Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; the state concerned may not be the sole judge of whether those conditions have been met.

52 In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an 'essential interest' of the state which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a 'grave and imminent peril'; the act being challenged must have been the 'only means' of safeguarding that interest; that act must not have 'seriously impaired an essential interest' of the state towards which the obligation existed; and the state which is the author of that act must not have 'contributed to the occurrence of the state of necessity'. Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53 The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabcikovo-Nagymaros Project related to an 'essential interest' of that state, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an 'essential interest' to a matter only of the 'existence' of the state, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission*, 1980, Vol II, Part 2, p 49, para 32); at the same time, it included among the situations that could occasion a state of necessity, 'a grave danger to ... the ecological preservation of all or some of the territory of a state' (*ibid*, p 35, para 3); and specified, with reference to state practice, that: 'It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States.' (*ibid*, p 39, para 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for states but also for the whole of mankind:

The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.' (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *ICJ Reports* 1996, pp 241–42, para 29.)

54 The verification of the existence, in 1989, of the 'peril' invoked by Hungary, of its 'grave and imminent' nature, as well as of the absence of any 'means' to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.

As the Court has already indicated (see para 33 *et seq* above), Hungary on several occasions expressed, in 1989, its 'uncertainties' as to the ecological impact of putting in place the Gabcikovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a 'peril' in the sense of a component element of a state of necessity. The word 'peril' certainly evokes the idea of 'risk'; that is precisely what distinguishes 'peril' from material damage. But a state of necessity could not exist without a 'peril' duly established at the relevant point in time; the mere apprehension of a possible 'peril' could not suffice in that respect. It could moreover hardly be otherwise, when the 'peril' constituting the state of necessity has at the same time to be 'grave' and 'imminent'. 'Imminence' is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of 'possibility'. As the International Law Commission emphasised in its commentary, the 'extremely grave and imminent' peril must 'have been a threat to the interest at the actual time' (*Yearbook of the International Law Commission*, 1980, Vol II, Part 2, p 49, para 33). That does not exclude, in the view of the Court, that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realisation of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, 'grave' and 'imminent' 'peril' existed in 1989 and that the measures taken by Hungary were the only possible response to it.

Both parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

55 The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see para 40 above), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment and in particular the drinking water resources in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gabcikovo power plant would 'mainly operate in peak-load time and continuously during high water', the final rules of operation had not yet been determined (see para 19 above); however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established which, in the Court's appreciation of the evidence before it, was not the case, that the reservoir would ultimately have constituted a 'grave peril' for the environment in the area, one would be bound to conclude that the peril was not 'imminent' at the time at which Hungary suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would, however, point out that the bed of the

Danube in the vicinity of Szentendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialised to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could, for example, have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two parties expressly recognised that that possibility remained open even though – and this is not determinative of the state of necessity – the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56 The Court now comes to the Gabcikovo sector. It will recall that Hungary's concerns in this sector related on the one hand to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Szigetkwz, with their effects on the fauna and flora in the alluvial plain of the Danube (see para 40 above).

Whether in relation to the Dunakiliti site or to the whole of the Szigetkz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it apprehended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in para 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the *ad hoc* Committee of the Hungarian Academy of Sciences, which was also referred to in para 35 of the present judgment, does not express any awareness of an authenticated peril even in the form of a definite peril, whose realisation would have been inevitable in the long term when it states that:

> The measuring results of an at least five year monitoring period following the completion of the Gabcikovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indicator objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included.

The report concludes as follows:

> It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.

> The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use.

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However 'grave' it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore 'imminent' in 1989.

The Court moreover considers that Hungary could, in this context also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, 'the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced'.

57 The Court concludes from the foregoing that, with respect to both Nagymaros and Gabcikovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they 'imminent'; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation 'characterised so aptly by the maxim *summum jus summa injuria*' (*Yearbook of the International Law Commission*, 1980, Vol II, Part 2 at p 49, para 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which whatever the political circumstances prevailing at the time of its conclusion was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabcikovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against

flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly, for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not, however, unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58 It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, 'seriously impair[ed] an essential interest' of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission a finding which does not in any way prejudge the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

59 In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, para 1(a), of the Special Agreement (see para 27), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

10.11 Remedies for international wrongs

In the *Chorzow Factory* case (1928) the PCIJ was called upon to consider the consequences of the illegal expropriation by Poland of a factory in Upper Silesia. In the course of its judgment the Court stated that:

> The essential principle contained in the notion of an illegal act – a principle which seems to be established by international practice and in particular the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[59]

59 PCIJ Ser A, No 17 (1928).

It seems to be accepted law that the first consideration, following a breach of an international obligation, should be the restoration of the *status quo* that existed before the wrongful act was committed. Territorial disputes can often readily be settled by means of restitution and in the *Temple of Preah Vihear* case (1962)[60] Thailand was ordered to return to Cambodia objects it had illegally taken from the temple in Cambodia. Where restitution is not physically possible, or even in cases where it is not politically possible, compensation can be paid. The aim of any monetary compensation should be to wipe out the consequences of the illegal act. Compensation should cover all damage which has flowed from the unlawful act, subject to principles of remoteness.

In some cases, monetary compensation will not be an appropriate remedy. In such cases, reparation can be made by satisfaction, which may involve apologising, acknowledging guilt, or accepting the award of a declaratory judgment. For example, in the *Rainbow Warrior* case, the French government did belatedly apologise to the victims of the sinking of the ship.

It was formerly thought that compensation would only be available for actual injury or damage suffered. This view was largely based on the fact that very often states would accept apologies or acknowledgements of guilt as sufficient reparation where no actual physical damage had been caused. However, it is now believed that compensation can be awarded for non-material damage. In the *I'm Alone* case (1933) the *I'm Alone*, a ship registered in Canada, was sunk by US coastguards. The international tribunal found that the ship was almost wholly owned by US nationals and therefore found that no compensation ought to be paid in respect of the loss of the ship or its cargo. However the US was ordered to formally apologise to the Canadian government and to pay $25,000 compensation as acknowledgment of the wrong done to Canada.

60 (1933) RIAA 1609.

CHAPTER 11

LAW OF THE SEA

11.1 Introduction

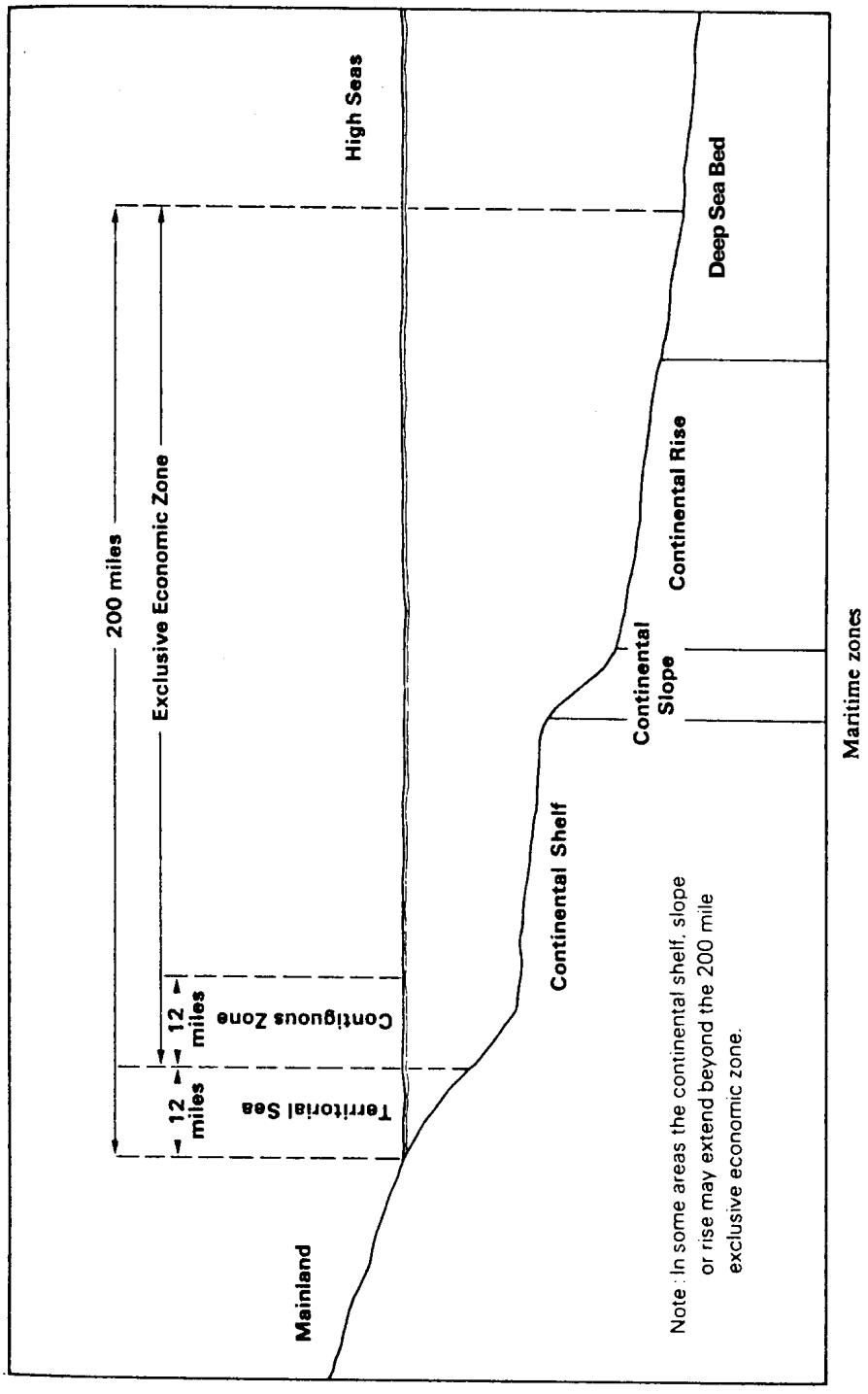
The law of the sea is that law by which states regulate their relations in respect of the marine territory subject to coastal state jurisdiction and those areas of the sea and sea bed beyond any national jurisdiction. The law is an amalgam of treaty and customary rules. It should be noted that the law of the sea is distinct from admiralty or maritime law which is concerned with relations between private persons involved in the transport of passengers or goods by sea.

The law has developed considerably since the end of the Second World War. The 1950s saw a dramatic rise in the number of claims and disputes involving the sea and technological advances together with changes in fishing methods led to a realisation that there was a need for a clarification of the law. The ILC was requested to work on producing a codification of the law of the sea and their work resulted in the subsequent emergence of four conventions governing much of the law. The four conventions marked the first successful occasion in which the ILC was involved in an attempt to codify an area of international law. Many of the conventions' provisions reflected rules of customary international law although some provisions represented a new development and thus did not bind non-parties. The four conventions were adopted at the first and second Geneva Conferences on the Law of the Sea of 1958 and 1960 (UNCLOS I and II). The conventions were:

- Convention on the Territorial Sea and the Contiguous Zone (TSC) which entered into force on 10 September 1964;
- Convention on the Continental Shelf (CSC) which entered into force on 10 June 1964;
- Convention on Fishing and the Conservation of the Living Resources of the High Seas (FC) which entered into force on 20 March 1966;
- Convention on the High Seas (HSC) which entered into force on 30 September 1962.

UNCLOS III convened in 1973 to reach agreement on a Law of the Sea Convention which would deal with many new areas of concern including the exclusive economic zone (EEZ) and the deep sea bed. The Conference did not convene to discuss any pre-existing draft convention but had its origins in the Sea Bed Committee which had been established by the UN General Assembly in 1967. Advances in technology during the 1960s opened up for the first time the possibility of exploiting the rich resources of the deep sea bed and discussions about the regime for the deep sea bed took up much of the discussion at UNCLOS III. Because of the big difference in views between developing and developed states it was thought that there was little use in adopting provisions of a new treaty by majority vote. The success of any new convention would depend upon the acceptance of the major maritime states who could be outvoted by other participants at the conference. The procedure adopted at UNCLOS III was therefore to look for consensus in an attempt to obtain maximum support for the whole convention. The outcome of UNCLOS III was

the Law of the Sea Convention 1982 (LOSC) which entered into force on 16 November 1994, 12 months after Guyana became the 60th state to ratify it. Many of the provisions of LOSC reflect customary international law and thus will bind non-parties, but some parts of the Convention are much more controversial and have yet to gain the acceptance of many of the major maritime powers.



Much of the law of the sea is concerned with the rights enjoyed by states in particular maritime zones. The principle zones that can be identified are:

- the territorial sea over which the coastal state enjoys many of the rights which attach to land territory. The regime of the territorial sea is discussed at 11.4;
- the exclusive economic zone (EEZ) and the contiguous zone which refers to an area of sea beyond the territorial sea over which the coastal state enjoys limited rights. The EEZ is discussed at 11.5.
- the continental shelf which refers to the area of sea bed not covered by deep ocean. The continental shelf is discussed at 11.6;
- the high seas which is constituted by all those areas of sea not included in the territorial sea or EEZ. The regime of the high seas is discussed at 11.7.

11.2 Baselines

In determining the extent of a coastal state's territorial sea and other maritime zones it is obviously necessary to establish from what line on the coast the outer limits are to be measured. This line is referred to as the baseline. The waters on the landward side of the baseline are internal waters and are an integral part of the territory of the coastal state. None of the provisions of the law of the sea applies to internal waters and a state enjoys full territorial sovereignty over them. The rules for delimiting baselines are to be found in Articles 3–11 and Article 13 of the TSC and in Articles 4–14 and Article 16 of the LOSC. The rules there stated are deemed to represent customary international law.

The starting point for drawing the baseline is the low-water line along the coast (Article 3 of the TSC and Article 5 of the LOSC) and this will be used wherever the coastline is relatively straight and unindented. Different rules apply to:

- coastlines which are heavily indented or fringed with islands;
- bays;
- river mouths;
- harbour works;
- low-tide elevations;
- islands;
- reefs.

There is a general rule that where states depart from the use of the low-water line as a baseline, such departures should be clearly indicated on charts and due publicity should be given to the baseline adopted.

11.2.1 Straight baselines

Where the coastline is heavily indented or fringed with islands it may be impractical for the baseline to follow exactly the low-water mark along the coast. For example, much of the Norwegian coastline is heavily indented by fjords and it is fringed with many small islands and rocky reefs. It would be possible to draw a baseline which followed the low water mark but this would

prove difficult and it would mean that ascertaining the outer limit of the territorial sea and other maritime zones would be confusing. Therefore Norway adopted the practice of drawing straight baselines connecting the outer-lying rocks and mouths of fjords along its coast. From the 1930s onwards the UK protested about this Norwegian practice and in 1949 the dispute was referred to the ICJ. In the *Anglo-Norwegian Fisheries* case (1951) the ICJ held that the Norwegian system of straight baselines was in conformity with international law. The court made it clear that the coastal state does not have an unfettered discretion as to how to draw the baseline and there was a requirement that such baselines follow the general direction of the coast. If a state does use straight baselines it must indicate the fact on charts and give due publicity to them.

Both Article 4 of the TSC and Article 7 of the LOSC permit the drawing of straight baselines where the coastline is 'deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity'. Both conventions make it clear that such baselines should not depart from the general direction of the coast and the sea inside the baseline must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. A further condition is that straight baselines cannot be used to cut off from the high seas the territorial sea of another state. There was an attempt at UNCLOS I to introduce a maximum length for a single straight baseline of 15 miles but the proposal did not obtain widespread agreement. In the *Norwegian Fisheries* case the ICJ approved one baseline which was 44 miles long.

The normal rule remains the drawing of baselines using the low-water mark and states are under no obligation to use straight baselines. Both TSC and LOSC make clear that the drawing of straight baselines should be limited to exceptional geographical circumstances. More than 50 states have in fact drawn straight baselines along part of their coasts. Not all of these states follow the rules or spirit of the law. For example, Colombia has a straight baseline of 131 miles in length which encloses a smooth coast with no indentations and Vietnam has connected an island 74 miles from its coast to an islet which is 161 miles away although it has been objected to by a number of other states. Prescott, who has carried out a survey of state practice has stated that:

> It would now be possible to draw a straight baseline along any section of coast in the world and cite an existing straight baseline as a precedent.[1]

However, the fact that a number of states have gone beyond what is permitted by the rules of international law does not mean that new customary rules emerge. As the ICJ stated in the *Norwegian Fisheries* case:

> The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law.[2]

Reference should be made to the discussion of customary international law at 3.2.2 on the nature of state practice and the effect of objections to it.

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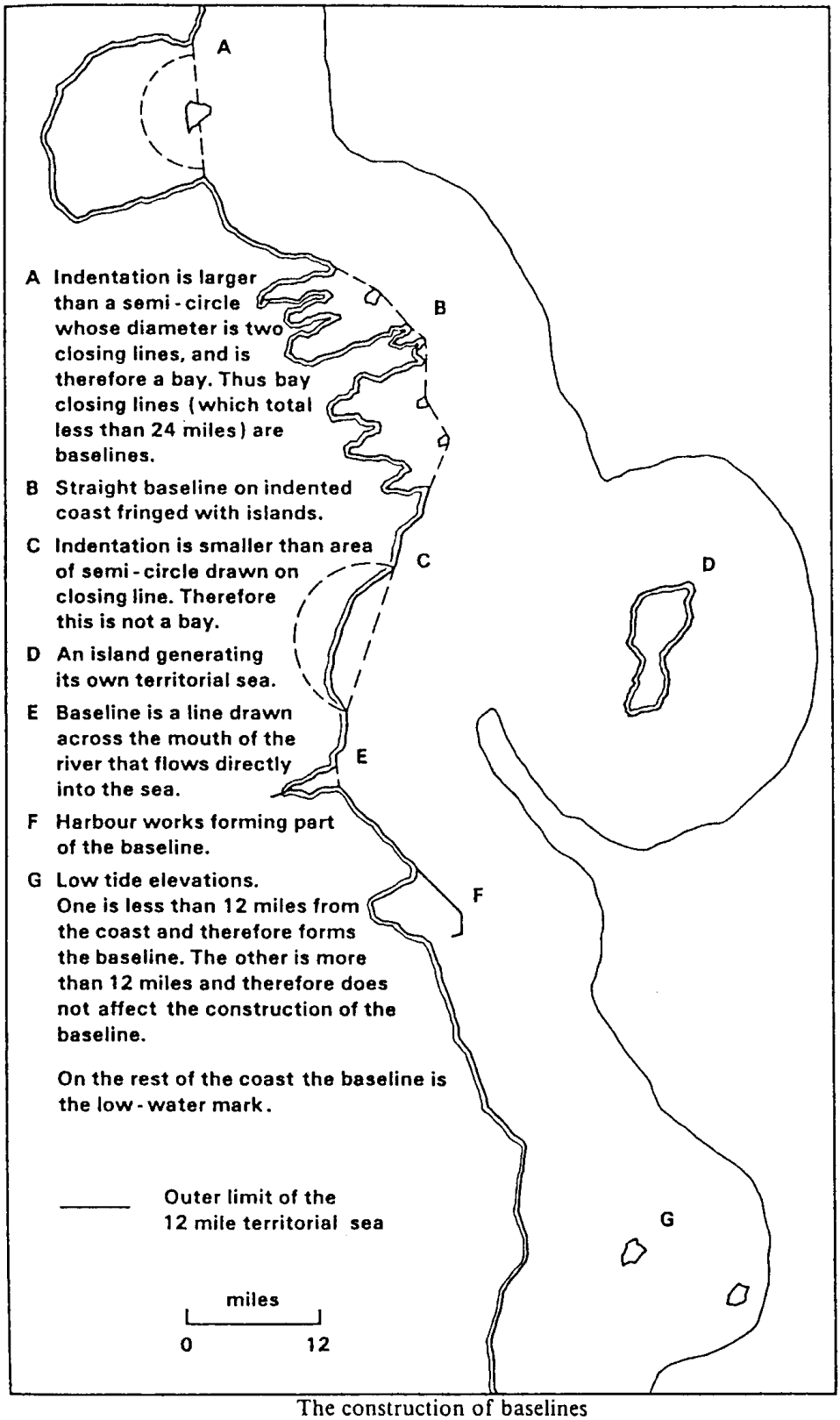
1 'Straight and archipelagic baselines' in Blake, 1987, *Maritime Boundaries and Ocean Resources*, London: Croom Helm.

2 [1951] *ICJ Rep* at p 116.

11.2.2 Bays



The construction of baselines