INDIVIDUAL OPINION OF JUDGE ALVAREZ

[*Translation*]

I

The United Kingdom has filed with the International Court of Justice an Application in which it challenges the validity of the Norwegian Decree of July 12th, 1935, which delimited the Norwegian fishery zones off a part of the Norwegian coast. It considers that the delimitation so effected is contrary to the precepts of international law and asks the Court to state the principles of international law applicable for defining the base-lines by reference to which the Norwegian Government is entitled to delimit its fisheries zones.

In the course of the oral proceedings, the United Kingdom Government submitted certain new conclusions, particularly on questions of law, and asked the Court to adjudicate upon these also.

In her Counter-Memorial and Rejoinder, and in her arguments in Court, Norway contended that the delimitation of these fisheries zones established in the 1935 Decree was not in conflict with the precepts of international law and that it corresponded, in any event, to historic rights long possessed by her and which she indicated.

The present litigation is of great importance, not only to the Parties to the case, but also to all other States.

At the beginning of his address to the Court, the Attorney-General said: "It is common ground that this case is not only a very important one to the United Kingdom and to Norway, but that the decision of the Court on it will be of the very greatest importance to the world generally as a precedent, since the Court's decision in this case must contain important pronouncements concerning the rules of international law relating to coastal waters. The fact that so many governments have asked for copies of our Pleadings in this case is evidence that this is the general view."

II

In considering the present case, I propose to follow a method different from that which is customarily adopted, particularly with regard to the law. It consists of bringing to light and retaining the principal facts, then of considering the points of law dominating the whole case and, finally, those which relate to each important question.

The application of this method may, at first sight, appear to be somewhat academic; but it is essentially practical, since it has as its object the furnishing of direct answers to be given on the questions submitted to the Court.

Moreover, this method is called for by reason of the double task which the Court now has: the resolution of cases submitted to it and the development of the law of nations.

It is commonly stated that the present Court is a continuation of the former Court and that consequently it must follow the methods and the jurisprudence of that Court. This is only partly true, for in the interval which elapsed between the operations of the Courts, a World War occurred which involved rapid and profound changes in international life and greatly affected the law of nations.

These changes have underlined the importance of the Court's second function. For it now happens with greater frequency than formerly that, on a given topic, no applicable precepts are to be found, or that those which do exist present lacunae or appear to be obsolete, that is to say, they no longer correspond to the new conditions of the life of peoples. In all such cases, the Court must *develop* the law of nations, that is to say, it must remedy its shortcomings, adapt existing principles to these new conditions and, even if no principles exist, create principles in conformity with such conditions. The Court has already very successfully undertaken the creation of law in a case which will remain famous in the annals of international law (Advisory Opinion of April 11th, 1949, on "Reparation for injuries suffered in the service of the United Nations"). The Court, in this case, can effectively discharge the same task.

The adaptation of the law of nations to the new conditions of international life, which is to-day necessary, is something quite different from the "Restatement" advocated by Anglo-Saxon jurists as a means of ending the crisis in international law, which consists merely of stating the law as it has been established and applied up to the present, without being too much concerned with any changes that it may recently have undergone or which it may undergo in the future.

III

I shall not dwell on a detailed examination of the facts alleged by the Parties nor upon the evidence submitted by the Parties in support of their contentions, because the Judgment of the Court deals with them at length. In the following pages I shall concentrate only on the questions of law raised by the present case.

For centuries, because of the vastness of the sea and the limited relations between States, the use of the sea was subject to no rules; every State could use it as it pleased.

From the end of the 18th century, publicists proclaimed, and the law of nations recognized as necessary for States, the exercise of sovereign powers by States over an area of the sea bordering their shores. The extent of this sea area, which was known as the territorial sea, was first fixed at the range of the contemporary cannon, and later at 3 sea miles. The question indeed was one for the domestic law of each country. Several of the countries of Latin America incorporated provisions relating to this question in their civil codes.

As the result of the growing importance of the question of the territorial sea, a World Conference was convened at The Hague in 1930 for the purpose of providing rules governing certain of its aspects and to deal with two other matters. This Conference, in which such great hopes had been reposed, did not establish any precept relating to the territorial sea. It made it clear that no well-defined rules existed on this subject, that there were merely a number of conventions between certain States, certain trends and certain usages and practices.

It was contended at the hearings that a great number of States at this Conference had accepted the extent of the territorial sea as being fixed at three sea miles, and had also accepted as established the means of reckoning this breadth ; and this assertion was challenged. It is unnecessary to dwell long on this point for, in fact, the Conference, as has been said, did not adopt any provision on the question. Moreover, the conditions of international life have considerably changed since that time ; it is therefore probable that the States which in 1930 accepted a breadth of three sea miles would not accept it to-day.

IV

What should be the position adopted by the Court, in these circumstances, to resolve the present dispute ?

The Parties, in their Pleadings and in their Oral Arguments, have advanced a number of theories, as well as systems, practices and, indeed, rules which they regarded as constituting international law. The Court thought that it was necessary to take them into consideration. These arguments, in my opinion, marked the beginning of a serious distortion of the case.

In accordance with uniformly accepted doctrine, international judicial tribunals must, in the absence of principles provided by conventions, or of customary principles on a given question, apply the *general principles of law*. This doctrine is expressly confirmed in Article 38 of the Statute of the Court.

It should be observed in this connection that international arbitration is now entering a new phase. It is not enough to stress the general principles of law recognized by civilized nations ; regard must also be had, as I have said, to the modifications which these

principles may have undergone as a result of the great changes which have occurred in international life, and the principles must be *adapted* to the new conditions of international life ; indeed, if no principles exist covering a given question, principles must be *created* to conform to those conditions.

The taking into consideration of these general principles, and their adaptation, are all the more necessary in the present case, since the United Kingdom has asked the Court to declare that the Norwegian Decree of 1935 is contrary to the principles of international law now in force.

V

What are the principles of international law which the Court must have recourse to and, if necessary, adapt ? And what are the principles which it must in reality create ?

It should, in the first place, be observed that frequent reference is made to the *principles* of the law of nations, in conventions and in certain of the Judgments of the Permanent Court of International Justice, but it is not said what those principles are nor where they may be found.

Some clarification is therefore necessary on this point.

In the first place, many of the principles, particularly the great principles, have their origin in the legal conscience of peoples (the psychological factor). This conscience results from social and international life ; the requirements of this social and international life naturally give rise to certain norms considered necessary to govern the conduct of States *inter se*.

As a result of the present dynamic character of the life of peoples, the principles of the law of nations are continually being created, and they undergo more or less rapid modification as a result of the great changes occurring in that life.

For the principles of law resulting from the juridical conscience of peoples to have any value, they must have a tangible manifestation, that is to say, they must be expressed by authorized bodies.

Up to the present, this juridical conscience of peoples has been reflected in conventions, customs and the opinions of qualified jurists.

But profound changes have occurred in this connection. *Conventions* continue to be a very important form for the expression of the juridical conscience of peoples, but they generally lay down only new principles, as was the case with the Convention on genocide. On the other hand, *customs* tend to disappear as the result of the rapid changes of modern international life ; and a new case strongly stated may be sufficient to render obsolete an ancient custom. Customary law, to which such frequent reference is made in the

course of the arguments, should therefore be accepted only with prudence.

The further means by which the juridical conscience of peoples may be expressed at the present time are the resolutions of diplomatic assemblies, particularly those of the United Nations and especially the decisions of the International Court of Justice. Reference must also be made to the recent legislation of certain countries, the resolutions of the great associations devoted to the study of the law of nations, the works of the Codification Commission set up by the United Nations, and finally, the opinions of qualified jurists.

These are the new elements on which the new international law, still in the process of formation, will be founded. This law will, consequently, have a character entirely different from that of traditional or classical international law, which has prevailed to the present time.

VI

Let us now consider the elements by means of which the general principles brought to light are to be adapted to the existing conditions of international life and by means of which new principles are, if necessary, to be created.

The starting point is the fact that, for the traditional *individualistic* régime on which social life has hitherto been founded, there is being substituted more and more a new régime, a régime of *interdependence*, and that, consequently, the *law of social interdependence* is taking the place of the old individualistic law.

The characteristics of this law, so far as international law is concerned, may be stated as follows:

(a) This law governs not merely a *community* of States, but an organized international *society*.

(b) It is not exclusively juridical; it has also aspects which are political, economic, social, psychological, etc. It follows that the traditional distinction between *legal* and *political* questions, and between the domain of law and the domain of politics is considerably modified at the present time.

(c) It is concerned not only with the delimitation of the rights of States but also with harmonizing them.

(d) It particularly takes into account the general interest.

(e) It also takes into account all possible aspects of every case.

(f) It lays down, besides rights, obligations towards international society; and sometimes States are entitled to exercise certain rights only if they have complied with the correlative duties. (Title V of the "Declaration of the Great Principles of Modern International Law" approved by three great associations devoted to the study of the law of nations.)

(g) It condemns *abus de droit*.

(h) It adapts itself to the needs of international life and develops side by side with it.

What are the principles which, in accordance with the foregoing, the Court must bring to light, adapt if necessary, or even create, with regard to the maritime domain and, in particular, the territorial sea ?

They may be stated as follows :

1. Having regard to the great variety of the geographical and economic conditions of States, it is not possible to lay down uniform rules, applicable to all, governing the extent of the territorial sea and the way in which it is to be reckoned.

2. Each State may therefore determine the extent of its territorial sea and the way in which it is to be reckoned, provided it does so in a reasonable manner, that it is capable of exercising supervision over the zone in question and of carrying out the duties imposed by international law, that it does not infringe rights acquired by other States, that it does no harm to general interests and does not constitute an *abus de droit.*

In fixing the breadth of its territorial sea, the State must indicate the reasons, geographic, economic, etc., which provide the justification therefor.

In the light of this principle, it is no longer necessary to debate questions of base-lines, straight lines, closing lines of ten sea miles for bays, etc., as has been done in this case.

Similarly, if a State adopts too great a breadth for its territorial sea, having regard to its land territory and to the needs of its population, or if the base-lines which it indicates appear to be arbitrarily selected, that will constitute an *abus de droit.*

3. States have certain rights over their territorial sea, particularly rights to the fisheries ; but they also have certain duties, particularly those of exercising supervision off their coasts, of facilitating navigation by the construction of lighthouses, by the dredging of certain areas of sea, etc.

4. States may alter the extent of the territorial sea which they have fixed, provided that they furnish adequate grounds to justify the change.

5. States may fix a greater or lesser area beyond their territorial sea over which they may reserve for themselves certain rights : customs, police rights, etc.

6. The rights indicated above are of great weight if established by a group of States, and especially by all the States of a continent.

The countries of Latin America have, individually or collectively, reserved wide areas of their coastal waters for specific purposes : the maintenance of neutrality, customs' services, etc., and, lastly, for the exploitation of the wealth of the continental shelf.

7. Any State directly concerned may raise an objection to another State's decision as to the extent of its territorial sea or of the area beyond it, if it alleges that the conditions set out above for the determination of these areas have been violated. Disputes arising out of such objections must be resolved in accordance with the provisions of the Charter of the United Nations.

8. Similarly, for the great bays and straits, there can be no uniform rules. The international status of every great bay and strait must be determined by the coastal States directly concerned, having regard to the general interest. The position here must be the same as in the case of the great international rivers: each case must be subject to its own special rules.

At the Conference held in Barcelona in 1921 on navigable waterways, I maintained that it was impossible to lay down general and uniform rules for all international rivers, in view of the great variety of conditions of all sorts obtaining among them; and this point of view was accepted.

In short, in the case of maritime and river routes, it is not possible to contemplate the laying down of uniform rules; the rules must accord with the realities of international life. In place of uniformity of rules it is necessary to have variety; but the general interest must always be taken into account.

9. A principle which must receive special consideration is that relating to prescription. This principle, under the name of *historic rights*, was discussed at length in the course of the hearings.

The concept of prescription in international law is quite different from that which it has in domestic law. As a result of the important part played by force in the formation of States, there is no prescription with regard to their territorial status. The political map of Europe underwent numerous changes in the course of the 19th and 20th centuries; it is to-day very different from what it was before the Great War, without any application of the principle of prescription.

Nevertheless, in some instances, prescription plays a part in international law and it has certain important features. It is recognized, in particular, in the case of the acquisition and the exercise of certain rights.

In support of the effect of prescription in such cases, two very important learned works should be mentioned, which adopt the collective opinion of jurists.

The first of these is the "Declaration of the Great Principles of Modern International Law" which provides, in Article 20: "No State is entitled to oppose, in its own interests, the making of rules on a question of general interest.

"When, however, it has exercised special rights for a considerable time, account must be taken of this in the making of rules."

The other learned work is the "Draft Rules for the Territorial Sea in Peacetime" adopted by the Institute of International Law at the 1928 Session in Stockholm. Article 2 of this draft provides :

> "The breadth of the territorial sea is 3 sea miles. (It was then thought that this was sufficient.)
> International usage may justify the recognition of a breadth greater or less than 3 miles."

For prescription to have effect, it is necessary that the rights claimed to be based thereon should be well established, that they should have been uninterruptedly enjoyed and that they should comply with the conditions set out in 2 above.

International law does not lay down any specific duration of time necessary for prescription to have effect. A comparatively recent usage relating to the territorial sea may be of greater effect than an ancient usage insufficiently proved.

10. It is also necessary to pay special attention to another principle which has been much spoken of : the right of States to do everything which is not expressly forbidden by international law. This principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day : the sovereignty of States is henceforth limited not only by the rights of other States but also by other factors previously indicated, which make up what is called the new international law : the Charter of the United Nations, resolutions passed by the Assembly of the United Nations, the duties of States, the general interests of international society and lastly the prohibition of *abus de droit*.

11. Any State alleging a principle of international law must prove its existence ; and one claiming that a principle of international law has been abrogated or has become ineffective and requires to be renewed, must likewise provide proof of this claim.

12. Agreement between the Parties as to the existence of a principle of law, or as to its application, for instance, as to the way in which base-lines determining the extent of the territorial sea are to be selected, etc., cannot have any influence upon the decision of the Court on the question.

13. International law takes precedence over municipal law. Acts committed by a State which violate international law involve the responsibility of that State.

14. A State is not obliged to protest against a violation of international law, unless it is aware or ought to be aware of this violation ; but only the State directly concerned is entitled to refer the matter to the appropriate international body. (Article 39 of

the "Declaration of the Great Principles of Modern International Law".)

VII

In accordance with the considerations set out above, I come to the following conclusions upon the questions submitted to the Court :

(1) Norway—like all other States—is entitled, in accordance with the general principles of the law of nations now in existence, to determine not only the breadth of her territorial sea, but also the manner in which it is to be reckoned.

(2) The Norwegian Decree of 1935, which delimited the Norwegian territorial sea, is not contrary to any express provisions of international law. Nor is it contrary to the general principles of international law, because the delimitation is reasonable, it does not infringe rights acquired by other States, it does no harm to general interests and does not constitute an *abus de droit.*

In enacting the Decree of 1935, Norway had in view simply the needs of the population of the areas in question.

(3) In view of the foregoing, it is unnecessary to consider whether or not Norway acquired by prescription a right to lay down a breadth of more than three sea miles for her territorial sea and the way in which its base-lines should be selected.

(4) If Norway is entitled to fix the extent of her territorial sea, as has been said, it is clear that she can prohibit other States from fishing within the limits of that sea without their being entitled to complain of a violation of their rights.

(5) The answer to the contentions of the Parties with regard to the existence of certain precepts of the law of nations which they consider to be in force at the present time has been given in the preceding pages.

(Signed) A. ALVAREZ.