth Committee could undertake a general debate on the subject, thus forming a pool of legal knowledge on the question. Secondly, the Governments of Member States could be requested to supply the Secretariat with all the relevant information on historic waters within their territories. The International Law Commission would then be asked to prepare a draft code in the light of the opinions expressed and the information collected. And finally, on the basis of that draft, an international conference of plenipotentiaries would prepare a draft convention on the régime of historic waters. By adhering to that course, the United Nations would make a truly historic contribution in a particularly important field.

10. Mr. ROSENNE (Israel), exercising his right of reply, recalled that Israel's position as one of the four riparian States on the Gulf of Aqaba was stated in the official records of the eleventh session of the General Assembly (666th plenary meeting) and in the records of the first United Nations Conference on the Law of the Sea.^{2/} His delegation thought it quite superfluous to reopen the matter, more especially as the wording of agenda item 58 was simply "Question of initiating a study of the juridical régime of historic waters, including historic bays".

11. Mr. EL-ERIAN (United Arab Republic), recalling the background of the current debate as described in the report of the Sixth Committee to the General Assembly,^{3/} said that his delegation attached great importance to the study of the juridical régime of historic waters, including historic bays, for both general and particular reasons. With reference to the general reasons, he recalled that the International Law Commission and the first United Nations Conference on the Law of the Sea had recognized the doctrine of historic bays but that thus far nothing had been done to define or codify the rules governing them. Any work undertaken in that field would therefore help to fill the gap. The special interest of the Arab countries in the subject of historic bays had been elaborately stated by the Saudi Arabian representative. He endorsed Mr. Shukairy's pertinent statements on the nature of the Gulf of Aqaba, statements which accurately reflected the law.

12. As the Israel representative had referred in that connexion to the first United Nations Conference on the Law of the Sea, he wished to stress that none of the decisions taken by that Conference had any bearing on the régime in the Gulf of Aqaba, and to reserve his delegation's position on that point. He recalled, moreover, that the International Law Commission had itself observed both in the introduction to its final

^{1/} Fisheries case, Judgment of December 18th, 1951; I.C.J. Reports 1951, p. 116.

^{2/} United Nations Conference on the Law of the Sea, *Official Records, Volume III: First Committee (Territorial Sea and Contiguous Zone)* (United Nations publications, Sales No.: 58.V.4, Vol. III), 13th meeting.

^{3/} *Official Records of the General Assembly, Thirteenth Session, Annexes, agenda item 58, document A/4039, paras. 1-4.*

report on the law of the sea (A/3159, para. 32) and in section III of part I relating to the right of innocent passage (*ibid.*, para. 33) that those regulations were applicable only in time of peace and not in situations resulting from an armed conflict. He wished also to recall the statements made to that effect by the delegation of the United Arab Republic at the first United Nations Conference on the Law of the Sea.^{4/}

13. Mr. CASTAÑEDA (Mexico) said that his delegation attached all due importance to the agenda item but believed that, if only because of its wording, it ought not to give rise to any immediate substantive discussion. Moreover, he did not think that the Committee was in a position to carry on a useful discussion on the substance of the matter so long as no thorough preparatory work had been done and the basic documents which might be used as working documents were not available. Customarily the task of preparing such documents was assigned to the International Law Commission. He accordingly agreed with the Saudi Arabian representative's suggestion that the services of that body should be enlisted. The Commission, in accordance with the provisions of its Statute, would prepare a first report which would be submitted to Governments for their comments. Only after those comments had been secured would it be proper for the General Assembly to embark on a debate. Moreover, it was undoubtedly premature to anticipate as the Saudi Arabian representative had done, the convening of a conference of plenipotentiaries which would draw up an international convention. In fact, it would be better to leave the widest freedom to the International Law Commission with regard to the type of study to be made (whether it should come within the codification of international law or its progressive development), the plan of work to be formulated (the Statute of the Commission offered various possibilities in that respect), the time limits and priorities to be established, and the recommendations which the International Law Commission would ultimately submit to the General Assembly. If other delegations shared that viewpoint, he would be prepared in due course to submit a draft resolution to that effect.

14. Sir Gerald FITZMAURICE (United Kingdom) said that he would not go into the substance of the question of historic bays as it was not on the Committee's agenda and as the Saudi Arabian representative had himself maintained that the General Assembly was not competent to take any decisions on the matter and that the views of States were accordingly both irrelevant and inadmissible. He wished, however, to reserve his Government's position in that connexion, as the Saudi Arabian representative had referred out of context to certain views expressed by him and he feared that his silence might be interpreted as an admission that the Saudi Arabian representative's statements were well founded, whereas in fact he disagreed with many of them.

15. The United Kingdom Government continued to have serious doubts regarding the need to undertake the proposed study as the subject was not a new one, it was fairly clear and had not in practice given rise to much serious difficulty. His Government was, however, prepared, if the majority so desired, to

agree to such a study being undertaken, on condition that, as the Mexican representative had proposed, the question should be referred to the International Law Commission in ordinary form and in such a way that the Commission's hands were not tied as regards the time at which it should consider the matter or the method of work to be adopted, nor as regards the recommendations it would make to the General Assembly. The procedure suggested by the Saudi Arabian representative seemed to be the reverse of that prescribed for the International Law Commission by its Statute. He agreed with the Mexican representative that it was too early to decide that the question should be the subject of an international conference of plenipotentiaries.

16. Mr. MAURTUA (Peru) said that he had listened with great interest to the Saudi Arabian representative's statement, although he could not fully agree with him on all points, particularly as regards the importance of historic waters and the high seas in relation to the interests of States.

17. Unlike the Mexican delegation, his delegation believed that there was no reason to cut short the debate. The question might not be a new one but it was none the less important: many theoretical and practical factors were involved, treaties on the subject provided precedents, and there were *de facto* situations which could not be ignored. States must therefore express their views on the subject before the International Law Commission undertook the preparation of a draft. The Commission must of course be free to draw up its plan of work as it desired, but it would undeniably be an advantage for the Commission to be informed of the main ideas and interests that were involved and their possible repercussions. It should not be forgotten that if the International Law Commission was requested to make a study of the question, it would not be called upon to elaborate a new theory but to collect existing opinions with a view to determining the state of international law on the subject.

18. Mr. CACHO ZABALZA (Spain) said that he did not agree with the Peruvian representative. The International Law Commission, which had studied the law of the sea, already knew the opinions of Member States on the substance of the question of historic bays. The Spanish delegation, for its part, considered that the International Law Commission should be asked to study the question.

19. Mr. ILLUECA (Panama) said that he did not wish to go into the substance of the matter, but simply to indicate the reasons which had led his delegation to submit, in conjunction with the Indian delegation, the proposal which had resulted in the adoption by the United Nations Conference on the Law of the Sea of the resolution of 27 April 1958 on the régime of historic waters,^{5/} as a result of which the present item had been placed on the General Assembly's agenda.

20. The Panamanian delegation's intentions had not been to initiate a long and sterile debate on concrete cases that were likely to give rise to divergences of opinion or to lead to conflict, nor had his delegation intended to cast doubts upon the historic character of bays which were already generally recognized as

^{4/} United Nations Conference on the Law of the Sea, *Official Records, Volume III: First Committee (Territorial Sea and Contiguous Zone)* (United Nations publications, Sales No.: 58.V.4, Vol. III), 21st meeting.

^{5/} *Ibid.*, Volume II: Plenary Meetings (United Nations publications, Sales No.: 58.V.4, Vol. II), document A/CONF.13/L.56, resolution VII.

such, but simply to secure the elaboration of a definition of historic waters, and particularly of the circumstances in which a bay might be described as historic, in order that a procedure should be available for defining a bay's status in case of dispute. Panama's interest in the question was due to the fact that from time immemorial it had sovereign rights over the Gulf of Panama.

21. Professor Angel Rubio, who had represented Panama at the Conference on the Law of the Sea and who was an authority on the subject, taught that according to the prevailing doctrine the technical criterion to be applied was that the geographical configuration of a bay, its immemorial usage by the riparian State and the national defence needs of the said State justified the bay being regarded as historic, and as the property of the riparian State, whatever the width of the bay and however far it might penetrate into the territory of the State concerned. The Gulf of Panama fulfilled all the necessary conditions for being considered as a historic Panamanian bay. If consideration was given to its

geographic configuration on the one hand, and to the important part it had played in the defence of the isthmus throughout the centuries and during the Second World War on the other, and also to the resources which Panamanian fishermen had always derived from it, it must be recognized that the Gulf of Panama was a historic bay and that Panama had a vital interest in possessing it.

22. In the light of the suggestions which had been made during the debate, the Panamanian delegation would endeavour to work out a compromise formula allowing for the study of that important question to be undertaken as soon as possible.

23. The CHAIRMAN drew the attention of members to the need to complete the Sixth Committee's work at the end of the week, at the same time as the other Committees of the General Assembly. He declared the list of speakers closed and invited any delegations who wished to do so to submit draft resolutions as soon as possible.

The meeting rose at 12.35 p.m.