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COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DES PÊCHERIES

(ROYAUME-UNI c. NORVÈGE)

VOLUME II

Exposés écrits (suite)

INTERNATIONAL COURT OF JUSTICE

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FISHERIES CASE

(UNITED KINGDOM *v.* NORWAY)

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Written statements (cont.)

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Written statements (cont.)

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INTRODUCTION

1. The Norwegian Government in its Counter-Memorial has submitted to the Court a lengthy statement of facts bearing upon the present dispute and of the applicable international law. In addition to submitting to the Court certain additional data, largely of an historical nature, which are peculiarly within its knowledge, the Norwegian Government has put forward objections and criticisms of the principles of law set out in the Memorial of the United Kingdom and has advanced certain principles of its own. The present Reply will not attempt to examine in detail all of the statements of fact and documents submitted by the Norwegian Government, many of which, though providing a useful and sometimes a necessary background, are not directly relevant to the legal issues with which the Court is concerned. In Part I it will deal with the general historical antecedents of the present case, replying to the contentions, so far as bearing upon the case, contained in Part I of the Counter-Memorial. In Part II the Government of the United Kingdom will reply to the Norwegian arguments on the law both in so far as these criticize the position taken by the United Kingdom and as they set out to establish positive contentions in favour of Norway.

In Part III it will reply briefly to the paragraph on damages in the Counter-Memorial (para. 577).

Summary of principal issues

2. It may be convenient to summarize at the beginning of this Reply what appear to the Government of the United Kingdom to be the principal issues in the case. The Norwegian Government contends that under international law Norway is entitled to sovereignty over all the sea which is delimited under the Royal Decree of 1935 and that in particular she is entitled to reserve all fishing in those waters to Norwegian nationals and to exclude therefrom fishermen of British and other foreign nationality. The question is whether the Government of the United Kingdom is obliged to accept this Norwegian claim with its consequent exclusion of British fishermen from the area. The question therefore is whether, under the rules of international law, the United Kingdom and other foreign Powers must recognize these waters as Norwegian waters.

(a) The first principal issue in the case may therefore be described as the "question of the burden of proof". The Norwegian Counter-Memorial, a great part of which is devoted to an attempt to prove that there is little or no international law regarding the limits of territorial and internal waters, puts forward rather unusual contentions with regard to the burden of proof. It contends that

Norway is entitled to claim sovereignty over any areas of sea except in so far as the United Kingdom establishes that there are rules of customary law binding on Norway limiting this right. The Counter-Memorial argues that it is not the case that the Government of the United Kingdom is only obliged to recognize and accept Norwegian claims to sovereignty over the sea to the extent that Norway can show positively that customary and other rules of international law binding on the United Kingdom entitle Norway to sovereignty over those waters. In brief, Norway contends that the burden of proof of the general rules of international law is on the United Kingdom. Norway puts forward her argument with regard to the burden of proof on two grounds, of which the first is that the Decree of 1935 is an act of sovereignty and the presumption is always in favour of the validity of an act of sovereignty. The reply of the Government of the United Kingdom to this ground is that any presumption in favour of the validity of an act of sovereignty only applies to acts which are taken within a sphere which is indisputably within the sovereignty of the State taking them, for instance, within its own undisputed national territory, and where in consequence the issue is whether that State's freedom of action (or domestic jurisdiction) within that sphere has been limited by some treaty provision, or by some exceptional rule of international law, limiting its freedom of action within a sphere which in principle is within its jurisdiction. Therefore, the presumption has no application to the present case when the whole issue before the Court is whether the waters to which the Decree of 1935 applies are or are not under Norwegian sovereignty. Norway's second ground for her contention is that, when an issue arises as to whether an area of waters is territorial waters or high seas, the presumption is always in favour of State sovereignty or, in other words, in favour of territorial waters as against the common rights of the community of nations over the high seas. To this the United Kingdom replies that, in the first place, it is questionable whether there can be said to be any burden of proof at all as regards the demonstration of the general rules of international law, which are matters within the judicial cognizance of the Court, and, in the second place, to the extent that it can be said that there is any burden of proof, the presumption is rather in favour of high seas and the rights of the community of nations rather than in favour of territorial waters and individual State sovereignty. The question of burden of proof is discussed exclusively in Part II of this Reply, principally in paragraphs 210-222. This question of the burden of proof is one of the three main issues before the Court.

(b) The second main issue before the Court is what are the general rules of international law with regard to the limits of territorial waters. Norway formulates her contention very simply in paragraph 242 of the Counter-Memorial, and it may be paraphrased as follows :

> A State's maritime territory is restricted to adjacent waters, namely to those waters which may be considered as accessory to the land. Waters accessory to the land are those waters which the coastal State has power to appropriate or occupy and in regard to which its legitimate interests justify its appropriation.

This statement sums up Norway's view of all the provisions of international law with regard to territorial waters. According to the view of the Government of the United Kingdom, the rules of international law with regard to the limits of territorial waters, which are set out more fully in paragraphs 61-122 of the Memorial, may be very briefly summarized as follows :

(i) A State is entitled to a belt of territorial waters of a certain breadth—the generally accepted limit is three miles—but Norway has an historic or prescriptive title to a belt of four miles.

(ii) The belt of territorial waters must be measured from a base-line which, subject to certain exceptions, must follow the low-water mark on the land.

(iii) Where there are bays or similar indentations of the coast (whatever name these indentations have) which are of a certain character and where there are islands off the coast, there are rules of general international law which permit the base-line of territorial waters to cease to follow low-water mark on the land and to enclose as national waters certain areas of sea.

(iv) A State can only establish a title to areas of sea which do not come within these general rules of international law on the basis of an historic or prescriptive title.

The United Kingdom contends that the claims made in the Decree of 1935 do not come within the general rules of international law. All the United Kingdom arguments with regard to this second main question before the Court are found in Part II of this Reply and in particular in paragraphs 180-209 below.

(c) The third principal question before the Court is as to the extent to which Norway has an historic or prescriptive title to claim as Norwegian waters areas of sea which are not covered by the general rules of international law, and which are enclosed by the 1935 Decree. The United Kingdom admits that Norway has a prescriptive title to a four-mile belt, and to a number of fjords or sunds which she could not claim by the general rules of international law. Further, the United Kingdom admits that Norway *may* have a prescriptive title to areas of sea measured from certain base-lines established by the Norwegian Decrees of 1869 and 1889. These areas of sea are situated off portions of the Norwegian coast which lie between Bergen and Trondheim, well south of the area which is the

subject of the case at present before the Court, which begins roughly with the Vestfjord and continues north and east as far as the frontier of the U.S.S.R. The United Kingdom maintains that Norway cannot justify the areas claimed by the 1935 Decree on the basis of any prescriptive title and disputes that Norway has acquired a prescriptive title to claim territorial waters along the whole of the Norwegian coast measured from base-lines drawn on the same principles as the Decrees of 1869 and 1889, and maintains further that the Decree of 1935 does not follow the same principle as the Decrees of 1869 and 1889. Norway contends that she has a prescriptive title to all the waters covered by the 1935 Decree. The principal relevance to the issues before the Court of Part I of this Reply, Part I of the United Kingdom Memorial and Part I of the Norwegian Counter-Memorial is to the question of the facts necessary for the establishment of an historic or prescriptive title. But this question is also dealt with in regard to the law applicable more briefly again in paragraphs 571-573 of Part II of the Norwegian Counter-Memorial and in paragraphs 488-509 of Part II of this Reply.

The chief difference between the Parties as regards the legal principles applicable to the acquisition of an historic title is that the United Kingdom contends there are two essential elements, namely:

(i) Actual exercise of authority by the claimant State;
(ii) Acquiescence by other States;

whereas Norway argues that the second element is not essential.

The chief difference between the Parties as to the inference to be drawn from the facts is that, whereas Norway maintains that the Royal Decree of 1935 is a mere application of principles which have always been part of Norwegian law and practice, the United Kingdom denies this and contends that Norway had not before 1912 developed any definite theory with regard to the measurement of Norwegian territorial waters and that between 1912 and 1935 she had, and acted on, different theories.

2 A. The actual area of sea in dispute in this case is that lying between the pecked blue lines and the pecked green lines on the charts filed as Annex 35 to this Reply. Although the arguments of the Parties range over almost every aspect of the law regarding the limits of territorial and internal waters which a State may claim in the sea adjacent to its coasts, in fact the issue is Norway's claim to measure her territorial waters from long straight base-lines drawn between the most advanced headlands or islets or semi-submerged rocks in a manner for which the nearest precedent is the ancient and long-abandoned claim of England's Stuart Kings to the "King's Chambers".

PART I

General and historical considerations

Preliminary

3. The main objective of Part I of the Counter-Memorial is to demonstrate that the Norwegian legislation with regard to fishing limits has followed, throughout a long and continuous period of years, a progressive development, based on certain definite principles of an historic nature, which principles are said to have been successively worked out in the various decrees from 1812 to 1935 inclusive. These principles, it is alleged (paras. 51-52, 57, 63 and 80-90 of the Norwegian Counter-Memorial), as well as the legislative enactments in which they have been expressed, have throughout been brought to the notice of and have in fact been well known to interested foreign Powers, including the United Kingdom, and have not been disputed until they were called in question by the United Kingdom in differences leading up to the present case. The purpose of this demonstration may be said to be, in general terms, to establish the historic nature of Norwegian claims to exclusive fishing rights in the waters concerned in this case, thus providing the facts necessary to establish a contention (which is pursued in Chapter III (E) of Part II of the Norwegian Counter-Memorial) that in law an historic title of this character has been acquired. In particular, the endeavour is made (see particularly paras. 91, 174, 177-181 of the Norwegian Counter-Memorial) to justify the Royal Decree of 12th July, 1935, the subject matter of these proceedings, on the grounds that it merely carries out these well-established and recognized principles, and that the Norwegian Government, in enacting the decree, was not departing in any way from a course of legislative action which she had evidently been following for over a century.

4. The Government of the United Kingdom will seek on the contrary to show that, with the exception of the claim that the breadth of territorial waters is 4 miles, which the United Kingdom considers as established, in the case of Norway, on historic grounds, and with the further exception of certain fjords and sunds, an historic title to which, within due limits, the United Kingdom is prepared to concede, the necessary ingredients to establish an historic title to areas enclosed by the 1935 Decree are not present, or at least have not been proved by the Counter-Memorial. Further, before 1935, Norway had neither explicitly nor by implication laid down any principle for the fixing of fishery limits (territorial waters) which was applicable to the area in question in the case. Such legislation as she had passed in 1869 and 1889 related to different portions of the coast and was of a strictly practical

character to meet present and practical problems. Such acceptance as there may have been of this legislation at the time (and this was very slight) was not based on the recognition of any principle but on the absence of any real conflict of interest coupled with a desire to maintain friendly relations with a country for whose needs and difficulties there was felt a sincere sympathy and respect. This acceptance was limited to the areas covered by those decrees and was given in circumstances precluding any inference that a system was applicable elsewhere, or even that Norway was seeking to establish such a system. The Royal Decree of 1935, so far from being a logical or necessary application to the northern half of the coast of already established principles, was on the contrary a new development : an assertion in fact of far-reaching claims not previously made which Norway herself felt compelled to put forward under pressure from what she then conceived to be her own economic interests, but which she herself did not venture to put forward until twenty-three years after the precise limits contained in the decree had been recommended by her special commission in 1912, because she recognized that they involved an extension, unlikely to be acceptable internationally, of anything she had previously put forward. In 1924 the ideas of the Norwegian authorities of their claims in this northern area were quite different from the 1935 Decree, as the red line shows (Annex 2 of the Memorial). The claims made by the Royal Decree of 1935 must, therefore, in the submission of the Government of the United Kingdom, be judged on their merits in the light of what is permitted by international law and, as will be shown in Part II of the Reply, cannot, on this basis, be justified.

General comments on the fisheries off the northern coasts of Norway (Counter-Memorial, paras. 12-24)

5. Chapter I of the Counter-Memorial presents a general description of the Norwegian fisheries, their geographic, economic and social characteristics, together with some statistics. The Government of the United Kingdom does not desire to contest the main lines of this description and will confine its observations to such matters as are directly relevant to the present dispute. For convenience of reference, in the examination of this portion of the Counter-Memorial and of the Reply, there is annexed (Annex 23) a glossary of the main varieties of fish referred to, setting out the corresponding designations, where possible, in English, French and Latin.

The first of the matters on which the Government of the United Kingdom wishes to submit some observations relates to the nature of the Norwegian coast and of the outlying banks and bed of the sea (see paras. 12-13 of the Counter-Memorial). It is not disputed either by the Counter-Memorial or by the *Principal Facts* that considerable differences exist along Norway's, 2,000-mile coast

line. These (which will be summarized in the next following paragraph) are of importance from two points of view.

The first is that these differences demonstrate the impossibility of applying to the Norwegian coast as a whole any special rule (differing from the rules generally applicable under international law) alleged to be justified by any special or "legitimate" requirement of Norway to protect her fishing industry. This point is well illustrated by Gidel in a passage in which he compares the advantages of control by international agreement with the arguments advanced by those who, like Norway, seek to deal with the problem by an extension of territorial waters. Dealing with the latter arguments he says (*op. cit.*, Vol. III, pp. 302-303) :

> « Ces solutions ne sauraient être retenues non seulement parce qu'elles porteraient atteinte à des situations séculaires intéressant de nombreux États, mais parce qu'elles ne peuvent être qu'arbitraires. Il est en effet impossible de prendre d'une façon générale la limite du plateau continental comme limite de la mer territoriale, même si l'on accepte la notion, assez arbitraire, que le plateau continental s'étend jusqu'aux fonds de 200 mètres, la limite de 200 mètres n'ayant été adoptée que parce qu'elle correspond environ à 100 brasses et est habituellement marquée sur les cartes marines. Assez rapprochées de certaines côtes, les limites du plateau continental s'en éloignent de plus de deux cents kilomètres dans d'autres régions d'Europe. Les données physiques relatives à la configuration des fonds ne sauraient donc fournir par elles-mêmes la solution à la question de savoir jusqu'à quelle distance il convient de réserver la pêche aux nationaux. »

The second is that the coast off Møre which forms the area covered by the Norwegian Decrees of 16th October, 1869, and 9th September, 1889, differs markedly from the rest of the coast and particularly from the coast of Finnmark. Whatever principles may therefore have been applied in the enactment of those decrees (a matter which will be examined in detail later in this Reply), these are not suitable for application to the rest of the Norwegian coast, nor can the Decree of 1935 properly be justified, as the Counter-Memorial attempts to justify it, as a logical application of those principles.

6. The significant features of the Norwegian coast which illustrate the argument put forward in the preceding paragraph are as follows :

(a) While it is true that the greater part of the Norwegian coast presents the features described in paragraph 13 of the Counter-Memorial, that is to say, of rocky peaks emerging from the surface of the sea and thus forming a "skjærgaard", this is not true of a substantial portion of the coast of Finnmark. Eastward of North Cape (lat. 71° 08′ N.), there is no "skjærgaard" lying off the coast, and the coast beyond

these points resembles any other coast broken by indentations and bays.

(b) While it is true that in the south of Norway, particularly from Oslo to Florø (lat. 61° 36′ N.-south of the area covered by the Royal Decree of 1935), the "coastal bank" is narrow and the bed of the sea descends rapidly from the shore, that is not the case in the greater part of the area covered by the Royal Decree of 1935 which begins in the south at lat. 66° 28′ 48″ N. From Florø northwards to Andøen (lat. 69° N.-north of the Lofoten islands), there is a wide shelf with general depths of from 100 to 200 fathoms on which are banks with less water, this shelf extending for the most part 100 miles or more from the coast. (*Principal Facts*, p. 6.) From Andøen, after a short space where deep waters come close into the shore, to Sørøy (lat. 70° 40′ N.), this shelf becomes increasingly wide continuing in a northerly direction to the west coast of Spitsbergen. From Sørøy to the Varangerfjord, the end of Norwegian territory, the coastal shelf is somewhat narrower but is of generally even width and slopes gradually from the shore in a manner not found elsewhere off the Norwegian coast. (*Principal Facts*, p. 15.) The 100-fathom line north of lat. 69° N. is clearly shown in figure 6 of the *Principal Facts*, p. 16.

(c) The nature of the area covered by the Decrees of 1869 and 1889 lying off the coast of Møre, between Bergen and Trondheim (well south of the area covered by the 1935 Decree), is markedly different from that elsewhere. In this area stretching from Stattlandet (lat. 62° 09′ N.) to Grip (lat. 63° 13′ N.), there is what has been described as a "great bank plateau" consisting of a number of well-marked continuous banks situated some distance from the shore, some of which were enclosed by the Decrees of 1869 and 1889 (see *Principal Facts*, p. 6, p. 10 (figure 3), p. 11, and p. 25 (figure 10)). On the individual character of this coast see further paragraphs 34 and 36 A below.

7. It is not the case, as appears to be suggested in paragraph 15 of the Counter-Memorial, that the majority of the fishing grounds are situated on a narrow strip of coastal bank, nor that there is any general coincidence between the areas where coastal fishing is carried on and any such configuration. As has been shown (para. 6 *(c)* above) the fishing grounds off the coast of Møre are some substantial distance from the shore, and the extensive outer banks of Medbotten are not even within the area which Norway felt able in her Decree of 1869 to claim as Norwegian waters. In the Finnmark area, which is covered by the 1935 Decree, a certain amount, in fact probably the greater part, of the fishing was, it is true, carried on close to shore because of the necessity of obtaining fixes (para. 15

of Counter-Memorial), but it is clear that local fishermen were prepared to go as far as 40 miles from the coast to seek suitable grounds (para. 20 of Counter-Memorial). Finally there are certain important fishing grounds frequented by foreign trawlers, to which reference is made in the Counter-Memorial (para. 22), namely, those on the Svensgrunnen (lat. 69° 35′ N.) and Malangsgrunnen (lat. 70° N.) which are a considerable distance from shore (see *Principal Facts*, figure 6, p. 16). It is significant to note that these particular grounds are not within the area covered by the Royal Decree of 1935, though that decree in many places does include areas many miles from shore.

8. The following further observations may be made on certain matters referred to in this part of the Counter-Memorial :

(a) The suggestion seems to be made in paragraph 14 of the Counter-Memorial that there is a particular variety of cod found and fished off the Norwegian coast—presumably as the basis for an argument that special protection is required for this breed. In fact there is little foundation for any such suggestion. Marking experiments carried out by the fisheries authorities of the United Kingdom and other countries have shown that cod from all the main regions migrate from one region to another. Annex 24 of this Reply contains a chart, based on information derived from United States, Canadian, Newfoundland, Danish, Norwegian, German and United Kingdom sources, which shows the results of the experiments conducted and the wide area of migration.

(b) Paragraph 17 of the Norwegian Counter-Memorial contains the statement that English fishermen were obliged to direct their activities to the more distant fishing banks (i.e. those lying off the Norwegian coast) by reason of the decline of productivity of the North Sea banks. This statement is only partially true and may be misleading. In the first place, English fishermen have since early times (see paras. 11 and 14 of this Reply) frequented northern waters not on account of any exhaustion of the North Sea banks, but in order to obtain certain varieties of fish, particularly cod, which are not obtainable in the North Sea. Secondly, although it is true that there has been a decline in the North Sea resources, this is not—as may be implied by the statement above referred to and also by a sentence in paragraph 534 of the Counter-Memorial—due exclusively or even mainly to the activities of English fishermen. From the earliest times fishing in the North Sea, and indeed off the coasts of England itself, has been freely open to fishermen of all nations and its resources have been exploited by Dutch, French, Danish, German and other vessels to an extent as least as great as by English ships. Correspondingly it is not only English vessels which have resorted to the northern waters off the coasts of Norway

and beyond : these waters—as is recognized by paragraph 23 *(a)* of the Counter-Memorial—have from early times been frequented by Russian, German, Dutch, Icelandic and other vessels.

(c) In paragraphs 22-23 of the Counter-Memorial reference is made to the economic importance of the fishing industry in the life of the inhabitants of the Norwegian coasts and particularly of Finnmark. The Government of the United Kingdom at once admits—as it has always been ready to recognize—the essential dependence of the inhabitants of Finnmark on fishing. At the same time it feels justified in pointing to the very substantial place which fishing—and particularly fishing in the northern waters off Norwegian coasts—occupies in the economy of English ports. At the three principal fishing ports of Hull, Grimsby and Fleetwood, the estimated population wholly engaged in the fishing industry is 88,000 out of a total population of 415,000 persons. In 1949, 560 trips were made by British vessels to waters lying off Norwegian coasts which, on a basis of an average crew of 21 and an average voyage of 24 days, represents an expenditure of 283,000 men days. There is no doubt that any substantial reduction in the facilities for fishing in these areas would result in serious unemployment and hardship among the population concerned.

(d) The Government of the United Kingdom does not accept the correctness of the statistics contained in paragraph 23 *(a)* of the Counter-Memorial which purport to show first that, in 1937, British trawlers made 2,000 trips to Norwegian waters off Finnmark and secondly that the landings of fish by foreign vessels far exceeded those made by Norway. The records maintained by the Fisheries Department in London show that in 1937 British trawlers made only 296 trips in the waters in question—as against the figure of about 2,000 alleged. Moreover, the comparison of the total catch of fish by British or German trawlers in 1937 with the Norwegian cod landings is misleading. From the table attached (Annex 25), which is obtained from the *Bulletin statistique*, it appears that in the years 1935, 1937 and 1938 Norway landed more cod than all the other nations whose catches were recorded, and the same was true of the total catch of demersal fish (i.e. fish which live at the bottom of the sea).

9. It may be convenient, in this portion of the Reply, to deal with an argument which is implicit in certain portions of the Counter-Memorial and is by implication invoked in the recitals of the 1935 Decree itself, that trawling as such represents a serious menace to the productivity of fish in the waters lying off the coasts of Norway and that there is an imminent danger that these resources may be depleted (see, for example, paras. 75 and 536 of the Counter-Memorial), thus :

(a) Annex 26 of this Reply reproduces a chart, prepared by a group of fishing biologists, of latent marine fishery resources showing the major stocks believed to be underfished in 1949. This chart was produced at the U.N.E.S.C.O. Conference on Conservation and Economic Utilization of Resources held at Lake Success from 17th August-6th September, 1949. On this chart the Arctic-Norwegian stock of cod is shown as underfished.

(b) One of the most eminent Norwegian fishery scientists, Gunnar Rollefsen, in a document published in the Rapport and Procès-Verbaux of the International Council for the Exploration of the Sea (Vol. CXXII) dealing with the productivity of Arctic-Norwegian cod, said:

> "We cannot demonstrate any effect on the stock from increased fishing before the war; also it cannot be demonstrated that the reduced fishing during the war had any effect",

and he showed that the productivity of this type of cod depended upon fertility factors related to particular age groups of fish rather than upon any increase or decrease in fishing intensity. This document is reproduced at Annex 27.

(c) Comparing the fishing methods of British (and other foreign) trawlers and those of Norwegian fishermen, it is relevant to note that, whereas British fishermen divide their effort between the waters off the coasts of Norway and more distant areas (e.g. the Barents Sea), the whole of the Norwegian effort is deployed against the cod of the Norwegian coast, mainly against the spawning stock. If the Norwegian authorities considered that there was any real threat to the productivity of cod in these areas, it would be open to them to direct that an increased proportion of the catch of Norwegian fishing vessels should be taken from the comparatively more distant waters. This is in fact what is done by English fishermen in relation to the cod spawning grounds off the Yorkshire coasts of England.

Further, the method of fishing practised by British trawlers is considerably more restricted than that commonly used by Norwegian fishermen. British trawlers make use of a trawl which works on the bottom of the sea; this can only be used in certain suitable areas and also only takes fish from the bottom. Norwegian fishermen on the other hand use a method of fishing by lines which can take fish at any depth and over types of bottom not suitable for trawlers. Cod, in particular, are not always found at the bottom: in the Lofoten area they are known to seek water of a suitable temperature which may often be found well above the bottom.

(d) The question how far trawling is deleterious to the fishing grounds has been under examination recently in Norway, the

Norwegian Government having in 1947 set up a committee to enquire into the matter. The report of this committee [1] finds that there is no sufficient proof from the records of antecedent periods that trawling damages the fisheries—the poor period having been from 1900-1925 before foreign trawling became of major importance and a rich period from 1930 onwards when trawling was fully developed in Norwegian waters. It proposes that Norwegian legislation regarding trawling be amended in order to permit an increase in this method of fishing. Whereas, under the present law, concessions have only been granted to eleven Norwegian trawlers, it is now proposed that the Government should have power to license an unlimited number. Thus, though for years there has been a prevalent and tenaciously held view of Norwegian fishing interests that trawling injured the fishing stocks and this opinion was probably the principal cause of the 1935 Decree, now—after the enactment of the decree reserving large fishing areas for Norwegian fishing vessels—it appears that expert opinion in Norway has, as a result of further study, reached the conclusion that this view was wrong. A translation of the most relevant portions of the report of this committee will be found in Annex 28 of this Reply.

10. Another, though different, argument against trawlers is the reference made by Norway in paragraph 23 *(a)* of the Counter-Memorial to the damage alleged to be done to the gear of Norwegian fishermen by foreign trawlers. Such statements must, in the opinion of the Government of the United Kingdom, be accepted with considerable reserve. The areas in which there might be concentrations of competing type of gear is exceedingly small and great care is (in their own interest) exercised by trawler skippers to ensure that such damage is avoided. It will be appreciated that the period of the greatest concentration in Norwegian northern waters is from April -June—a period when there is light for 24 hours and consequently but little risk of accidents. Moreover the nature of the methods employed render it unlikely that opportunity for collision will arise. See the observations of the Norwegian Ministry of Foreign Affairs quoted in paragraph 431 below. To deal with such cases of damage as may arise, an agreement was concluded between the two countries in 1934 which provided for the establishment of boards in the two countries to deal with claims made by fishermen of one country

[1] Komitéen til utredning av spørsmålet om rasjonalisering av fisket og fiskeriindustrien. Innstilling om endring av lov av 17 mars 1939 om fiske med bunnslepenot (trål), og en Redegjørelse om den norske fiskeflåtes stilling og fremtidige utvikling. (The committee appointed to report upon the question of the rationalization of the fishing and fish-processing industries; a report concerning the amendment of the Act of 17th March, 1939, regarding trawling and a statement concerning the situation of the Norwegian fishing fleet and its future development.) The committee's report was dated in Bergen on 18th January-5th February, 1949.

against fishermen of the other country in respect of damage to fishing gear in waters adjacent to the coasts of Norway and of the United Kingdom (Annex 29). Where damage is reported, the board investigates the claim, ascertains whether it is well founded, and what is the extent of the damage involved. When the investigation is complete, the board endeavours to assist the parties to reach an amicable settlement. Since the signing of the agreement, the boards have functioned with full effect and the majority of claims by Norwegian fishermen for damage to gear have been settled according to their recommendation. In the submission of the Government of the United Kingdom, the appropriate method to deal with possible conflicts of this kind is by international arrangement rather than by extension of the area of territorial waters (see further paras. 135-137 below).

The Government of the United Kingdom would not, however, dispute the importance—claimed in paragraph 24 of the Counter-Memorial—of the fishing industry for the population of the coast of Norway and especially Northern Norway, nor its undoubtedly ancient character, but does not accept the other contentions in that paragraph which would, if accepted, entitle Norway to appropriate, at her discretion, such areas of sea off her northern coasts as she considered desirable. The limits within which Norway is entitled to exclusive rights of fishery must, on the contrary, be defined by reference to international law, on principles which, according to the submission of the United Kingdom, are set out in the Memorial and will be further developed in this Reply.

Historical (Counter-Memorial, paras. 25-44)

11. The Government of the United Kingdom does not propose to follow in detail or indeed to contest the account of the very early history of the development and economy of fishing in Norwegian waters from the palæolithic age to the sixteenth century contained in paragraphs 25 to 31 of the Norwegian Counter-Memorial. The transition from the period of ancient history to modern times takes place in the sixteenth and seventeenth centuries, when the régime of *mare clausum* is progressively superseded by that of *mare liberum*. The régime of *mare clausum* was marked by the total exclusion of foreign States from participation in commerce of any kind [1]: from the sixteenth century onwards this principle of exclusiveness begins to break down and at the same time, in the particular domain of fisheries, fishermen increasingly begin to assert the right to fish outside their coastal waters and to resist attempts to exclude them. The refusal—under the principle of *mare liberum*—of foreign, and

[1] By no means all the countries which claimed dominion over large areas of sea under the *mare clausum* doctrine reserved to themselves all commerce and all fishing in those seas. For instance, neither England nor the Venetians did so. The extreme example of exclusiveness in relation to both commerce and fishing was the Kingdom of Denmark/Norway.

particularly of British, fishermen to accept such attempts to exclude them from the most distant waters is as conspicuous a feature, from the sixteenth century onwards, of the development of fishing in the North Sea and adjacent areas as are the efforts of riparian States—in particular Denmark/Norway—to exclude them under the vanishing régime of *mare clausum*. It would probably be correct to say that in relation to the coasts of Norway the movement towards assertion of the doctrine of *mare liberum* spread from South to North and, indeed, the northern regions of Norway, owing to their great distance from other countries, except Russia, were not generally accessible to fishermen from other lands until the advent of steam navigation, and did not represent any serious economic interest until the advent of steam trawling in the twentieth century.

The arrival, off the coast of Finnmark in the years immediately preceding the first World War, of the first steam trawlers, created, for the first time, in relation to this area, a problem on the plane of international law the legal solution for which cannot be found in historical antecedents of a time when this problem did not exist. This is significantly shown by the order of events leading to the present litigation. In 1906-1908 trawling began off the east coast of Finnmark (i.e. east of North Cape) and in 1911 the first incident—that of the *Lord Roberts*—occurred. In 1912 the Norwegian Government established the Commission on Territorial Waters. In 1922, after the first World War, trawling was resumed and this was followed by the Oslo and London Conversations of 1924-1925. In 1933 trawling began off the coast of Finnmark west of North Cape. In 1935 the Royal decree, adopting the fishing limits which had been recommended by the Commission of 1912, was passed. In 1949 the present proceedings (after some negotiations and the intervention of the second World War) were started. Plainly the dispute involved is not one representing the culmination of a long historic process but one arising out of a situation newly come into being in 1906-1908 involving a conflict of interest which did not previously exist.

12. The Government of the United Kingdom would equally not dispute the general statements of fact contained in paragraph 28 of the Counter-Memorial that fishing was not, even in early times, confined to the areas immediately adjacent to the coasts. No doubt Norwegian fishermen, like those of Scotland and its outlying islands, engaged in fishing at considerable depths for cod and for other fish to the greatest extent compatible with their available technical resources. The conclusion does not, however, necessarily follow, nor is it established, as stated at the end of paragraph 28 of the Counter-Memorial, that the area within which historic and prehistoric fishing was carried on coincided even approximately with the area of water superimposed on any continental shelf. The most that can be established is a negative conclusion, namely, that fish-

ing in these times could not be profitably conducted beyond certain definite depths. In fact there is nothing which prevents a line fisherman from fishing in any depth of water up to 500 fathoms (a depth at which line fishing has actually been carried on in Greenland).

13. Paragraphs 30-34 of the Counter-Memorial set out the claims which were made by the Kings of Norway in early times to exercise sovereignty over extensive areas of sea and the measures which were taken to exclude foreigners from access to those seas. The Government of the United Kingdom does not dispute that these claims were made—claims of the same kind were, as the Counter-Memorial itself points out, made by other countries. A graphic illustration of the extent of British claims during the seventeenth century is provided by the Frontispiece to Fulton, *The Sovereignty of the Sea*, which shows the "British Seas" according to Selden as extending up to the coast of Norway to a substantial degree of north latitude. (See also Fulton, *The Sovereignty of the Sea*, pp. 102-104, for the claims made by Dee (1577), which extended to the midway line between British and foreign territory.) Fulton (p. 339) describes the Scandinavian claim as "not of great practical importance".

The period up to the sixteenth century was, as has already been stated, the characteristic period of *mare clausum* before this was superseded, as in the course of the seventeenth century it was superseded, by the régime of *mare liberum*. As Mr. Koht, the Norwegian Minister of Foreign Affairs, put it in his speech to the Storting of 24th June, 1935 (Annex 52 of Counter-Memorial):

> "Il fut un temps où les rois de Norvège se considéraient seuls maîtres de la mer septentrionale, et pouvaient interdire aux nations étrangères d'y expédier leurs vaisseaux. Le développement des échanges internationaux, au point de vue juridique comme au point de vue économique, a mis fin à de telles prétentions, et il n'y a personne dans ce pays à vouloir fermer la mer septentrionale aux marins et pêcheurs étrangers."

The restrictions and prohibitions imposed by various States were, moreover, not directly, solely or even principally against fishing, but against trading or commercial intercourse of any kind including the purchase or selling of fish. This appears clearly from the Treaty of 1465 (cited in para. 32 of the Norwegian Counter-Memorial) between King Christian of Denmark/Norway and King Edward IV of England which prohibited "navigation in the direction of Iceland", "landing and penetration in Iceland", and trading on the coasts of Haalogaland and Finnmark as well as from the other documents there referred to. If reference is made to these early treaties, it is as well to recall that in addition to the Treaties of 1432 and 1465 cited in the Counter-Memorial in paragraph 32, which are asserted to have put an end to English commerce in the vicinity of Northern Norway, there was also a treaty of 1490 concluded between King John II of Denmark/Norway and the English

King Henry VII by which English subjects were granted liberty to sail freely to Iceland for trading and for fishing, which treaty was renewed in 1523. These documents are, however, of no significance at the present time. It is true that Norway asserts that her present claims represent a substantial reduction on her ancient claims (see for example para. 44 of the Counter-Memorial) : but the same is true of the claims of all other nations. What is relevant and necessary is to ascertain at what point to-day the dividing line is to be drawn between the claims of the coastal State and the claims of others. This must be done not by reference to ancient legislation relating to a totally different régime but on the basis of the rules of modern international law.

14. As regards fishing off or near the coasts of Finnmark, reference is made in the Rapport 1912 (p. 134) to the "invasion" by foreign fishermen (specifically British and Dutch) of the waters of Finnmark in the sixteenth century for purposes both of fishing and of commerce. As the report of the Prefect there cited shows, this "invasion" was of great benefit to the local inhabitants, "ce dont semblent témoigner la population nombreuse existant en ce temps et l'aisance générale des habitants, dont on trouve encore ici des vestiges".

It was, however, considered damaging to the Royal revenues and the Kings accordingly sought to prevent it. But the Government of the United Kingdom does not regard it as by any means established that the Norwegian Kings of the sixteenth century in fact succeeded in excluding English fishermen from this area. No doubt forcible action was, from time to time, taken with a view to preventing English fishing vessels from either proceeding towards the Arctic Sea, or trading in fish, or fishing off these coasts. But English fishermen persisted in appearing off these coasts in spite of opposition. The agreement of 22nd June, 1583 (cited in para. 33 of the Counter-Memorial), in effect, appears to represent a victory for the English point of view since permission was obtained for passage by the Arctic Sea to Russian trading areas, unaccompanied by any agreement on the English side to refrain from fishing off the Finnmark coasts. And, although Queen Elizabeth was prepared, in 1585, to enjoin her subjects resorting to Iceland and to Vardö to conduct themselves well, she at the same time resisted a Danish/Norwegian claim that she should prevent them from fishing near those places without special permission and indeed asserted that they had the right to do so under international law (Rapport 1912, pp. 135-136. See also Fulton, p. 110). All these events took place in the last phases of the régime of *mare clausum*. The English maintained their fishing expeditions (as is shown by the repeated efforts of Kings Frederick II and Christian IV to stop them—see para. 34 of the Counter-Memorial) and it will be seen that when, in 1602, negotiations were opened between the two countries, the English repre-

sentatives put forward and maintained the contention that the seas were free [1]. These negotiations can hardly be interpreted as an abandonment of English claims to fish in this area and, in fact, the Government of the United Kingdom has no reason to believe that, apart from whale fishing which was discontinued for a time under an agreement made by King James I, there was any cesser of fishing by English vessels in the areas of the Finnmark coast. At any rate it is clear that the Danish Kings were unable, in spite of considerable efforts, to exclude Dutch fishermen from their waters. As Fulton states, "the efforts of Denmark to preserve a monopoly of fishing and trading in the Arctic Sea were intermittent and ineffectual" (*op. cit.*, p. 528).

15. The Government of the United Kingdom notes the development of the Norwegian rules as to neutrality as set out in paragraphs 37-38 of the Counter-Memorial. It is correctly stated in these paragraphs that the early rules relating to the limits of maritime territory, contained in the Rescript of 18th June, 1745 (the first appearance of the Scandinavian league of 4 miles), and in subsequent eighteenth-century rescripts, were rules of neutrality, but at a later date they became applicable for the delimitation of territorial waters generally. The Norwegian Government does not (in the understanding of the United Kingdom Government) dispute the fact that exclusive fishing rights cannot be claimed outside the limit of territorial waters. The Government of the United Kingdom will refer later in this Reply to the Rescript of 1812 which, as admitted in paragraph 38 of the Counter-Memorial, was not passed with an object of defining fishing limits and was not even published until 1830. (See paras. 22-24 below.)

Norwegian regulations relating to coastal fishing (paras. 39-44 of Counter-Memorial)

16. The Counter-Memorial in paragraphs 39-44 sets out a number of facts and documents designed to illustrate Norwegian customary law, for the purpose of showing that areas or parcels of sea were appropriated at various times for the exclusive use of communities or individual fishermen. Whatever else can be said of the effect of these régimes, it is not correct (as the first sentence of para. 29 of the Counter-Memorial says) that a private right of ownership over portions of the sea was created similar to that existing over cultivated land. (See Ræstad: *Kongens Strømme*, pp. 365-366.) These paragraphs contain material bearing on two quite distinct points.

[1] For an extensive summary of the instructions given to the English representatives, see Fulton, *The Sovereignty of the Sea*, pp. 110-112 (Annex 30 of this Reply). Fulton describes this as "an admirable exposition of the freedom of the seas". These are the negotiations referred to in paragraph 34 of the Counter-Memorial (Vol. I, at the foot of p. 240).

The first point [1] is that the local authorities, in various areas, enacted regulations of a police character designed to ensure the orderly development and exploitation of the fishing grounds. The only relevance of this material to the present dispute would be to show that the Norwegian authorities had from remote times exercised "dominion" or "national authority" or "jurisdiction" or "control" or had "affirmed sovereignty" over the areas now in dispute and so to provide evidence of their historic claims to such areas (see paras. 543, 545, 546, 549, 560, 564 of the Counter-Memorial). Under this heading come the various prohibitions (cited in paras. 41-42 of the Counter-Memorial) against long-line fishing on Sunday, fishing in certain seasons, the laying of nets and similar matters. With regard to these, two observations may be made.

First, these regulations (which were often enacted at the request of the local population or even by the local population itself) have no bearing upon the question, what areas of sea were considered as appropriated for exclusive use by Norwegian subjects. It is common for legislation of a regulatory character to be applied to all fishing operations whether or not these are conducted within the areas reserved for local use. These regulations are enforced at least against nationals of the country concerned both within and outside the limits of territorial waters [2]. They afford no guide as to the area over which sovereignty extends.

Secondly, there is no specific indication given in any case as to the precise areas to which the regulations in question were applied. The only geographical expressions which are used are general expressions such as "les lieux de pêche leur appartenant" (Vol. I, C.-Memorial, p. 246, line 6), "les eaux attenant à leurs propriétés privées" (*ibid.*, line 8), "les lieux de pêche communs" (*ibid.*, line 9, line 31 and line 40) or, when specific places are referred to, a mere mention of the place concerned without indication of the distance to sea to which the legislation extends—thus "dans la juridiction de Vâgan" (*ibid.*, line 14), "la face atlantique de l'île de Senja" (*ibid.*, line 17), "le Nordland entier" (*ibid.*, line 22). Such legislation appears to have been of a local character applicable more in the County of Nordland than in Finnmark. Indeed, with regard to Finnmark it appears that there was no general legislation applicable to fishing off the coasts of that province earlier than 1830 (see Rapport 1912, p. 137, note 1). Since the exercise of "sovereignty" or "jurisdiction" or "authority" over an area is

[1] The second point is dealt with in paragraph 17 below.

[2] As examples of such legislation reference may be made to the Law of 1st July, 1907, regarding cod fishing in the County of Romsdal, Article 1 of which expressly states that the law applies whether or not fishing takes place within or outside Norwegian territorial waters; and to the Law of 21st July, 1911, regarding the use of explosives against fish, Article 4 of which contains a similar provision. See also paragraph 23 of the Counter-Memorial.

one of the two necessary ingredients in the establishment of an historic title (see para. 476 below), the Norwegian Government has not in this portion of the Counter-Memorial succeeded in showing that the area over which such exercise took place in these early years included or coincided with the area covered by the Royal Decree of 1935 nor indeed that it extended to any particular area at all.

The weakness of the Norwegian argument on this point is well illustrated by the statement contained in paragraph 44 of the Counter-Memorial. It is there said that a number of fishing areas which "from very ancient times have indisputably formed part of Norwegian coastal fisheries and *have been subject to Norwegian jurisdiction*" are outside the fishing limits fixed by the Decrees of 1869, 1889 and 1935. Taking as an example the areas involved in the Decree of 1869, if it were the fact that these were areas which had indisputably been subject to Norwegian jurisdiction from ancient times, this would, according to the Norwegian contentions of law, have conferred upon Norway an historic title to these waters and would have justified her exclusive claim to fisheries therein under international law. Yet, as the Exposé des Motifs of the 1869 Decree itself makes plain (see para. 34 below), Norway did not at the time the decree was passed consider that she was justified under international law in claiming these areas. The inference can only be drawn either that Norway did not at the time consider that she had exercised jurisdiction over the areas concerned, or that she did not regard such jurisdiction as justifying a claim to an historic title. The same observation may be made with reference to the Decree of 1935, which equally does not include certain important grounds, for example the Svensgrunnen and Malangsgrunnen (see para. 7 above) to which the statement in paragraph 44 of the Counter-Memorial equally applies.

17. The second point to which the material in paragraphs 41 and 42 of the Counter-Memorial is directed, is that certain areas of the sea were by custom or by positive enactment allotted for the exclusive use of certain communities or individuals. This would, it is supposed, be relied upon as evidence of "occupation" or of "exclusive usage" or of "monopoly by Norwegian fishermen", which are stated by the Counter-Memorial to be other possible ingredients in the establishment of an historic title (see Counter-Memorial, paras. 548 and 573). The Counter-Memorial, however, first makes no distinction between individual acts of appropriation by fishermen or by parishes for their own benefit and acts of the Norwegian State asserting a claim to these areas as Norwegian national waters. Mere actions by individuals, unaccompanied by any Act of the State, could not of course confer upon Norway any rights under international law. Further the Counter-Memorial contains little definite information as to any precise areas which

were involved or as to the extent of such areas, and certainly does not establish that all or even any substantial part of the areas of sea claimed by the Royal Decree of 1935 were so allotted, occupied or appropriated. The document contained in Annex 7 of the Counter-Memorial, in particular, which appears to refer to an area within the Vestfjord, makes no specific mention of any limit to seaward to which the allotted "parcels of sea" were to extend—on the contrary, it merely establishes certain regulations "as far in the sea as the continuous lines are moored" without indicating how far that may be. The document contained in Annex 8 of the Counter-Memorial appears to be directed as much against trading in fish as against actual fishing, but even in connection with fishing, it does no more than refer generally to "Norwegian fishing grounds" without specifying what these may be. Again the Royal Decree of 10th December, 1698 (Annex 9, No. 1, of the Counter-Memorial), refers in general terms to "parcels of sea allotted to the continuous lines of the local inhabitants" or to "the fishing grounds to the east of Vardö" without specifying how far these may extend. The Ordinance of 20th August, 1778 (Annex 9, No. 3, of the Counter-Memorial), prohibits the inhabitants of Nordland from fishing in "interior fjords" and "where the local inhabitants have placed their lines". This merely establishes the priority of the local inhabitants in certain unspecified areas and is no evidence of any exclusive use, as against foreigners, of any particular area. The document set out in Annex 10 of the Counter-Memorial refers only to an area some distance (near the modern Vadsö) inside the mouth of the Varangerfjord, and appears to mention only two very small sea parcels on either side of the island of Vadsöy which is only 500 metres from the coast.

No doubt in certain cases, where the fishing population was numerous, fishermen from particular localities tended by custom and mutual arrangement to resort habitually to the same fishing grounds, normally those nearest their respective habitations. An example of this is given in *The Principal Facts*, page 25, figure 10, in the Sunmöre area. But even user of this kind by individuals cannot in any event amount to occupation by Norway under international law and moreover, except perhaps for an area inside the Vestfjord (see *Principal Facts*, p. 41, figure 17), where the Norwegian title is not disputed, there is no evidence of any comparable situation in the area covered by the 1935 Decree. On the contrary, so far as the coasts of Finnmark were concerned (as appears to have been stated by a Government report of 1785), the local inhabitants of the Finnmark coasts could not at this time, for the most part, reach the fish off their coasts since they were concentrated too far from the shore, so that these were collected by fishermen from Nordland and Russia. (Rapport 1912, p. 123.) The Nordland fishermen seem in fact to have played a predominant part in the fishing in Finnmark and the prosperity of that area

seems to have depended largely upon their activities. (Rapport 1912, p. 126.)

18. A point of great significance which does emerge from early fishing customs is the importance which was invariably attached by fishermen to the obtaining of "fixes" ("med") on fixed points on shore to determine the position of their fishing grounds. It is obvious that in an age before navigational instruments were generally available—and indeed the same would be true to-day for the smaller individual fishermen who could not afford to buy them—the method of taking an alinement on shore would be the only practicable means of deciding where any individual boat might legitimately fish. This is brought out in paragraph 39 of the Counter-Memorial which uses the words :

> "La connaissance des bons alignements est estimée très précieuse par le pêcheur norvégien, et il la garde jalousement."

And the same point is referred to *(a)* in the report dated 9th November, 1791 (Annex 10 of Counter-Memorial), which defines the parcel of sea to be allotted to the Prefect by reference to certain alinements there mentioned, *(b)* in the extract from the register of charges dated 23rd March, 1835 (Annex 7 of Counter-Memorial), which records a division according to alinements by reference to which the division is to be made, and *(c)* in the report of the Geodesic Institute of 7th May, 1889, on which the Decree of 9th September, 1889, was based (Rapport 12, page 28), which refers to certain fixes which could be used for defining the limit proposed by the Commune of Bod.

It seems clear not only that this is a principle traditionally adopted in Norway for the identification and definition of fishing grounds but that it is a principle far more clearly established and far more fundamental than any of the other alleged principles upon which later Norwegian legislation is now said to be based. As has been pointed out in the Memorial (para. 129), the Royal Decree of 1935 has radically departed from this principle. In the first place, the base-lines adopted by decree are in many cases a considerable distance from the nearest land (for example, between points 20-21, 27-28, 34-35 there are points distant respectively, 16¼, 8 and 7½ miles from land) ; the outer limit of territorial waters, being four miles further to seaward, would of course be even further from any land. Secondly, the Norwegian Government itself professes to base the 1935 Decree upon quite different principles (see para. 62 of the Counter-Memorial), one of which is that there is no limit to the length of the base-lines—which involves that the base-lines may, whenever desired, be drawn out of sight of land. This fact, of itself and apart from all other considerations, completely undermines the present Norwegian argument that the 1935 Decree is in conformity with principles traditionally and historically accepted in Norway.

19. The conclusion to be drawn from this portion of the Counter-Memorial is therefore, in the submission of the Government of the United Kingdom, that no evidence has been furnished by the Norwegian Government that Norway has from ancient times continuously exercised sovereignty or jurisdiction or authority over the area covered by the Royal Decree of 1935, and that with insignificant exceptions (i.e. the small areas inside the Vestfjord, near Vardö and inside the Varangerfjord, referred to in paragraph 17 above, all of which are within the green line accepted by the United Kingdom), no definite portions of this area are shown to have been occupied or exclusively reserved for purposes of fishing for the local inhabitants by any internal arrangements. This conclusion, as will be later demonstrated in this Reply, is not in any way invalidated by the succeeding portions of the Counter-Memorial or by the Norwegian legislation and other material there referred to.

Prohibition of whale fishing off Norwegian coasts (paras. 35-36 of Counter-Memorial)

20. With regard to whale fishing, it is a consequence of the nature of this industry and of the high profits to be derived from it that States should claim, as they frequently have claimed in the course of history, to control it over very extensive areas. This explains the large area of prohibition which was involved in the concession granted to Eric Lorch described in paragraph 36 of the Counter-Memorial, namely, from an area up to 80 sea miles from the coast. The fact that the King of Denmark/Norway assumed the right to grant concessions for this industry over an area of this extent—in 1688 before the régime of *mare clausum* had been abandoned—is not a reliable indication of the limits claimed as established by him in respect of fisheries in general.

Limits for purposes of neutrality (para. 37 of Counter-Memorial)

21. The Government of the United Kingdom does not consider it necessary to examine in detail the early Norwegian legislation regarding neutrality which is summarized in paragraph 37 and Annex 6 of the Counter-Memorial. This legislation was enacted during the *mare clausum* period in a time of considerable belligerent activity (as shown by the words in the letter of 9th June, 1691—Annex 6, No. 1, of Counter-Memorial—"vessels of war and privateers of French, Spanish, English and Dutch nationality").

The Decree of 9th June, 1691—Annex 6, No. 1, of Counter-Memorial—which defined the neutrality line as from Cape Lindesnes to Jutland, must be read together with the Royal Decree of 13th June, 1691—Annex 6, No. 2—which fixed the range of vision at 4-5 leagues. These were extensive claims made during the height of the maritime wars of the time and the distance named in the second of these decrees was afterwards reduced, in 1740, when

the doctrine of *mare liberum* was beginning to prevail to the more reasonable limit of one league, which was thereafter maintained. The line drawn from Cape Lindesnes to Jutland must be regarded as having been drawn under the same conditions and on the same temporary basis.

The period from the Rescript of 1812 to 1906—Chapter III of Counter-Memorial

The Rescript of 1812 (paras. 45-49 and 56 of Counter-Memorial)

22. The Rescript of 1812, translations of which are provided in paragraph 6 of the Memorial and in Annex 9 of the Memorial [1], is fundamental, in many respects, to the Norwegian case, since it is upon this rescript and upon the principles alleged to have been established by it that the subsequent Norwegian decrees, including the Royal Decree of 1935, are professedly based. A just appreciation of its antecedents and of its intended legal effect are, therefore, essential preliminaries to an understanding of the issues involved in this litigation. The first point which, in the submission of the Government of the United Kingdom, is of cardinal importance, is that the rescript, as is made perfectly clear in paragraphs 45-46 of the Counter-Memorial, looks backward and not forward : it is the final stage in a series of legislative enactments, the necessity for which was provided by the naval wars of the seventeenth-eighteenth centuries, commencing from the Royal decrees of 1691, and continuing through the rescripts of 1745-1779. The objects of these decrees and rescripts—in so far as they were concerned with neutrality—was first to define Norwegian territory and then to lay down a minimum distance from that territory within which belligerent activities were not to be permitted.

23. The Rescript of 18th June, 1745 (Annex 6, No. 4, of the Counter-Memorial), made these purposes quite clear (see paras. 37 and 45-49 of the Counter-Memorial). After reciting that foreign ships and corsairs by continuous tacking among the rocks and under the coast were watching for ships of enemy countries, which had been admitted to Norwegian ports, and were attacking and capturing these ships immediately after leaving port, the rescript stated that ships might not be captured within one league *from the Norwegian coasts and the banks and rocks situated off these coasts which are considered as forming part thereof*. This was plainly an attempted definition of Norwegian land territory and merely prohibited capture

[1] The translation in paragraph 6 of the Memorial is the translation of the Court. This uses the expression "not covered by sea". The translation in Annex 9 of the Memorial is by Mr. Nansen. This uses the expression "not run over by the sea". The latter translation is thought to be somewhat closer to the original and will be adopted in this Reply.

at the distance of one league from any one portion of Norwegian territory as so defined. It is perhaps a permissible supposition that the purpose of this rescript was to supplement the earlier Rescript of 10th October, 1740, which had declared that the territory of the State extended one sea mile from the coast, without referring to islands or rocks. At any rate no question of drawing or defining any continuous limit arose. There followed the Resolutions of 7th May, 1756, and 20th April, 1759, which defined a league as equal to one-fifteenth of a degree and also in terms measured this distance from the coast. There followed a Royal letter of 27th July, 1759, which stated that the line was to be drawn one league *"from the mainland"* —thus using an expression even more definite than "from the coast" —and, as explained by Ræstad (*Kongens Strømme*, pp. 332-333), making it clear that the line was not to be drawn from the skerries. The terms of the Resolution of 1759 were substantially repeated in a further resolution of 10th November, 1779. These were followed by two regulations laid down in the Napoleonic Wars (14th September, 1807, and 28th March, 1810, respectively) which again referred to the territory as extending one league "from the coast". On 18th August, 1810, the Chancellery issued a circular letter stating that the Department had been asked "if the right of neutrality stretched outside the coast or the shallows". The answer given was that the Resolutions of 20th April, 1759, and of 10th November, 1779, and the Regulation of 28th March, 1810, decided that this distance should be one league *"from the coast"*.

In these circumstances the incident took place which gave rise to the Rescript of 1812, namely, the capture by the French privateer *Pourvoyeur* of the German prize *Frau Margaretha* within one league from a rock outside Groshavn, near Grimstad, upon which instructions were sought by the regional Prefect of Christiansand (*ibid.*, p. 342). The solution provided by the 1812 Rescript was to declare, in effect, that Norwegian territory extended to all rocks "which are not run over by the sea"—thus extending the definition which had been applied since 1759 and replacing the expression used in the Rescript of 1745 by one which was certainly more definite, but not, as will be shown, by any means free from ambiguity. Although, again, there is an element of conjecture, it may be permissible to suppose that one of the difficulties in framing this new definition was whether uninhabited islands formed part of Norwegian territory. Two Swedish laws of 8th July, 1788, and 30th April, 1808, did in fact measure the belt of territorial water from the nearest inhabited coast or island, and a similar tendency may have existed in Norway. It will be seen in paragraph 289 below that the same difficulty presented itself to Lord Stowell in deciding the case of the *Anna* (1805) at just about the same time. The rescript certainly succeeded, by employing the expression "which are not run over by the sea", in disposing of this ambiguity, although, as will be shown, it thereby created a fresh one in that it did not make clear

what was the position of rocks which are not *continuously* run over by the sea—a problem on which opinion remained divided until 1908[1]. At any rate, that the Rescript of 1812 was not regarded as a fundamental piece of legislation laying down any principle is shown not only by the circumstances in which it was enacted—as set out above—but by the fact, as stated in paragraph 38 of the Counter-Memorial, that it was not published at the time of its enactment or even thereafter and was only brought to public notice through the medium of an historical work on national defence (not, be it noted, on fisheries) published in 1830[2]. The Law of 13th September, 1830, concerning fisheries in Finnmark, in fact, made no reference to it. The subsequent history of the next 120 years was to show that this rescript would be used as the basis for extensive Norwegian claims, but the United Kingdom feels justified in asserting, on the basis of its antecedents, that the rescript had at the time of its promulgation no such purpose, that it stated no principle, old or new, but was merely directed to resolving a particular uncertainty or ambiguity regarding the extent of Norwegian territory. It is certainly in the submission of the United Kingdom an overstatement, or at least carries a misleading implication, to say, as is alleged in paragraph 48 of the Counter-Memorial, that this rescript "is in harmony with the traditional Norwegian legal conception that the line of the skjærgaard is considered as following the line of the coast and that the waters between the islands and the rocks, inside these land formations, are considered as Norwegian". Whether there is any such "traditional legal conception" is precisely what has to be proved in this case and is what the Government of the United Kingdom does not admit. And, moreover, even if the meaning of the rescript was that all waters inside the islands and the rocks were to be considered as Norwegian waters, this would not entitle Norway to disregard the rules of international law as to the manner in which the extent of those waters was to be ascertained. In fact, the rescript contributed nothing to the law of territorial waters except a clarification on the one point relating to what islands and islets were included in Norwegian territory.

24. With regard to the interpretation of the rescript, it is the fact, as has been stated above, that it was not, at the time, enacted with a view to defining fishery limits, nor was it intended to lay down any rule regarding the manner in which territorial waters should be delimited. The object of it was to reaffirm for neutrality

[1] The problem was not an actual one since, in the area where Grimstad (where the ship was seized) is situated, there is practically no tide, the rise at spring tides being in fact no greater than ¾ ft. (23 cm.). It may also be noted that as late as 1889 Norwegian authorities were doubtful whether use could be made of uninhabited territory. (See Annex 17 of Counter Memorial, p. 64.)

[2] It is interesting to note that the similar Swedish Resolution of 18th February, 1779, was not published at the time. States were no doubt reluctant in these times to declare their attitude on contentious legal issues.

purposes the limit of one league and to make clear that Norwegian territory included rocks—whether inhabited or habitable or not—not run over by the sea. The rescript in the first place makes no reference to the coast of the mainland at all, and accordingly does not provide any guidance as to the manner in which indentations of the coast are to be treated, or as to points at which lines may be drawn across bays. Secondly, as has been indicated, the rescript does not make clear whether "rocks not run over by the sea" means "rocks not continuously run over by the sea", and it is a fact that the word "continuously" was first used in the interpretation of the rescript in the letter of 24th March, 1908 (Annex 21 of the Counter-Memorial), from the Minister of Foreign Affairs to the Minister of National Defence (see para. 62 below). Thirdly, although the rescript is concerned with islands and outlying rocks, it makes no attempt to provide a solution for the problem which must arise when it becomes necessary to draw the line marking the outermost limit of territorial waters, namely, between what points that line, or some other line on which it is based, is to be drawn. On the contrary, it leaves this question entirely open. It may be that the rescript does not in terms forbid the taking as base-points, between which lines could be drawn, any pair or greater number of rocks not continuously run over by the sea, however distant these rocks are from each other and from the coast of the mainland. It is, however, a much more natural interpretation of its text to apply a system under which the limit of territorial waters must be drawn by reference to the coast line and under which a rock cannot be used as a base-point for extending territorial waters unless it is within 4 miles of the coast and is itself permanently dry. At the highest it can only be argued by Norway that the rescript leaves these questions open. At any rate, as will later be explained, it was only at a much later date that Norway sought to interpret it as justifying a system of the kind mentioned above in this paragraph.

It is probable, in fact, that if the question of drawing lines to show the limits of territorial waters had been present to the mind of those who were responsible for these early decrees, they would have decided that such limits must be drawn from high-water mark and without taking account of rocks sometimes submerged. Whether Norwegian rules were in origin based upon cannon range or, as was suggested by Dr. Ræstad in his Opinion in the case of the *Deutschland* (which is attached as Annex 31 of this Reply) [1], by reference to the range of vision, they could clearly only be measured in the manner stated above. In point of fact it may be regarded as quite certain that no one at that date had in mind the possibility

[1] A revised and enlarged translation of this opinion, incorporating some of the amendments made by Mr. Arntzen in Annex 47, No. 1, of the Counter-Memorial, has been prepared by Mr. Nansen and is filed as Annex 31 to this Reply. A photostat copy of Dr. Ræstad's Opinion in the original Norwegian has also been filed with the Court by the Government of the United Kingdom.

of territorial waters being measured in any other way than directly from a piece of solid territory. And, as the Norwegian Government agrees (para. 56 of the Counter-Memorial), the original limits of territorial waters for fishery purposes cannot exceed the limits as they were defined for purposes of neutrality.

Russian participation in fishing off Finnmark (paras. 50-55 of Counter-Memorial)

25. In Annex 13 of the Counter-Memorial the Norwegian Government has filed documents relating to the attempted regulation by Denmark/Norway in the eighteenth century of Russian fishing activities off the coast of Finnmark. While those documents undoubtedly show that a conflict of interest arose at this time, and that by agreement between the two countries certain regulations were made by the Danish/Norwegian authorities outside the area of the Varangerfjord, the use made of them by the Counter-Memorial to show that the Russian Government at this time recognized Norwegian sovereignty or that Norway was exercising sovereignty beyond the limited extent of territorial waters is hardly justified.

From Annex 13, No. 1, which is a letter from the Prefect of Finnmark to the King, dated 28th October, 1746, it appears that certain Russian fishermen, in 1743, had constructed or rented huts on the island of Vardö, and were salting fish there for export to Russia. They had, in addition, been extracting the fish from waters close to the shore, described (para. 3) as "les eaux royales norvégiennes". The Prefect was concerned to establish that the Russians had no absolute right to practice these activities and he reported that an agreement, which was of an amicable character, was reached under which—

(a) the Russians agreed to fish not closer than one league to the shore—that is to say, to the actual coast line;

(b) they agreed to comport themselves in a manner which would not hurt the local inhabitants;

(c) they agreed to pay a tax, for the current year. The tax is described in the translated version of Annex 13, No. 1, as payable "pour la pêche" but no doubt was rather in respect of the entire activity of exporting the fish, including the salting which took place in Norwegian land territory, than in respect of the right to fish outside the league. Indeed, it will be seen that thereafter there is little reference and little importance attached to the actual fishing outside this limit and that the attention of the authorities was confined to activities within the limit of a nature calculated to prejudice the inhabitants.

The Prefect concludes by asserting that he has obtained a recognition of the *absolutum dominium* of the King over the "sea off these coasts" and that he has protected the inhabitants against any

"interference with their means of self-support". Two points emerge from this statement. First the reference to *absolutum dominium* clearly represents a survival of the seventeenth-century conception of *mare clausum* of the unlimited claims of Norwegian (and other) sovereigns over the open sea. This is recognized by the Rapport 1912 which, dealing with the Rescript of 10th February, 1747 (see para. 26 below), in reply to the Prefect's letter (Annex 13, No. 2, of Counter-Memorial) states (p. 18) : "Se basant sur le principe d'un territoire maritime plus large, le rescrit est conforme au droit antérieurement en vigueur pour la province de Finnmarken ; voir les deux dispositions relatives à la chasse à la baleine, de 1692 et 1698. Il fut édicté à une époque où les Norvégiens des régions méridionales ne se rendaient pas à Vardö pour y faire la pêche, et où la population propre de l'endroit ne pêchait probablement pas loin de la terre." The Rapport continues by pointing out that whatever was the object of the rescript, a legal practice developed by which the payment was treated as made on account of the right *to sojourn on land*—see paragraph 29 below. It will be noted that the Prefect's letter is dated 28th October, 1746, that is, only shortly after the Rescript of 18th June, 1745, which reduced the area of claim to one league and which had possibly not yet come to the notice of the Prefect. In any case, this statement in the Prefect's letter represents no satisfactory authority for the proposition that Russia recognized Norwegian sovereignty over a wider area than that of territorial waters to the extent of one league from the shore.

Secondly, the reference to interference with the means of support of the inhabitants, coupled with the agreement not to fish within one league from the coast, shows clearly that the vital interests of the inhabitants in this district were at this time considered to be confined to an area less than one league from the coast and did not extend further out to sea.

26. The Rescript of 10th February, 1747 (Annex 13, No. 2, of Counter-Memorial), confirmed that the concern of the local authorities was to prevent the Russians seizing "the fish near to land" (line 6) and that the tax was imposed in consideration of allowing them "to carry away all their fish" (line 10). The latter part of the rescript emphasizes again that what was objected to was fishing "near the coast to the prejudice of the inhabitants", "carrying away fish from the best fishing grounds of the inhabitants" and seizing wood. The continued payment of the tax is refered to and it is stated as due "for the fishing (la pêche) carried on in Norwegian waters" : at the same time at the end of the rescript the payment is referred to as one "which the Russians have been persuaded voluntarily to pay (de leur bon gré)", which confirms that this was an

ex gratia payment made by amicable arrangement for no very defined purpose [1].

27. The order of the Empress Elizabeth of 31ste March-11th April 1747 (contained in Annex 13, No. 3, of the Counter-Memorial in the form of a translation from a German version of the original), is fully consistent with the above view of the matter. It makes plain that what was giving rise to complaint was fishing "tout près de la côte et sur les meilleurs lieux de pêche", seizing wood, arbitrary and despotic behaviour, and then refers to the fact that the Danish authorities had granted the Russians the right each year "de pêcher sur les côtes de l'île de Vardö", and that in order to obtain this privilege they had agreed to fish one league from the shore. It is plain that the privilege there referred to is the privilege to do on the island of Vardö what the Prefect had found them doing in 1743 (Annex 13, No. 1, of the Counter-Memorial), that is, carrying on the business of fishermen, salting, etc.; and that it was in exchange for this privilege, i.e. to go on to the island and perform certain operations there, that they agreed to fish one league from the shore. The order does not in fact support the Norwegian contention that the Russians regarded the right to fish more than one league from the coast as itself a privilege. That this is so, is confirmed by the expression later in the order "pratiquant la pêche sans permission dans les eaux danoises" which clearly refers to Danish waters within the limit of one league—since fishing outside that limit was authorized.

28. Again, in the Russian note of May 1761 (Annex 13, No. 5, of the Counter-Memorial), what is prohibited is "se rendre sur le territoire danois ou dans les lieux en dépendant"—referring, no doubt, to the coast of Danish (Norwegian) territory and adjacent territorial waters: and in the following paragraph the expression "pratiquer la pêche dans les eaux norvégiennes" evidently refers again to the comprehensive operations carried on at the "island of Vardö", referred to in Annex 13, No. 1, of the Counter-Memorial.

29. These eighteenth-century documents, therefore, in the submission of the Government of the United Kingdom, show nothing more than that the Danish/Norwegian authorities at the time were having difficulties in keeping Russian activities on and off the coasts within due limits (it should be noted that the Russian authorities were having similar difficulties with regard to Danish/Norwegian subjects—see Annex 13, No. 5, of the Counter-Memorial): and that these difficulties were dealt with by practical arrangements involving, on the Russian side, keeping outside a one-league limit and

[1] It is interesting to note that Fulton (p. 62), dealing with a tax imposed by the English King Richard II on foreign vessels, states that this "must have been done with their consent" and uses this as an argument to show that the Kings of England had not proved sovereignty over the sea.

making a small payment, and on the Danish/Norwegian side, permitting the Russians to continue their activities at Vardö—arrangements which were in fact by no means always observed by the Russians. To draw the conclusion that the Russian Government at this time recognized any area of sea beyond the limit of one league as Norwegian territory involves in the submission of the Government of the United Kingdom a strained and distorted interpretation of the documents. On the other hand, it is quite clear from the much later document of 23rd April, 1885, issued by the Norwegian Minister of the Interior (Annex 13, No. 6, of the Counter-Memorial) that the Norwegian Government then recognized as territorial waters of Russia any area closer to the shore than "une lieue de mer *du littoral*", which corresponds exactly to the conceptions of the United Kingdom in this case.

30. The above view of the matter is wholly confirmed by the Rapport 1912, page 18, in a passage cited in paragraph 54 of the Counter-Mémorial. That document states quite explicitly that the payment was made for the right to sojourn on land and that the fishing which was carried out at a distance of one league was considered as fishing in the open sea ("mer libre"). Although the Counter-Memorial in paragraph 54 calls this statement "inaccurate", it only in fact criticizes it upon the point that the Rescript of 1812 is shown to be concerned with neutrality. There can be no doubt in fact that the extract correctly states the position prevailing in the eighteenth century.

31. The additional documents cited by the Counter-Memorial (Annex 13, Nos. 7 to 13) do not in any way affect the conclusions above stated. The letter of 23rd November, 1767 (Annex 13, No. 7), admittedly proceeds on the basis that the Russians had been forbidden to fish in Norwegian *territorial waters*, i.e. within one league from the shore: this can be the only meaning of the expression "les eaux du Finnmark". Equally it is clear from the Letters Patent of 1st June, 1771 (Annex 13, No. 8), that it had by this time been forbidden to the Russians to land on the coast and make use of huts. But it is somewhat misleading to say, as does the Counter-Memorial in paragraph 52, that the Treaty of Commerce of 8-19th October, 1782 (Annex 13, No. 9), does not contain any disposition authorizing the Russians to engage in fishing. The additional declaration to the treaty in fact plainly contemplates that the Russians may be fishing off the Finnmark coasts and forced to take refuge there in bad weather and does not refer to this as being either illegal or by concession.

The same paragraph of the Counter-Memorial refers to a proposal of Mr. H. H. Gunnerus to exclude the Russians from fishing even outside the one-league limit. It is not suggested, however, that this proposal was acted upon and it may be classified together with other suggestions of the same kind (as for example that made

by the Commune of Bod in 1889—see para. 38 of this Reply) that Norwegian claims should be extended beyond the limits applicable under international law. The fact that such claims were made—and not given effect to—lends no support to the Norwegian case.

The Law of 13th September, 1830 (Annex 13, No. 10, of the Counter-Memorial), which is said to have replaced the Rescript of 10th February, 1747, commences by referring to "la pêche qu'ils [les Russes] pratiquent au delà de la distance d'une lieue du rivage"—again without any suggestion that this fishing is otherwise than by right [1]. The rest of the law deals with the conditions under which they may be permitted to perform certain operations within the limit. The law again refers to the payments or duties in force, making it once more plain that these are in respect of rights exercised *within* the limit. These rights are again referred to without comment in the extracts from the Treaty of Commerce of 8th May-26th April, 1838 (Annex 13, No. 11, of the Counter-Memorial). And, further, the Law of 3rd August, 1897 (Annex 13, No. 12, of the Counter-Memorial), after expressly stating in Article 1 that the right to fish *within* Norwegian territorial waters on the coast of Finnmark is reserved for Norwegian subjects refers in Article 48 to foreign fishermen "qui font la pêche au delà de la limite territoriale", and to the Law of 13th September, 1830, clearly contrasting the two cases, fishing in the one case being forbidden to foreigners and in the other being permitted. The same expression is used in the Law of 17th March, 1911 (Annex 13, No. 13, of Counter-Memorial), which repealed Article 40 of the Law of 13th September, 1830. It is abundantly clear from all these enactments that it was never considered by the Norwegian legislative or administrative authorities that fishing outside the limit of one league from the coast of Finnmark (it is repeated that we are not here concerned with the Varangerfjord)—which, if the principle followed by the Norwegian Government itself in the notice of 23rd April, 1885 (Annex 13, No. 6, of Counter-Memorial), is accepted, means one league from the coast line—was otherwise than by right and that the Norwegian authorities never made any attempt to control any activities other than such as might be carried on within the limit of one league.

Exchange of notes with France on the subject of the Vestfjord (para. 57 of the Counter-Memorial)

32. The Government of the United Kingdom agrees with the Counter-Memorial in considering this exchange of notes as of some interest for the purpose of these proceedings. The conclusions to

[1] It may be noted that in the Rapport 1912, p. 4, footnote, this passage is translated: "Si, à l'occasion de la pêche à laquelle ils *peuvent s'adonner* jusqu'à la distance d'une lieue des côtes....", this suggesting even more plainly that the fishing outside the limit was entirely legitimate.

be drawn from it are not, however, in the opinion of the Government of the United Kingdom, those drawn by the Norwegian Government. The *Quatre-Frères* having been arrested in 1868, the French Minister at Stockholm delivered the note dated 6th June, 1868 (Annex 15, No. 1, of Counter-Memorial). This note states the French position in two paragraphs

> "Les usages internationaux ont admis généralement des limites aux mers territoriales ; dans ces limites sont restreints les droits exclusifs des riverains.
>
> La Norvège n'a jamais manifesté qu'il y eût pour elle un besoin spécial d'étendre ces limites au delà de la fixation ordinaire que leur assignent les usages internationaux."

and continues by affirming the attachment of France to the three-mile limit. It then emphasizes the importance of the case in view of the large number of fjords, bays, etc., on the coast of Norway and the danger that this case might become a precedent.

The Norwegian note in reply dated 7th November, 1868 (Annex 15, No. 2, of Counter-Memorial), first states that the action of Norway is justified by traditional law, by the geographical situation of Norway and by the duty of the Government to protect the interests of a poor and industrious population. It then proceeds to state that the Vestfjord is an internal sea and must be considered as part of Norway's maritime territory.

The French Government did not pursue the matter but the reasons why it did not do so are made plain in its notes of 21st December, 1869, and 27th July, 1870 (Annex 18, Nos. 1 and 5, of Counter-Memorial). In the first note the French Minister at Stockholm refers to "les motifs spéciaux qui l'ont déterminé, de même que d'autres gouvernements, à ne pas insister pour que le Vestfjord en tant que considéré comme une mer intérieure, fût ouvert aux bateaux de pêche étrangers".

In the second note the French Chargé d'Affaires at Stockholm writes :

> "En nous reportant aux discussions qui se sont précédemment élevées entre les deux Gouvernements relativement à l'exercice du droit de pêche dans le Vestfjord, il nous sera permis de rappeler que si, dans l'esprit de conciliation qui nous a toujours animés vis-à-vis des Royaumes-Unis, nous avons consenti alors à abandonner des prétentions que nous jugions légitimes, nous étions fondés à penser qu'il ne s'agissait que d'une exception à ce que nous considérions comme les vrais principes sur la matière, et qu'aucune difficulté analogue ne se renouvellerait sur un autre point des côtes de la Norvège."

These notes make it plain that the French Government in deciding not to contest further the Norwegian action taken with regard to the *Quatre-Frères* was not in any way abandoning or waiving any of its claims as to the rules of international law applicable to fishery rights off the coasts of Norway nor was it in any

way conceding any general Norwegian claims but was prepared to treat the Vestfjord as a special case without prejudice to its general position. As will be shown below, the French Government took up the same attitude in relation to the Decrees of 1869 and 1889.

The Decrees of 16th October, 1869, and 9th September, 1889 (paras. 58-62 of the Counter-Memorial)

33. As has been pointed out above (paras. 22-23) and as the Counter-Memorial admits, the Rescript of 1812 was not directed to the question of fishing limits. The first application of the rescript to this matter is stated (para. 56 of the Counter-Memorial) to have been in 1862. It is interesting to note that the letter referred to of 31st January, 1862 (Annex 14 of the Counter-Memorial), merely states that "Selon une thèse qui .... est communément admise en droit international et, en ce qui concerne la Norvège, a été adoptée par décret royal du 22 (lettre patente de chancellerie en date du 25 février 1812), les eaux territoriales sont présumées s'étendre jusqu'à une « *lieue de mer* » *de la côte.*" It is evident that at this time the 1812 Rescript was regarded as dealing only with the matter of distance, i.e. as establishing the distance as one league instead of three miles—and not as laying down any rules or principles as to the manner in which the fishing limit or the base-lines are to be drawn. In fact it is only in comparatively recent times, when Norway was seeking historical justification for her claims to extensive areas of the high seas, that the argument was put forward that certain principles were established in 1812 in regard to both these matters, which were merely followed by the later decrees and particularly by the Decree of 1935. It is clear that the Rescript of 1812 itself contained, and was intended to establish, no principle and indeed did not deal with the method of delimiting fishery limits at all.

34. The Decree of 16th October, 1869, was, as the Exposé des Motifs (Annex 16 of the Counter-Memorial) shows, enacted to meet the situation created by the appearance of certain Swedish fishing vessels and of fishermen from other parts of Norway off the coast of Sundmöre. The application of the decree was confined to a small area—the line of demarcation being only twenty-six miles long—which, until the appearance of the Swedes, had never been of interest to foreign fishermen. The *Principal Facts* (p. 40) makes it clear that the fishing in this area had for long been exploited exclusively by the local inhabitants, these being sufficiently numerous to carry out "a thorough utilization of the fishing area". This is contrasted with the coast of Finnmark, where it is said (*ibid.*, p. 44) a number of craft from southern districts come to fish, and in which also an increasing interest is shown by foreign fishermen. Moreover, the area in question lies off a number of inhabited islands of some size

which, as the diagram at page 25 of the *Principal Facts* shows, had comprehensively parcelled out the fishing grounds lying opposite to each island. The individual character of this part of the Norwegian coast was brought out by Dr. Johan Hjort, a former director of Norwegian fisheries, in the course of the Oslo conversations of 1924. According to the protocol of the fourth meeting, Dr. Hjort "proceeded to explain the special peculiarities of the Norwegian fishing industry off the coast of Møre, as affording a typical example of the combination of special conditions which characterized this industry off the west coast in general *up to the Lofoten Islands*". (Annex 4 of Memorial, Vol. I, at p. 123.)

In these circumstances the Norwegian authorities, as the result of pressure from their own fishing interests, felt obliged to make some regulation concerning this district, and in this connection it is interesting to note what was the principle on which they proceeded. The Exposé des Motifs contains the following passage :

> "L'étendue de haute mer pour laquelle un État peut exiger que le monopole de la pêche soit exclusivement réservé à ses sujets coïncide, lorsque des traités n'en décident pas autrement, avec le territoire maritime sur lequel il a, suivant le droit international, le droit d'exercer sa souveraineté. Les limites de ce territoire ont été fixées en partie d'après le pouvoir de dominer, de la terre, l'étendue de mer adjacente, en d'autres termes d'après la plus longue portée de canon, ce qui est sans doute la base de détermination qui concorde le mieux avec la nature de la question ; et en partie à la distance d'une lieue géographique du territoire terrestre." (Annex 16 of Counter-Memorial, at middle of p. 60.)

The Norwegian authorities were thus clearly of opinion that definite limits were set by international law to the area which could be claimed as exclusively reserved for Norwegian subjects.

The Exposé then continues to justify the actual line adopted—namely from Svinø to Storholmen. Reference is first made to the Rescript of 1812, in justification for applying the distance of one league, in a passage where the following words are used :

> "Cette dernière mesure doit probablement pouvoir être employée, sans hésitation, pour la délimitation de la frontière — comme cela a aussi eu lieu antérieurement pour notre pays (voir la lettre patente du 25 février 1812) —, d'autant plus qu'elle ne correspond même pas complètement à la distance à laquelle les progrès de la science de l'artillerie, qui, en général et avec raison, est censée devoir exercer son influence sur l'étendue des eaux territoriales, permettent dès maintenant de tirer aux pièces de la côte." *(Ibid.)*

Clearly the Rescript of 1812 was not at this time considered to have authoritatively disposed even of this question of distance—the words used "doit probablement pouvoir être employée" followed by a reference by way of example to the rescript are of the most tentative character. There follows a reference to the "point de départ du calcul" and here again language is used which implies

first that the principle of using outlying rocks not run over by the sea is a possible principle for which some precedent (not of a conclusive character) exists in the Rescript of 1812 but which requires to be justified, and secondly that the use of rocks submerged at high tide was not legitimate. The words used are :

> "Comme point de départ du calcul, ce n'est pas la terre ferme seule qui doit pouvoir être utilisée, *mais aussi* les *îles et rochers situés au large de la côte, pourvu qu'ils ne soient pas recouverts par la mer;* cette conception a d'ailleurs déjà été adoptée dans la lettre patente mentionnée ci-dessus" (viz. the Rescript of 1812).

The Exposé continues by referring to "îlots ou rochers *qui sont toujours visibles au-dessus de la mer*" (*ibid.*, pp. 60, 61).

35. The Exposé then proceeds to supply the necessary justification for the line which it was proposed should be adopted and it will be seen from a careful perusal of it (Annex 16, p. 61 of Counter-Memorial) that this is derived from hydrographical and geographical data peculiar to this region. First, it is pointed out that the deep water of the Bredsunddypet represents continuations of the opening of the Bredsund and of the Storfjord. Then it is shown that the line which is drawn coincides with the deep water which provides a natural boundary between the inshore banks and the outer banks (sc. of Medbotten), and so can easily be identified by fishermen.

Finally, and this, it is submitted, is where the principal interest of this legislation lies for the purpose of these proceedings, the Exposé proceeds to deal with the claims which had been made to reserve for exclusive Norwegian use the fishing grounds in the Medbotten zone, on the outer side of the natural line adopted by the decree. These claims were (Annex 16 of Counter-Memorial, at p. 62, line 18) based upon the fact that these banks, too, had been "réservés de temps immémorial aux habitants du pays sans participation d'étrangers aucune", and ought to be reserved for the local inhabitants "même là où elle s'étend un peu au delà de la limite que la règle principale du droit international en cette matière trace comme délimitation ordinaire de la mer territoriale". The attitude of the Minister in face of this claim was to reject it. As the Exposé continues, "mon ministère n'ose pas la considérer comme assez justifiée par des principes incontestés de droit international qu'on puisse conseiller d'édifier sur cette seule base un principe de droit tendant à interdire, purement et simplement, aux étrangers le droit de pêcher sur une partie de mer ainsi délimitée" (*ibid.*, line 33) and proceeds to state that any such proposed extension would be a matter to be dealt with by "représentations amicales" (*ibid.*, line 43).

The Government of the United Kingdom has already remarked upon the interest of this passage (para. 16 above). It shows quite clearly that the fact (if it was a fact) that the banks in question had from time immemorial been fished exclusively by the local inhabi-

tants was not in 1869 regarded as justifying a departure from what was recognized to be the general rule of international law.

36. With regard to the line itself, it is important, in considering the extent to which this decree may be said to have established principles applicable to other are as of the Norwegian coast, to notice that the two rocks between which the line is drawn are permanently exposed. It is evident, therefore, that the decree does not in any way establish a rule as to the manner in which rocks not permanently exposed may be made use of—on the contrary it evidently proceeds upon the basis that they may not be used.

36 A. This Decree of 1869 was, in the submission of the Government of the United Kingdom, of an exceptional character, a point which is well brought out by the distinguished Swedish lawyer, M. Kleen, representing the Swedish-Norwegian views at the Institute of International Law in 1892. In a memorandum presented to the Institute, after discussing the origins of the 4-mile rule, and expressing the opinion that even this wider limit did not correspond to modern requirements, he cites the Decree of 1869, applicable to the Sundmöre area.

He states that buoys "de date immémoriale, subsistant depuis des siècles", mark the seaward limits of the fishing banks : that this natural limit, marked by buoys "sanctionnées par l'usucapion", extends nearly 5 miles beyond the outermost rocks. "Ces marques de mer traditionnelles ont de tout temps été respectées par l'Europe." He then points to the impossibility of dividing this natural unity, and to the fact that it is in the interest of all to recognize it and respect it as of inestimable value for the whole of Europe. He concludes by describing this example as "le plus frappant que nous connaissons" [*sic*] (Annuaire XII, pp. 142-144).

It is evident from this that the banks of Sundmöre possess characteristics which are practically unique. Certainly there is nothing to suggest that anything similar exists in the portion of the coast covered by the Decree of 1935. It is also significant to note the emphasis laid by M. Kleen on the general interest of European nations : evidently he considers this to be a factor of no small importance in relation to the validity of the decree.

37. The position was, therefore, in 1869, that the Norwegian authorities were fully recognizing the limitations imposed on their powers by international law ; they did not consider that immemorial user by itself conferred any claim to exclusive rights ; they did not regard the 1812 Rescript as laying down any incontestable automatic principles : on the contrary they acted upon the assumption that the limits must be drawn with careful regard to hydrographical and other circumstances particular to the area. The contrast with the attitude adopted by them in relation to the Decree of 1935 is striking. Instead of regarding the claims of the local population

based on alleged user and on economic necessity as a matter for "représentations amicales" they now treat these as of themselves affording a justification in law for extensive claims (see para. 181 (3) of Counter-Memorial) ; instead of treating the 1812 Rescript as affording a possible starting point in the delimitation of the limits, they now rely upon it as providing an automatic rule historically sanctioned. The Government of the United Kingdom—whose view on the validity of the 1869 Decree will be stated below (para. 43)—submits in any event that the approach to the problem which was made in 1869 is not, as is now represented, the same as that made in 1935, but was basically different and affords no justification for the latter [1].

38. The Decree of 9th September, 1889, was enacted not, as was that of 1869, to restrain the incursion of fishermen from abroad, but in order to define the area within which the Prefect could enact domestic regulations controlling Norwegian fishing for cod in spring (Annex 17 of Counter-Memorial, para. 4). There is no evidence or suggestion that foreign fishermen have ever been interested in any way in the area to which this decree applies. It will be seen from the Exposé des Motifs (Annex 17 of Counter-Memorial) that the Commune of Bod had forwarded a request for a line to be drawn directly from Storholmen (where the 1869 line had terminated) [2] to a point "au large de Bratvaer". This line would have been 67 sea miles in length (Rapport 1912, p. 28, footnote). The attitude of the Minister in face of this request is interesting. He did not (as might have been expected, if, as the Norwegian Government now contends, the principles on which fishing limits should be drawn had been clearly and unequivocally established by the Rescript of 1812 and the Decree of 1869) deal with the matter himself on the basis of these enactments, but instead he referred the matter to the Geodesic Institute, a purely technical body, which furnished a report which appears at page 28 of the Rapport 1912. This report first points out that the line proposed by the Commune of Bod would have the advantage of running straight for a considerable distance but that, on the other hand, it would pass a considerable distance (in one case 3 leagues) outside the outermost islands or rocks (which rocks were in fact used as the base-points by the decree when it was enacted), and

[1] It may be added that when, in 1878, the question was raised whether the limit could be drawn further out to sea than it was drawn in 1869, the Ministry of the Interior expressed the opinion that an extension beyond the 1869 line "ne trouverait sans doute pas de point d'appui dans le droit international général" — thus recognizing that such positive justification under international law is necessary for such an extension. (See Rapport, 1912, p. 27.)

[2] The version of the Exposé des Motifs in the Rapport 1912 (p. 28) refers to "one league from Stemshesten", where the 1869 line terminates. The Government of the United Kingdom cannot identify Stemshesten and assumes that the starting point referred to is Storholmen.

it proceeds to state that there would thus be adopted a different system from that which was followed in 1869. (It may be noted, in passing, that the 1935 line in a number of cases passes a similar or greater distance outside the nearest point of land (see para. 129 of Memorial) and is therefore evidently itself based on a different system from that followed in 1869.) The report continues that the Commune's proposals cannot be accepted "si la règle générale, qui a été donnée ici pour l'étendue de la mer territoriale d'un pays, doit toujours être considérée comme juste", and further "si l'on s'en tient à la règle suivie précédemment pour la détermination de la frontière des eaux territoriales", the shorter line actually proposed by the Institute ought to be adopted. The language showed that the Institute itself had no fixed view as to the rule which ought to be applied but merely thought that *prima facie* a line drawn similarly to that adopted in 1869 would be correct. It then proceeds to consider whether this line is technically justifiable, and here it is significant to observe that the advantage of drawing the line direct from Storholmen to Bratvaer is not considered to be a decisive element and that the fact that the line is nearly straight between Gravskjær and Jevleholmen is referred to quite incidentally—which does not at all support the Norwegian argument that straightness is a basic principle which had now become accepted (Vol. I, C.-Memorial, p. 262, at foot No. 4). It is further interesting to note that the Institute was prepared to recommend that if an extension of the line at its northern end was desired it could be carried up from Grip to the most outlying island of Bratvaer, which would have meant a bend in the line of 40°. There can be little doubt that if the lines in this area had fallen to be drawn in 1935, when according to the present Norwegian thesis straightness is a basic principle to be followed, the line would have been drawn as proposed by the Commune of Bod and not as it was actually drawn in 1889 on the recommendation of the Institute. This illustrates once more how far Norwegian theory and practice has advanced since 1889 and how little true it is to say that the 1935 lines are drawn according to principles accepted before 1889. In 1889, straightness was not regarded as a basic principle : what was then regarded as important was that the limit could readily be ascertained by means of "fixes" —which are specified in the report of the Institute (the lighthouse of Ona and of Moø, etc.), and by soundings. As has been stated in paragraph 129 of the Memorial, this is by no means the case with the line of 1935 and this fact constitutes one of the many objections to it. It should also be noted that the line of 1889 is not drawn between the outermost line of rocks "not *continuously* run over by the sea" but is drawn between rocks which are permanently uncovered. There were in fact outside of the line a number of submerging rocks (see Rapport 1912, p. 42, note 1). This decision seems to have been quite deliberate since the Exposé des Motifs

uses language very similar to that adopted in that of the 1869 Decree.

> "Cette distance devait être calculée non seulement en partant de points fixes situés sur la terre ferme, mais aussi sur les îles et sur les rochers qui ne sont pas recouverts par la mer" (Annex 17 of Counter-Memorial at p. 64).

The Geodesic Institute used similar language (Rapport 1912, p. 28).

The recommendations of the Institute were accepted without comment by the Minister and embodied in the decree. In the submission of the Government of the United Kingdom no rule or conclusion of principle can be deduced from this decree at all, in any case not as regards the manner in which base-lines should be drawn between outlying rocks or across the mouth of bays. The decree was of purely domestic interest and the lines were drawn on technical considerations. The question whether these lines can be said to have received any kind of international recognition will be examined below (paras. 40-45).

39. Two other incidents at this time may be referred to as showing with particular clarity that no definite principles with regard to the delimitation of Norwegian territorial waters were considered to have been established.

The first was the consultation by the Ministry of the Interior of the Faculty of Law in 1898 which is briefly referred to in the Rapport 1912 (p. 38). The consultation was prompted, it appears, by certain questions which had been put to the Department by the Geodesic Institute regarding the drawing of territorial limits, which the Department was unable to answer. From the report in *Norsk Retstidende*, 1898, page 705, it appears that the Department *inter alia* referred to the rule stated on page 92 in Professor Aschehoug's work *Norges nuværende Statsforfatning* (2nd edition), that it is not necessary where fjords cut into the land to follow the coast closely, but that the boundary for the sea-territory can be drawn parallel to a straight line between both the outermost points of the opening of the fjord, at any rate when there only is a question of smaller bays or where the fjord cuts far into the land and that one also in the same way can jump from the one island to the other.

The Department goes on to state that this new rule in particular instances causes considerable doubt and obscurity, for instance as to what can be the maximum distance from the land of islands, islets and rocks without the latter falling outside the territorial limit of the mainland; what distance there can be between the islands, when a parallel line for the territorial border can be drawn from one island to another instead of letting the line according to the headlands lying inside or between the islands, etc. As examples,

the Department points to the area outside the Kvenangenfjord, where it is doubtful if the territorial border can be drawn parallel to a straight line between the outermost points of Fuglö and Loppen, or if it must be drawn from Fuglö to the outermost point of Arnö, from there to the cape lying on the other side of the fjord and from there to Loppen [1]. Likewise the stretch outside Laksefjord and Porsangerfjord can be mentioned where it seems doubtful if the line can be drawn from Nordkyn to Nordkap or if the line must be curved inwards towards Sverdholtklubben.

The Department goes on to state that it is not aware whether existing international law gives more detailed rules than those cited above.

The Department enclosed with its letter maps received from the Geodesic Institute on which the territorial limit was marked not according to straight lines between the different outermost islands and rocks but by curved lines following the sinuosities of the coast. As to this, the Department remarked that this of course was not according to the rule stated by Professor Aschehoug.

The Legal Faculty in its opinion stated that as far as it was aware there did not exist any generally accepted international rule governing the point in question, i.e. to what extent the territorial limit should follow the sinuosities and the indentations of the coast.

The Faculty thereafter refers to the rules recommended by the meeting in 1894 of the "Institut de droit international" in Article 3.

According to the Faculty's opinion due consideration must, however, be given to the irregularity of the Norwegian coast. After having discussed this question in detail the Faculty sums up as follows : "A protest in this matter is least likely to be anticipated if, in fixing the territorial limit, care were taken to avoid—at any rate except in rare exceptional cases—exceeding the limits established by the Institute of International Law, viz., 6 miles from the shore, and calculated at the opening of fjords and between islands and rocks from a straight base-line drawn between points, lying at a distance of not more than 12 sea miles from each other."

According to the opinion of the Faculty, the letter from the Department dated 28th October, 1868, concerning the fishing in the Vestfjord, the various decrees concerning the Varangerfjord and the Decrees of 16th October, 1869, and 9th September, 1889, must be presumed to be based on the above indicated fundamental rules. "And", continues the Faculty, "as these provisions have not been met by any protest upheld by the foreign State in question, the legal situation established thereby must surely be looked upon as internationally acknowledged."

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[1] The *outer* of these two possible lines is well inside the 1935 line ; the inner is even inside the 1924 red line.

This consultation is of interest as showing, in the first place, how uncertain the Department of the Interior was as to the manner in which the territorial limit should be drawn and, in the second place, how expert opinion, that of Professor Aschehoug and the Faculty of Law, was divided, and none of the opinions expressed coincided with the doctrines now put forward by Norway and stated to represent a body of theory consistently held for centuries.

The second incident was the exchange of communications which took place in 1903 and 1905 between the Norwegian Ministry of Commerce and the Geodesic Institute (Rapport 1912, p. 38). The Institute stated that it had embarked upon a measurement of the principal fjords and was considering making a similar calculation for the sea up to the boundary of territorial waters. It pointed out that such a calculation could not be made until the question of the determination of that boundary had been solved and asked whether the time had not come for a definitive determination for the whole of the Norwegian coast. The Ministry replied that it could not support the making of such a calculation in respect of the area of territorial waters. It was of opinion that the right course was to proceed as before, namely to determine the boundary for each portion of the coast individually, where this might be considered especially necessary on account of the fisheries or for other reasons.

This reply thus underlines once again the practical and individual character of the preceding decrees, namely, those of 1869 and 1889.

Attitude of other countries to the Decrees of 1869 and 1889 (Counter-Memorial, para. 63)

40. It has already been stated (Memorial, para. 6) that the parts of the coast covered by the Decrees of 1869 and 1889 were of no great interest to British fishermen. There was thus no correspondence between the British and Norwegian Governments on the subjects of these decrees. Moreover, the Norwegian Government did not at any time prior to the present proceedings make clear to the Government of the United Kingdom that these decrees were purportedly based on principles of general application. On the other hand, this was made quite clear in the notes which passed between Norway and France on the Decree of 1869, and for this reason this correspondence merits careful study. It results from such a study that France in no way recognized as legally justified the principles on which the decree might be said to be based.

41. In its first two notes (Annex 18, Nos. 1 and 2, of the Counter-Memorial) the French Government, after referring to its interest in the implications of the 1869 Decree from the point of view of international law generally, drew attention to two points: the fact that the limit was drawn four miles from the shore instead of three miles, and the fact that the line should have been a broken

line following the contours of the coast. The object of the second note (Annex 18, No. 2, of the Counter-Memorial) was, as is correctly pointed out by the Rapport 1912 (p. 100, note 1), to obtain the confirmation of the Norwegian Government that fishing on the outer banks of Sundmöre—i.e. those outside the proposed line—was open to foreigners of all nations and not only to those of Swedish nationality—an interpretation in the latter sense being possible from the terms of the "Exposé des Motifs". The Norwegian Government, first, in a note of 3rd January, 1870 (Annex 18, No. 3, of the Counter-Memorial), gave an assurance that fishing on the outer banks was open to all nations and then, on 8th February, 1870, delivered a lengthy reply setting out the reasons why the line had been drawn as it had (Annex 18, No. 4, of the Counter-Memorial). This note, after referring to the historic character of cod fishing in these parts, proceeds to a justification of the four-mile limit, as based on the range of modern guns and on established and long-dated Norwegian legislation.

The note then deals with the question whether the line itself should be a broken line or a straight line, and after stating that there is no established rule fixing the maximum distance between two points as 10 miles, contends that in fact a broken line, in this area, would be both impracticable and incapable of enforcement and would cut in two the most important fishing bank. The note concludes by saying that the historic facts and the compelling natural and local circumstances seem "presque pouvoir invoquer le droit des gens à leur appui", but that the Norwegian Government has nevertheless not desired to derogate "aux règles appliquées par lui depuis longtemps".

42. In its note in answer dated 27th July, 1870 (Annex 18, No. 5, of the Counter-Memorial), the French Government states that a reply would have been sent before "si la discussion eût pu être renfermée dans une simple question de droit", and (in the second paragraph) states in express terms that the French Government cannot accept the argumentation on which the Norwegian Government claims to base its conclusions. It then proceeds that "*en dehors du droit international*" the French Government is prepared to attribute a certain effect to practical considerations and continues (Annex 18, No. 5, at the top of page 72):

"C'est dans cet ordre d'idées, *étranger au droit de gens*, que s'est placé le Gouvernement de l'Empereur pour l'étude de la question des pêcheries" and suggests a common approach on a practical basis to the problem under consideration.

The note makes clear that it is not so much concerned with the immediate issue of the restrictions imposed in a particular area as with the future consequences of acceptance of the principles raised by the decree.

"Il était à craindre, en effet, que la reconnaissance, *en tant que principe*, des limites de pêche fixées par la décision royale ne constituât un précédent...." (Annex 18, No. 5, p. 72), and then makes the suggestions that "toute question de principe serait écartée" to enable a bilateral arrangement to be made on the spot.

43. There can be no doubt as to the conclusions to be drawn from this document. If the Norwegian note of 8th February, 1870 (Annex 18, No. 4, of the Counter-Memorial), stated, for the first time, certain principles alleged to underlie the fixing of the limits by the 1869 Decree, the French Government—which, it should be remembered, had already made its attitude plain in the Anglo-French Convention of 1839 and in the further abortive Anglo-French Convention of 1867—did not fail to make it abundantly plain that it in no way accepted these principles, or the Norwegian argument which purported to justify them, and that, on the contrary, it entertained the gravest apprehensions lest, as a matter of law, a precedent should be created by them. As it is stated in the Rapport 1912 (p. 105), "il semblerait donc que chacun des deux pays, la Norvège et la France, eût conservé sa manière de voir".

The attitude of the Government of the United Kingdom towards the Decree of 1869 is precisely similar. Even admitting that the United Kingdom is—in the absence of any positive evidence of acquiescence on its part—precluded from disputing the Norwegian claim to exclusive fishing rights within the limits laid down by the decree, all that Norway has acquired is a *de facto*, or possibly, prescriptive, title to those particular rights in that area and it has not thereby acquired any similar rights to whatever system may have been implicit in the decree. Just as the French Government expressly made clear that it did not accept the system, but was not prepared to contest the particular limits in question, so the Government of the United Kingdom, by its conduct, is at the most committed to recognize the limits. The Norwegian argument that she has thereby acquired—either as against France or against the United Kingdom—the right to apply the same rules wherever else she pleases along her coast is consequently one that cannot be maintained.

43 A. It may be also convenient to deal in this portion of the Reply with the later communications with the French Government which are referred to in paragraphs 83 and 89 of the Counter-Memorial. These carry the matter no further and in fact show that the French Government in no way abandoned the principles it asserted in 1870. It will similarly be appropriate to refer to the communications with the Russian Government referred to in paragraph 88 of the Counter-Memorial.

44. In 1895, the French Consul at Christiania asked for particulars of Norwegian legislation concerning fishing limits (Annex 30, No. 1, of Counter-Memorial). The question was particularly directed to the distance of the limit from low tide. The reply (Annex 30, No. 2, of Counter-Memorial) states this distance as one geographic league. It then states that all fjords and bays are considered as forming part of Norwegian maritime territory and that for certain practical reasons it is not possible to follow all the irregularities of the coast. Copies of the Decrees of 1869 and 1889 are referred to and enclosed in this connection.

The French Government thus received an answer to its question together with certain additional information. No doubt it did not think fit to enter into correspondence on that additional information for the reason that its attitude had been fully stated in the note of 27th July, 1870 (Annex 18, No. 5, of Counter-Memorial).

In 1908, the French Chargé d'Affaires at Christiania made a further enquiry (Annex 34, No. 1, referred to in paragraph 89 of the Counter-Memorial). This enquiry related again to the distance of the limit and asked if it should be drawn "en ligne droite du dernier cap à la mer". The reply (Annex 34, No. 2) stated that the limit of 4 miles was still in force and that the distance must be reckoned from low tide taking each island not continually submerged as a starting-point. No answer was given to the question whether lines could be drawn from extreme headlands and no reference was made in this note to the Decrees of 1869 and 1889.

45. The Russian enquiry made in 1869 (Annex 33, No. 1, referred to in paragraph 88 of the Counter-Memorial) was concerned only with the exact measurement of the Norwegian "mil" (i.e. the Scandinavian league). It appears from the note that Russia was at this time contemplating the issue of legislation excluding foreign vessels from certain areas of the White Sea and elsewhere.

The Norwegian reply (Annex 33, No. 2, of Counter-Memorial) did nothing more than state the precise measurement of the mil.

With regard to the informal request for documents said to have been made by the Russian Legation in 1907 (para. 88 of Counter-Memorial), no record appears to exist of the purpose for which these were required, nor from the note made by Dr. Scheel (Annex 33, No. 3, of Counter-Memorial) does it clearly appear what documents were in fact transmitted.

No conclusions can, it is submitted, be drawn from these enquiries and their results.

Norwegian legislation concerning whale fishing (paras. 64-66 of Norwegian Counter-Memorial)

46. Paragraphs 64-66 of the Counter-Memorial refer to and quote various Norwegian laws and proclamations regarding whale fishing off the coast of Finnmark. These enactments according to the

Counter-Memorial appear to have been prompted not by any actions of foreign fishermen, but by the demands of the fishing population along the coast who feared that the decline in the number of whales was having an effect on the supply of other fish (Vol. I, C.-Memorial, para. 64, p. 266, sub-para. 3). The Government of the United Kingdom does not consider it necessary to comment in detail upon this legislation since it does not lay down any principle regarding the manner in which fishing limits, or the extent of territorial waters, should be fixed ; it proceeds simply upon the basis that the field of application of the various enactments is "territorial waters" and in referring to territorial waters merely mentions the distance of a geographic league from the extreme island or islet not run over by the sea. The purpose of the Norwegian Government in referring to this legislation in fact appears to have been to establish that, as regards the Varangerfjord, the line from Cape Kibergnes to the river Grense-Jakobselv was during this period regarded as the appropriate base-line. In view of the fact (see Chapter V of Part II of this Reply) that the Government of the United Kingdom does not propose to contest the right of the Norwegian Government to draw the fishing limit where it has done so accross the Varangerfjord, no purpose would be served by pursuing this point. It is however interesting to note that whereas, in the first instance, the Norwegian Government considered that the line limiting the entrance to the Varangerfjord should be drawn from Vardö to the river Grense-Jacobselv (see Vol. I, p. 267 of the C.-Memorial, and Annex 19, No. 2), later, on the recommendation of the Prefect of Finnmark, it decided "pour éviter tout heurt" to draw the line from Cape Kibergnes (i.e. further inside the fjord) rather than from Vardö (see Vol. I, p. 267 of C.-Memorial *ad finem*), thus showing that the Norwegian Government realized that there were limits to the extent of water which it could claim to protect and that the wider claim would bring it into conflict with Russia.

47. For the same reasons the Government of the United Kingdom does not consider it necessary to join issue with the Norwegian arguments contained in paragraph 66 of the Counter-Memorial based upon the proceedings of the Behring Sea Arbitration and of the North Atlantic Fisheries case of 1910. At the same time the Government of the United Kingdom wishes to make it clear that it cannot accept the interpretation placed by the Counter-Memorial (Vol. I, § 66, p. 271) upon the citation by the Government of the United Kingdom in the 1910 arbitration of the statement made by M. Gram in 1893. M. Gram, as a reference to his statement will make plain, was merely saying that *some* of these fjords have a considerable development but yet have been from time immemorial considered as inner waters. While not disputing this, the Government of the United Kingdom was not committing itself to a statement that *all* Norwegian fjords or bays have the same character

and still less to any extravagant notion of what may properly be regarded as a fjord.

The North Sea Fishing Convention of 1882 (paras. 67-68 of Counter-Memorial)

48. The Government of the United Kingdom has no comments to make on paragraphs 67-68 of the Counter-Memorial and accepts the explanation of the Norwegian attitude therein contained.

Base-points for the delimitation of the territorial sea (Counter-Memorial, para. 69)

48 A. It has already been pointed out in paragraph 24 above that the Rescript of 1812 did not attempt to deal with the question of base-lines nor with the case of rocks sometimes submerged, and that neither the Decree of 1869 (paras. 33 and 36 of the Reply) nor the Decree of 1889 (para. 38 above) made use of any rocks other than rocks permanently exposed. It was in fact in 1908 (namely by the letter of 24th March—Annex 21 of the Counter-Memorial) that for the first time the word "continuously" was used in connection with the words "run over by the sea". This was a new departure and was made use of in practice for the first time by the Commission of 1912.

Norwegian fishing legislation (paras. 70-77 of Counter-Memorial)

49. Paragraphs 70-77 contain an account of legislation passed by the Norwegian Government with the object of reserving the right to fish in Norwegian wat ersto Norwegian subjects. The Government of the United Kingdom does not propose to examine this legislation in any detail since the area to which it is applied, in each case, is stated to be "Norwegian territorial waters" or "Norwegian maritime territory" without any definition of the extent of those waters or that territory (the subject of the present proceedings). This legislation is, for this reason, no evidence of the exercise of Norway's sovereignty or authority over any particular geographical area and in particular over the area claimed as territorial waters by the Royal Decree of 1935. The following observations may however be made on these paragraphs of the Counter-Memorial:

(a) Paragraph 70 contains two statements, each of them misleading. The first is that from time immemorial the local inhabitants have had the exclusive right of fishing off the Norwegian coast without any limitation of distance. The Counter-Memorial however (as is demonstrated above in paras. 13-19) had not succeeded in proving this or in relating the actions of local inhabitants to any act of the Norwegian State or in showing more than that during a certain period (mainly in the fifteenth and sixteenth centuries during the régime of *mare clausum*) the Kings of Norway asserted

extensive and undefined claims to large areas of the seas which were during that period resisted and which were later abandoned.

Secondly it is stated as a fact that from the middle of the eighteenth century the Russians obtained the right, on payment, to fish beyond the distance of 6 sea miles from the coast. This matter has been examined in detail in paragraphs 25-31 above, and it has been shown that the Russian payment was, as stated in the Rapport 1912, page 18, made not for the right to fish outside the limit but for the privilege of exercising certain rights within the limit.

(b) The Laws of 2nd June, 1906 [1] (Annex 22 of Counter-Memorial), and 13th May, 1908 (Annex 24 of Counter-Memorial), refer only in general terms to "les eaux territoriales norvégiennes". The Royal Decree of 22nd December, 1906, containing instructions for the commanders of inspection vessels (Annex 23 of Counter-Memorial) refers also in general terms to "les eaux territoriales norvégiennes" but adds a definition following the terms of the Rescript of 1812.

(c) It is not appreciated for what purpose the Counter-Memorial refers (para. 74) to the Board of Trade notices issued in 1908, 1912 and 1916. The only purpose of such reference would appear to be to show that in the 1908 edition the Board of Trade referred to territorial waters of Norway as being 4 English miles—obviously here stating the Norwegian claim. Since there is no issue in the present case whether the extent of Norwegian territorial waters for fishing purposes is 4 miles or 3 miles, there seems to be little object in filing these documents.

Norwegian customs legislation (paras. 78-79 of Counter-Memorial)

50. The Government of the United Kingdom offers no comment on those portions of the Counter-Memorial (paras. 78-79) which deal with the matter of customs legislation. It should be pointed out however that Article 19 of the Convention of 19th August, 1925, between Germany, Denmark, Finland, Lithuania, Latvia, Norway, Poland, Danzig, Sweden and the U.S.S.R. (Annex 27, No. 2, of Counter-Memorial) refers not, as stated in italics at the end of paragraph 79 of the Counter-Memorial, to the "skjærgaard" but to "les archipels". In other words there is not, as paragraph 79 seems to suggest, special treatment for Norway in respect of the "skjærgaard", but equal and reciprocal treatment for customs purposes conventionally agreed between the signatory States in respect of archipelagoes generally.

[1] This law has, it is understood, been amended by a recent law promulgated in 1950. This does not, however, affect the argument, which is concerned with the application of the Law of 1906 at the time when it was passed.

Relations between Sweden and Norway (para. 81 of Counter-Memorial)

51. The Norwegian Government in paragraph 81 of the Counter-Memorial disputes the contention made in paragraph 4 of the United Kingdom Memorial that before 1905, when the separation of Norway from Sweden occurred, no dispute could have arisen between the two countries "on the plane of international law". The Counter-Memorial argues against this, that Norway and Sweden might very well and often did have conflicting interests in international affairs and might enter separately into international conventions. No doubt this is true, but this does not show that the two countries were, prior to the separation, separate International Persons: disputes between the two countries would, before 1905, be on the plane of constitutional not international law. The position of Sweden/Norway prior to 1905 is described by Oppenheim, *International Law* (7th edition, Vol. 1, p. 163) as a Real Union with the following characteristics:

> "A Real Union is not itself a State but merely a union of two full sovereign States which together make one single but composite International Person. They form a compound Power and are by the treaty of union prevented from making war against each other.... They can enter into separate treaties of commerce, extradition and the like, but it is always the Union which concludes such treaties for the separate States, as separately they are not International Persons."

The Norwegian Government relies for support upon the Grisbadana Arbitration, but this in no way confirms its argument. The case was in fact decided by the Permanent Court of Arbitration in 1909, upon a *compromis* signed in 1908, both after the separation. The fact that the origins of the dispute belonged to an earlier period is irrelevant.

British notes of 1906 and 1908 concerning fisheries (paras. 84-87 of Counter-Memorial)

52. In paragraph 87 of its Counter-Memorial the Norwegian Government criticizes the Government of the United Kingdom for having, in paragraph 4 of its United Kingdom Memorial, "travestied" the effect of a certain note, namely, the note of 9th January, 1906 (Annex 31, No. 1, of Counter-Memorial), by representing that the predominant factor behind this note was the recent commencement of trawling by British vessels off the Finnmark coast. The Government of the United Kingdom admits that there is some confusion of dates in paragraph 4 of the Memorial and that the chronology given by the Counter-Memorial is correct. There were, in fact, two separate approaches made by the Government of the United Kingdom to the Norwegian Government, as is pointed out in paragraph 84 of the Counter-Memorial—the first in 1906 dealing with the possible adherence of Norway to the North Sea Fisheries

Convention, 1882, and the second in 1908 asking for information about Norwegian fishery legislation. The Government of the United Kingdom certainly did not intend to say that the first approach was motivated by a desire to protect British trawling interests in Finnmark or indeed by anything other than a desire to secure Norway's adherence to the North Sea Fisheries Convention, 1882. On the other hand it was correct to say that the request made in 1908 was prompted by the desire to know whether the existing Norwegian decrees on fishing limits were likely to interfere with the nascent trawling activities off Finnmark, and it was precisely because it was seen that this legislation had no application to the coast of Finnmark, but only related to areas in which British fishermen had never had any interest, that the enquiry was not followed by any more positive action.

Discussions at the Institute of International Law (para. 90 of Norwegian Counter-Memorial)

53. Paragraph 90 of the Counter-Memorial refers to two sessions of the Institute of International Law in which the matter of territorial waters was discussed. The account of these sessions given is, however, in important respects, incomplete and misleading.

At the first session, that held in Hamburg in 1891, the Institute was at the stage of examining the different systems adopted by States for the purpose of defining territorial waters : the purpose of the session was in fact purely informatory. M. Aubert presented, apparently to the Assembly, a report, which is included in the minutes, of Norwegian practice : it does not appear to have been followed by any discussion, but the decision was taken by the Assembly to publish the report in the minutes (Annuaire XI, p. 147) : this decision implies neither assent nor dissent from any statements made therein. The main thesis for which M. Aubert was arguing at this meeting was for "un droit exclusif à la pêche dans une zone de plus en plus étendue" (*ibid.*, p. 135). Following this the greater part of the report deals with the question of the four-mile limit, and with fjords and bays, but it is interesting to note that M. Aubert refers to the fact that fishing (by Norwegian inhabitants) takes place on banks so far from the shore that the fishermen cannot take advantage of the privileged situation of nationals in the territorial sea even if the latter be defined in the widest sense, thus illustrating that Norway cannot and did not claim any privileged position for her fishermen outside territorial waters even on the ground of usage (Annuaire XI, p. 138). On the question of base-lines, M. Aubert expressed himself as follows :

> "Une question peut-être plus importante encore pour la Norvège est celle de savoir à partir de quelle base doit être mesurée l'étendue de la mer territoriale. Les rochers de la terre ferme se continuent sous la mer, pour en émerger souvent à une très grande distance, par exemple dans Lofoten, sous la forme d'îles ou d'îlots. Nous

> avons regardé comme tout naturel que, *l'île n'étant pas située plus qu'à deux anciens milles marins (deux quinzièmes de degré)* de la terre ferme, l'étendue de la mer territoriale doive être comptée jusqu'à un mille au delà de l'île, et ainsi de suite d'île en île." (Annuaire XI, p. 139.)

M. Aubert is thus arguing for a rule by which islands can only be used as base-points if they are less than 8 miles from the shore or from another island, and, as will be shortly shewn, this was not the only occasion on which he expressed himself in this manner, nor was he alone in taking a restrictive view of the right to make use of islands and rocks. It is, in the submission of the Government of the United Kingdom, highly significant that so great an authority as M. Aubert, attending the meeting of the Institute specifically for the purpose of explaining the Norwegian point of view (he was speaking in his own name and in that of M. Aschehoug, and it is impossible to believe that he was so doing without the full knowledge and approval of his Government) should have expressed himself in this manner (which is wholly inconsistent with the present Norwegian attitude) regarding the interpretation to be placed upon the Rescript of 1812. That he should have done so demonstrates how little consistent Norwegian doctrine in this matter has been and completely falsifies the Norwegian claim to a continuity of theory for over a century.

The fact, moreover, that M. Aubert should have been invoked in paragraph 90 of the Counter-Memorial as expounding "the Norwegian legal rules", implying that these were the rules relied upon in this case, indicates the need (which is illustrated again by the matters referred to in paragraph 55 of this Reply) for some caution in relying upon Norwegian references to legal authorities.

54. It is interesting to note that, on the subject of bays, M. Aubert said (*ibid.*, p. 140), "Jusqu'à quelle largeur cette ouverture peut-elle aller sans cesser de former la base d'une mer territoriale s'étendant au dehors ? *C'est un point sur lequel nous n'avons aucune règle fixe*", and proceeds by referring to Norway's inability to accede to the North Sea Convention of 1882 because the maximum of 10 miles was too narrow and because Norway possesses a very large number of fjords of this category. In other words Norway, while not able to accept the 10-mile rule as applicable generally, had not at this time promulgated any rule of her own.

54 A. At the meeting of the Institute held the following year in Geneva, M. Aubert, after pointing out with regard to Norway that

> "les grandes pêcheries s'y font en grande partie en dehors de la mer territoriale norvégienne" (Annuaire XII, p. 147),

points to the difficulty of extending fishing regulations so as to apply to foreigners outside territorial waters. The remedy which he suggested on this occasion was not to extend the territorial

limit, but to permit the coastal State to extend the application of its fishery laws outside the territorial sea, i.e. he was arguing for a contiguous zone for fishery purposes (*ibid.*, p. 149).

55. At the meeting in Paris in 1894, M. Aubert referred to certain maps; but it is inaccurate to say—as appears in paragraph 90 of the Counter-Memorial—that M. Aubert "a démontré, par la présentation de cartes, l'absurdité qu'il y aurait à vouloir se servir pour une côte telle que celle de la Norvège, d'une limite territoriale suivant strictement les contours du rivage". This was not the purpose or effect of M. Aubert's demonstration at all nor did M. Aubert describe anything as an "absurdité". M. Aubert, in fact, was referring to maps in connection with a proposed article which, after laying down a general rule for the limit of territorial waters as six miles, contained a paragraph as follows:

> "Article 2 (2). Dans le cas où un État voudrait soumettre la pêche à des règlements quelconques jusqu'à une distance plus grande que six milles de la côte, il faudrait l'assentiment des États interéssés." (Annuaire XIII, p. 287.)

The Rapporteur explained that this draft article had been inserted at the request of M. Aubert, and M. Aubert then proceeded to use his maps to show that there were reasons militating in favour of the greatest possible extension of territorial waters in matters regarding fishing. The limits, he said, should be extended to include fish nurseries, and even with a 10-mile limit there would be left numerous banks which could be profitably exploited by foreigners. M. Aubert is not reported (pp. 287-288) as referring in any way to the "contours du rivage". On the question of bays, it is interesting to note that, when a vote was taken, M. Aubert voted in favour of a limit of 12 miles for the closing line (*ibid.*, p. 292).

The decision taken on the draft Article 2 (2) was, after a short discussion, to reject it (*ibid.*, p. 291). If any positive conclusion can be drawn from these proceedings, it is that the Institute did not regard with sympathy claims by States, for special reasons, to extend their territorial waters beyond the limits generally recognized by international law.

56. The meeting of the Institute of International Law at Hamburg in 1891 (para. 53 above) was not the only occasion in which M. Aubert is on record as taking a restrictive view of the right to make use of islands and rocks for the purpose of defining territorial waters. In his article on the Norwegian territorial sea, published in the *Revue générale de Droit international* (Vol. I, 1894, pp. 429-441), M. Aubert, after saying that it was not clear whether submerging rocks might be used as base-points and that in fact such rocks never had been used in Norwegian practice, said, in relation to the question of distance: "On a donc ici compté, comme base de la mer territoriale, la ligne qui court entre ces îlots ou rochers, *à*

moins qu'elle n'ait plus de 8 milles. C'est là une conséquence nécessaire du principe établi en 1745 qu'on doit calculer la distance non seulement des côtes, mais aussi des écueils (rochers) qui les bordent. Et comme la limite de 4 milles admise par la Norvège ne se trouve pas en conflit avec le droit international, il faut déclarer aussi légitime cette manière de compter la limite qui a toujours été considérée comme une partie intégrale de la limite elle-même" (at pp. 434-435). It is evident, from the close consistency between these two expressions of M. Aubert's opinions, that this represented his considered view. And it is of great significance to observe that M. Aubert not only considered the 8-mile limit to be the proper rule, but considered it to be an integral part of the Norwegian system and inseparable from the Norwegian 4-mile limit. M. Aubert was not the only Scandinavian authority to express himself in this sense at this time. According to the Rapport 1912 (p. 53, note 1), M. Hroar Olsen expressed himself in precisely the same sense as M. Aubert (i.e. as in favour of an eight-mile limit) in his address to the Fisheries Congress at Bergen in 1898. And, also according to the Rapport 1912 (p. 53), M. Kleen went even further and declared in favour of a four-mile limit.

57. Finally, there are passages in the Rapport of 1912 (to which reference will be made in paragraph 69 below) which clearly indicate the difficulties which were felt *even at that time* in putting a precise interpretation on the Rescript of 1812. It is pointed out that there had been no legislative or judicial interpretation of the words "islands or islets not run over by the sea" (Rapport 1912, p. 43) ; learned opinion was far from agreed on the subject (*ibid.*, pp. 45 and 49) ; it was uncertain whether the limit should be drawn from high, medium or low tide (*ibid.*, p. 41, quoting a communication from the Minister of the Interior in 1894 to the Association for the Reform and Codification of International Law) and what was the maximum distance that a rock might be from land or from another rock before it could be used (*ibid.*, p. 48).

The situation in 1906 (para. 91 of Counter-Memorial)

58. The Government of the United Kingdom has in the preceding sections of this Reply followed, with certain departures for the sake of clarity, and commented upon the contentions put forward by the Norwegian Government in Chapters I-III of its Counter-Memorial. The conclusions which the Norwegian Government seeks to draw from these chapters are contained in paragraph 91 of the Counter-Memorial. In the submission of the Government of the United Kingdom the Court will find that these conclusions are not established.

It is in the first place of no importance that Norwegian claims had been reduced in comparison with earlier claims made under the régime of *mare clausum*. The same was generally true and is of no

assistance in the task of ascertaining where the limit of territorial waters should be drawn under modern international law. It is in the second place not proved and is not the case that, by 1906, the Norwegian principles upon which Norwegian territorial waters are to be defined were firmly established. Of these alleged principles (see Vol. I, para. 91 of Counter-Memorial, p. 285) :

(a) The Government of the United Kingdom is prepared to admit that one-fifteenth of a degree, i.e. 4 miles, had by this time been established, on historic grounds, as the breadth of the maritime belt to which Norway was entitled [1].

(b) The Government of the United Kingdom is prepared to admit that Norway was entitled to claim certain fjords as internal waters on the basis of Norway's historic claims which are dealt with in paragraphs 432-515 of this Reply. The Government of the United Kingdom does not admit that Norway has the right to claim as internal waters the waters of all fjords regardless of rules of international law as to the points at which the limiting line is to be drawn. As has been shown (para. 54 above) Norway had not at this time formulated any definite rule on this point.

(c) No clear rule had been established in Norway as to the manner in which the base-lines for the definition of territorial waters should be drawn between islands or rocks lying off the shore.

58 A. The Rescript of 1812 left this question *(c)* undetermined and no definite rule had emerged from the subsequent Norwegian decrees including the Decrees of 1869 and 1889. It is clear, on the contrary, from the opinion of the Legal Faculty in 1898 (para. 39 above) and from the statements made by M. Aubert at the Institute of International Law and by M. Olsen about the same time, that no settled practice or theory had been developed up till the end of the nineteenth century, though it was certainly thought that base-lines should not be longer than 8 miles. If there was any fundamental principle as to the manner in which base-lines should be drawn, it was that they must be by reference to fixes or alinements of points on land. As a restatement and confirmation of the view just expressed, the Government of the United Kingdom cannot do better than cite a passage from the official report of the Norwegian Ministry of Foreign Affairs which was issued in 1928 in connection with the 1924-1925 conversations in Oslo and London. This document, which was not to hand at the time of the preparation of the Memorial, is entitled "St. med. nr. 8 (1926)

[1] It is interesting to note that as late as 1880, certain Norwegian deputies expressed doubts whether the four-mile limit could be maintained in the face of protests which might be raised by foreign Powers (Rapport 1912, p. 9, note).

Om forhandlinger med Storbritannia vedrørende sjøterritoriet" [1]. The translations used in the Reply are unofficial. In the section of this report in which the Ministry of Foreign Affairs sums up the position from the legal point of view, after stating that in its opinion it has a strong case in law for the limit of four miles, the Ministry proceeds to deal with the question of base-lines as follows:

> "On the other hand, with regard to the question of the base-lines for calculating territorial waters, the case is more doubtful. No defined principle is formulated in international law regarding this calculation. In some cases the question has been solved in treaties between foreign States. In others its application has been decided by the national legislation of the countries concerned and by arbitral judgments. These various solutions, however, are to some extent conflicting, and provide no adequate foundation for the acceptance of any definite principle. In some cases a line double the width of territorial waters has been taken as a basis: this must necessarily result in various solutions since the extent of territorial waters in different countries is variable. In other cases arbitrary base-lines have been used. In a number of treaties the base-line of 10 nautical miles has been adopted, especially as far as concerns the fishery question. In certain countries base-lines of 12 to 20 nautical miles have been adopted for certain purposes. Base-lines of 12 nautical miles were also proposed by l'Institut de Droit international in 1894 and the International Law Association in 1924.
>
> With regard to Norwegian territorial waters no general regulation regarding the calculation of the base-line has been issued. There exists no rule as to the length to be given to the base-lines for our territorial waters" (p. 25).

And then, after referring to the Rescript of 1812, the Decrees of 1869 and 1889 and the legislation affecting the Varangerfjord, the report continues:

> "The earlier Territorial Waters Commission of 1911, which was to clear up this side of the matter, proposed base-lines for the Counties of Finnmark, Troms, Nordlands, North and South Trøndelag and certain parts of Møre County. *These base-lines which in some cases are very long were drawn more with a view to local interests than on the basis of any general principle.* At the same time the commission also prepared tables of other base-lines for the said stretches of coast, under the assumption that no base-line should be more than 10 or 12 nautical miles respectively" (p. 25).

The Court will not overlook the fact that the base-lines here referred to are the very lines which are in question in this case. Their character and origin could hardly be more strikingly demonstrated. The passage quoted should, moreover, be compared with an earlier passage (quoted in full in para. 75 *(c)* below), in which

[1] This document, an original copy of which has been filed by the Government of the United Kingdom with the Court, will in future be referred to as St. med. nr. 8 (1926).

the Ministry of Foreign Affairs states that *the red lines* of 1924-1925 (i.e., NOT the blue lines) *were drawn according to the principles laid down in the Decrees of 1869 and 1889*. This not only destroys the Norwegian contention, which is one of the main pillars of the argument contained in Part I of the Counter-Memorial, that the blue lines were drawn according to the principles laid down in the Decrees of 1869 and 1889, but also illustrates once again the point that *the blue lines were not drawn according to any general principles*.

With regard to international knowledge and acceptance, even if Norway's claim to a 4-mile limit and Norway's claim to her fjords had by this time achieved the character of an historic claim, at any rate there is no justification for the contention that Norway's further claims enjoyed any measure of recognition. In the first place they had never been clearly stated ; the Decrees of 1869 and 1889 stated no system, and in so far as they were presented as based upon a system, this was explicitly rejected by the only country (France) which had occasion to consider it. Against other countries, including the United Kingdom, Norway could gain no more than a possible prescriptive right to the particular waters enclosed by those particular decrees. As regards statements at international conferences, these were consistent neither with the present Norwegian case nor with each other and in any event received no measure of endorsement.

59. With regard specifically to fisheries off the area involved in the present dispute, the position at this time may be summarized as follows :

(a) It has not been established by the Counter-Memorial that any particular fishing banks, with the exception possibly of some banks situated inside the Varangerfjord or the Vestfjord or in the immediate vicinity of Vardö, all of which are within the green line recognized by the United Kingdom, had from time immemorial or for any period been appropriated for user or occupied by the local inhabitants. On the contrary, fishermen from other parts of Norway and foreign countries had for many centuries asserted an interest in them and particularly in the Finnmark fisheries and had not been effectively excluded.

(b) It has not been established by the Counter-Memorial that Norwegian sovereignty or legislative or administrative authority had been exercised over any defined area of coastal waters and in particular over the area comprised in the Royal Decree of 1935. Apart from whale fishing (legislation as to which was, outside the Varangerfjord, expressed to apply to "Norwegian territorial waters" without further definition), and leaving out of account the agreement by Russian fishermen not to fish within one league from the coast, there was no general legislation regarding fishing off

the coast of Finnmark before the Law of 13th September, 1830, and the subsequent legislation again referred in general terms to Norwegian territorial waters.

(c) The legislation applicable in 1906 consisted of the Law of 3rd August, 1897 (Annex 13, No. 12, of Counter-Memorial), and of the Law of 2nd June, 1906 (Annex 22 of Counter-Memorial), both of which forbade fishing by foreigners within a belt described in general terms as "Norwegian territorial waters" without more specific definition.

(d) No specific definition of "territorial waters" in any part of the area comprised in 1935 had been made except in relation to one headland (viz. the west terminal point) of the Vestfjord (note of 7th November, 1868, Annex 15, No. 2, of Counter-Memorial) and the Varangerfjord (Law of 5th January, 1881, and Exposé des Motifs of 20th December, 1880—Rapport 1912, p. 29). As regards other fjords in Finnmark, no specific legislation existed; they were not mentioned in the Law of 1881 or the Exposé des Motifs of 20th December, 1880, and the question what should be considered the outermost points between which lines might be drawnhad been left undefined (see Rapport 1912, p. 33).

(e) With regard to the "skjærgaard" and other portions of the coast where rocks and islands might have to be used in the delimitation of territorial waters, there existed no legislative disposition other than the Rescript of 22nd February, 1812, and the manner in which this rescript was to be interpreted in relation to this matter was far from clear (paras. 24 and 58 A above).

Finally, Norway herself, as the Exposé des Motifs of the Decree of 1869 makes clear, recognized that there were limiting rules of international law applicable to the matters dealt with by Norwegian fishery legislation. It is true that she was of opinion that her legislation was not in conflict with those rules, whether correctly or not is not a matter that arises directly in the present proceedings. But in any event such domestic legislation—as the Decree of 1869—could at the most have the effect of conferring upon Norway a prescriptive title to a particular area.

The period from 1906-1918

Events subsequent to 1906 (paras. 92-96 of Norwegian Counter-Memorial)

60. It was, as stated in paragraph 92 of the Counter-Memorial, about 1906 that the first British and other foreign trawlers began to appear off the coast of Finnmark, their operations at this time being confined to the eastern portion. The reactions of the inhabitants of these regions are described in the same paragraph and are

of some significance. It will be recollected that at this time fishing of any kind within Norwegian territorial waters by foreigners was entirely forbidden (Law of 3rd August, 1897, Annex 13, No. 12, of Counter-Memorial, and Law of 2nd June, 1906, *ibid.*, Annex 22). The demands of the inhabitants were accordingly, as this paragraph of the Counter-Memorial shows, for the limits of territorial waters to be extended, one of the proposals being to extend them to a distance of 9 or 10 miles, thus recalling the suggestion made by M. Aubert at the Institute of International Law in 1894. It is clear, therefore, at this time that the opinion of the local inhabitants was that the fishing grounds for which they desired protection were outside territorial waters as then defined.

61. It may be convenient to refer at this point to the document published in 1927 under the description Number 17 B (1927), which is contained in Annex 44 of the Counter-Memorial. This represents the work of the "practical" section of the Commission of Foreign Affairs and Constitutional Questions. In the portion of its report which begins at page 134 of Annex 44 of the Counter-Memorial, the commission refers at some length and in some detail to the attitude of the fishing population. The commission elicited two main points : first, as would be expected, that the fishing population was strongly opposed to the narrowing of the limits of exclusive fishery ; secondly, that with almost equal unanimity it considered that fishing by foreigners *outside* the territorial limit ought to be restricted. The following quotations, which represent replies made to the commission's enquiries, will illustrate how great was the pressure brought to bear on the Norwegian Government :

(a) "Le chalutage pratiqué par les étrangers, *au delà comme en deçà de la limite territoriale*, est mal vu de tous ceux qui pêchent au Finnmark. J'ai l'impression que la population autochtone et les pêcheurs venant d'autres provinces norvégiennes à la fois, considèrent comme très nécessaire de faire respecter, pour les pêcheurs norvégiens, le monopole de la mer territoriale norvégienne." (Capitaine de frégate v. Krogh, le 18 novembre 1925.) (*Loc. cit.*, p. 137.)

(b) "Ceux qui sont personnellement engagés dans la pêche envisagent naturellement avec grande antipathie le chalutage pratiqué par les étrangers *en deçà comme au delà de la limite territoriale*, et jugent nécessaire qu'on fasse respecter le monopole des pêcheurs norvégiens en territoire norvégien." (Capitaine de corvette Wigers, le 12 novembre 1925.) (*Loc. cit.*, p. 138.)

(c) "La population « considère le chalutage comme une pêche abusive, qui va épuiser les bancs en un temps très court. Non seulement le chalut s'empare du poisson, mais aussi, de l'avis des pêcheurs, il détruit la végétation du fond, et diminue d'autant la faune sous-marine pour un temps assez considé-

rable, car le fretin devient de moindre qualité.... Ils préconisent la cessation de tout chalutage sur les fonds du Finnmark, *au delà comme en deçà de la limite territoriale....*»" (Capitaine de corvette O. Blom, le 17 novembre 1925.) (*Loc. cit.*, p. 138.)

(d) "Il y a une hostilité, on pourrait même dire une indignation générale, à l'égard du chalutage *au delà comme en deçà de la limite.*" (Capitaine de corvette Diesen, le 17 novembre 1925.) (*Loc. cit.*, p. 138.)

(e) "La commission a reçu également une déclaration sur ces questions de la part de l'enseigne de vaisseau Kullmann, qui indique notamment que la population envisage le chalutage en général, *au delà comme en deçà de la limite*, avec inquiétude, et qu'elle estime nécessaire de faire respecter le monopole des pêcheurs norvégiens, en mer territoriale norvégienne." (*Loc. cit.*, p.-139.)

It is evident from these expressions of opinion, as well as from those referred to in paragraph 60, that the Norwegian Government was, from 1906 onward, faced with demands which were not—as Norway in effect now contends—that protection should be given in respect of historically established limits, but that the recognized limits should be substantially extended. It was precisely this extension which was given by the 1935 Decree [1].

62. Returning to the situation in 1908, the Administration sought the advice of the Prefect (para. 93 of the Counter-Memorial), who suggested that lines should be drawn between the extreme headlands of certain fjords, mentioning certain points which were, in general, later accepted as points by the 1935 Decree. In this case, however, the Administration did not, as it had done in 1869 and 1889, proceed to determine the base-points after a consideration of the Prefect's proposals, nor did it promulgate any regulation on the subject—no doubt because it entertained the gravest doubts whether the proposals were in accord with international law and would not lead to protests from the United Kingdom. All that was done was to incorporate the general sense of the Prefect's proposals —i.e. that lines should be drawn from extreme headlands—in a departmental communication dated 24th March, 1908, from the Minister for Foreign Affairs to the Minister of National Defence (Annex 34 A of Counter-Memorial). It will be seen that even this document states the extreme headland principle as an *interpretation*—in fact a new interpretation—of the Rescript of 1812. This communication was not included in the documents forwarded to the

[1] It may also be noticed (see sub-para. *(c)* above—and there are other references to the same effect) that the opinion was voiced at this time that trawling is in itself a destructive method of fishing and this no doubt made some impression on the Norwegian Government. It has been pointed out above (see para. 9 of this Reply) that later experience has shown this not to be the case and has even convinced the Norwegian Government of the fact.

British Minister at Christiania on 6th August, 1908 (see Annex 32, No. 2, of Counter-Memorial). Moreover, when in the course of the London conversations of 1925 the Norwegian Delegates submitted a memorandum showing the points of departure from which Norwegian territorial waters are reckoned by Norwegian Royal decrees, etc., the only reference made to the letter of 24th March, 1908, was the following (which was made with reference to a discussion on fjords) : "from the outermost coast line at low tide or from the outermost island or rock which is not permanently submerged [1]", no reference being made to the use of extreme headlands (see Annex IX to minutes—Vol. I, Memorial, Annex 7, p. 160).

The conclusion can, therefore, be drawn, in the submission of the Government of the United Kingdom, that neither in 1908 when it was issued, nor in 1925, was the letter of 24th March, 1908, regarded as an authoritative definition of Norwegian territorial waters in so far as it stated an extreme headland principle. In any event, the fact that, no doubt deliberately, the Norwegian Government did not on two occasions, when it might have been appropriate to do so, think fit to communicate the statement of such a principle, contained in the letter, to the Government of the United Kingdom, shows that the Norwegian Government appreciated that the Government of the United Kingdom would not accept the principle, as in fact the latter has never done.

63. The following steps taken by the Norwegian Government are obscure, but confirm the impression that the Norwegian Government realized that it was on dangerous ground. Paragraph 95 of the Counter-Memorial appears to suggest that in 1908 instructions were issued to apply the "new rules" with moderation, though no document or other evidence is produced to establish that this was the case. It appears that the commanders of fishery inspection vessels were, in cases of ships found fishing within a limit defined by reference to a ten-mile base-line across a fjord, strictly to enforce that legislation. Outside that area they were, it seems, to give warning and take the names of ships. In fact, only one British ship was warned during the period preceding the first World War (*Caulonia* on 10th March, 1913), and that was within what was afterwards known as the red line.

It is of importance to note that these Norwegian instructions referred to a ten-mile line in the case of fjords and bays, the position being that vessels found fishing within a limit drawn by reference to such a line were to be strictly dealt with, and that outside it "lenient enforcement" was to take place. The reference to such a line at this time is hardly consistent with the contention sub-

[1] It has already been pointed out (para. 24 above) that it was in this letter that the word "continuously" was used officially for the first time in connection with the expression "run over by the sea". In 1925 the expression "permanently" was used.

sequently made in the Counter-Memorial, that Norway never attributed any significance to 10-mile base-lines at all (see paras. 113 and 115 of Counter-Memorial). The inference would, on the contrary, appear to be that Norway in 1908 considered that, so long as she enforced her fishery legislation within a limit drawn by reference to a ten-mile line, she would be acting in accordance with international law (the ten-mile line being at that time the line which enjoyed the greatest measure of international acceptance), but that if she went further, and enforced her legislation further towards the "high seas" she would be exposed to charges of not acting in accordance with international law.

64. It is indeed alleged in the Counter-Memorial (Vol. I, § 95, p. 289, para. 2) that even during this period of "lenient enforcement" arrests were made—the implications being that they were so made in the area of "lenient enforcement" and outside the area of "strict enforcement". But this is not confirmed by the facts. Only one arrest (the *Lord Roberts*, 1911) was made after this issue of the order of 1908 before the first World War and this was well inside the Varangerfjord, i.e. inside the "strict enforcement" area. The next six arrests (*Celerine*, *Jeria*, *Lord Lister*, *Sarpedon*, *Quercia* and *Our Alf*) (Annexes to Counter-Memorial, p. 243, Nos. 2-7) which were made between November 1922 and October 1923 were all within the area which was then recognized as territorial waters by the United Kingdom [1]. After that date, arrests were made outside this area (although the *Earl Kitchener* and *Salmonby*, Nos. 10 and 15 *(ibid.)* were inside it and *Elf King* and *James Long*, Nos. 13 and 14 *(ibid.)* were barely outside it), but these were still within the red line which at this date—1923—was probably coming to be accepted by Norwegian expert opinion as the correct line for "strict enforcement". These facts hardly support an argument that the Norwegian Government was at this time enforcing its claims beyond what it considered to be the limit which could safely be applied with strictness, i.e. a limit drawn in accordance with international law. On the contrary, they seem to indicate that Norway fully appreciated that arrests outside such a limit could not be justified [2].

65. The reasons given by the Norwegian Government in paragraph 96 of the Counter-Memorial, for what is decribed as "a certain prudence" in this matter, are unconvincing. What is alleged is that

[1] This is shown in the Norwegian charts contained in Annex 2 of the Counter-Memorial as a green line. It must not, of course, be confused with the green line, representing the United Kingdom view as to what Norwegian territorial waters should now be, which is drawn on the charts filed as Annex 35 to this Reply.

[2] In order to assist the Court, there is set out in Annex 32 a table reproduced (without the geographical positions) from Annex 56 of the Counter-Memorial showing the position of the various ships arrested and warned by reference to the red and blue lines.

the attitude of the Government of the United Kingdom towards these questions was such that Norway could not declare the principles in which she believed. In support of this allegation reference is made to a declaration of the British Minister at Oslo in 1906, that opinion in favour of the three-mile rule was almost unanimous. This declaration was certainly made : yet Norway had for a long period not shrunk from asserting a four-mile limit and indeed in relation to this very area, as she herself states, was preparing to *enforce strictly* existing Norwegian legislation which incorporated a four-mile limit. It would not appear, therefore, that the British Minister's declaration could have had a markedly deterrent effect.

The fact that the Faroe Islands and Iceland had—some seven years earlier—agreed to a 3-mile limit would again only be a dominating consideration if Norway was in the situation of being obliged to promulgate a four-mile limit for the first time in 1908. But, in fact, she had done so long ago. Admittedly the United Kingdom was anxious to secure as much acceptance as possible for the three-mile rule—although it is somewhat of an exaggeration to speak of "unremitting propaganda" : but Norway had committed herself long ago to a different principle and had succeeded in resisting all efforts to bring her over. Why then should she shrink from stating what—on the basis of this same four-mile limit—she considered to be the proper fishery limits in Eastern Finnmark ?

The real reason for Norway's hesitation was of course that she appreciated that the limits which she was beginning to enforce, particularly in so far as they exceeded limits drawn by reference to a 10-mile line across bays, could not be justified in international law and would not be accepted by other nations. Paragraph 96 of the Counter-Memorial makes a point of the fact (to which reference is made on other occasions by the Norwegian Government) that other nations have not published charts or lines defining the limits of their territorial waters as Norway has. There is of course a good reason for this inasmuch as other nations define these limits generally by reference to their coasts. The publication of charts or lines therefore assumes far less importance for such countries than it does for Norway, which defines its limits by reference to base-lines which have little or no relation to the configuration of the coast line.

The Lord Roberts *(1911)* (paras. 97-102 of the Counter-Memorial)

66. With regard to the *Lord Roberts* incident (which, it will be remembered, took place well inside the Varangerfjord), it is no doubt the fact that Sir Edward Grey, the British Foreign Secretary, expressed himself strongly on the subject of the four-mile limit ; the contemporaneous note made of the conversation with M. Irgens is included in Annex 33 of this Reply. This was, however, nothing new and it is again difficult to appreciate why Norway should by

these remarks have been induced to exercise what she thought her rights with moderation. In 1908 she had already decided upon a policy of "lenient enforcement" and, so far as the Varangerfjord was concerned, she had already covered this by legislation. Nothing that was said by Sir Edward Grey, or otherwise on behalf of the United Kingdom in anyway affected Norway's conduct in this respect. She continued to enforce her claim to the Varangerfjord and her claim to a 4-mile limit and, so far as the particular case of the *Lord Roberts* was concerned, she showed no signs of giving way and did not do so.

The Government of the United Kingdom does not propose to comment further on the *Lord Roberts* case in view of its consent to treat the Varangerfjord as within Norwegian territorial waters for fishery purposes on the basis of historic title.

The Territorial Waters Commission (1911) and the Rapport 1912 (paras. 103-106 of Counter-Memorial)

67. As stated in paragraph 103 of the Counter-Memorial, this commission was set up in 1911 to study the question of the Norwegian territorial waters in Finnmark. In view of the fact that passages from the Rapport of 1912 have been relied on in support of the Norwegian case in these proceedings, it is of importance to appreciate the general basis on which the commission proceeded and the nature of the approach which it made to the question. This approach was, in fact, and as would be expected from the composition of the commission, a purely Norwegian approach, and not in any way an impartial approach aimed at balancing the claims and interests of Norway with those of other countries according to rules of international law. The method adopted by the commission in the first section of the published portion of the Rapport, which is where the principles and rules applicable to the drawing of the limit are examined and the conclusions of the commission stated, is to set out the antecedent Norwegian legislation in relation to the area in question, to assume (as it was bound to assume) that such legislation was legally valid, and then to consider what further measures might be taken consistently with that legislation. The Rapport contains in addition a section (pp. 55 *et seq.*) dealing with the international law on the subject both generally and in relation to existing Norwegian legislation, but this section, appearing as it does after the Commission had stated its main conclusions, is admittedly selective and is essentially of a justificatory character being designed to show that there is nothing in Norwegian legislation contrary to the principles of international law. The arguments used are broadly those put forward in the Counter-Memorial.

68. The Counter-Memorial in paragraph 103 cites two passages from the Rapport to support its case, the first dealing with fjords

and the second with outlying rocks. It is interesting to examine these quotations in their context and, if this is done, it will be seen that the support they in fact give to the Norwegian argument is inconsiderable.

The first quotation appears in a passage beginning on page 18, in which the commission sets out to examine the rule established by the Rescript of 1812 particularly in relation to fjords. It points out that the rescript itself makes no mention of fjords but was designed to deal with the case of the "skjærgaard", though of course it also left open the possibility of interpretation in relation to fjords. The Rapport then affirms the complete absence of any doubt on the subject of the sovereignty over fjords, and states (p. 20) that a fjord need not be bounded on each side by *terra firma* but may be bounded on one side by islands and then continues :

> "Cependant, il peut surgir des doutes quant à l'endroit où il convient de dire que les différents fjords commencent ou, en d'autres termes — lorsqu'il est question de la limite des eaux territoriales —, quant à l'endroit où il faut, à l'embouchure des fjords, tirer la ligne à partir de laquelle on doit compter la marge ordinaire des eaux territoriales, à moins qu'il n'existe, dans la direction de la mer, un groupement continu d'îlots, de sorte que les eaux territoriales doivent être comptées à partir de celui-ci.
>
> Les doutes qui surgiront à cet égard devront être résolus par les faits géographiques, historiques et autres pour chaque endroit en particulier. L'opinion qui s'est formée au cours du temps chez les habitants de l'endroit servira ici d'indication."

This passage is followed by that quoted by the Counter-Memorial, the whole of which paragraph however should be read :

> "En général, dans les cas particuliers, on prendra le plus sûrement une décision en conformité avec la vielle notion juridique norvégienne, si l'on considère la ligne fondamentale comme étant tirée entre les points les plus extrêmes dont il pourrait être question, nonobstant la longueur de la ligne. (Ceci n'empêche pas, bien entendu, qu'au cours d'une poursuite judiciaire qui pourrait être entamée par exemple contre un étranger du chef de pêche illégale à l'embouchure d'un fjord, le fait qu'il n'a pas été donné de prescription expresse relative à la ligne de frontière dans la région, et que la position de la frontière ne peut pas être considérée comme étant manifeste pour d'autres raisons, peut avoir une influence décisive sur le résultat de la cause.)"

It will be seen therefore that the commission considered, in 1912 (being on this point in agreement with M. Aubert—see para. 54 above) that the question between what points the base-line should be drawn across the mouth of a fjord as doubtful and as not regulated in any definite manner by the Rescript of 1812. The commission states its own recommendation as to the rule to be adopted, which is that quoted by the Counter-Memorial, but adds the significant qualification that this rule would not be binding on foreigners

in penal proceedings in the absence of an express enactment applying it (as, for example, possibly existed in the case of the Varangerfjord). Clearly therefore the commission is only considering the rule in relation to Norwegian domestic legislation, and saying that, unless there is a definite Norwegian law appropriating waters which are not on the face of them part of Norwegian territorial waters, the Norwegian Court will not convict. The Government of the United Kingdom would add to this that even the existence of an express Norwegian enactment applying this rule would not of itself make a particular base-line valid under international law.

69. The second quotation contained in paragraph 103 of the Counter-Memorial is part of a passage commencing on page 39 of the Rapport which deals with the interpretation to be placed on the Rescript of 1812 in relation to outlying rocks. The commission starts (p. 40) by pointing out that the expression "qui ne sont pas recouverts par la mer" is ambiguous. It then examines various examples of Norwegian legislation and states (p. 41) (as has already been shown in paragraphs 36 and 38 of this Reply) that the Decrees of 1869 and 1889 did not supply any answer to the question. The base-points of the lines drawn in 1869 and 1889 are permanently exposed ; as regards the Decree of 1889, although there were certain rocks which are periodically exposed *outside* the line which was drawn [1], these rocks were not made use of.

The commission then refers (p. 45) to certain treaties and cites Professor Aschehoug, Mr. Arctander and Professor Morgenstierne, all of whom—at dates between 1891 and 1909—had expressed the opinion that only rocks exposed at high tide could be used, and also M. Aubert *(ibid.)*, who stated in 1894 that in practice no rock had ever been used which was not permanently exposed [2]. Other authors holding the opposite view are cited on page 46, amongst them M. Kleen, whose views were evidently influenced by the form of Swedish legislation in which the word "continuellement" [3] occurred.

[1] See Rapport 1912, p. 42, note 1.

[2] One citation from a modern author may be added. Professor Frede Castberg, in his *Norges Statsforfatning*, published in 1946, writes (Section 4, The Sea Territory; I. "The Extent of the Sea Territory."): "The letters patent of 1812 establish in reality only the principle itself for the calculation of the sea territory. The application of this principle when determining where the exact territorial boundary is to go has in many respects caused doubt. The first question is whether the outermost islands or islets which are to form the starting point for the calculation must be such as constantly lie above water, or whether consideration can be given to islands or islets which are only visible at low tide. According to the wording ('which are not run over by the sea') it is, if anything, to be presumed that an island or an islet to be able to form the starting point for the calculation must always lie above the level of the sea. This is, however, not in accordance with the general international method of calculation. The rule in the Letters Patent of 1812 is therefore applied in such a way that the boundary is calculated at low-water tide."

[3] It appears that the first published Swedish enactment containing this word was a law of 5th May, 1871, concerning fishing on the west coast of Sweden. It had, however, been previously used in unpublished eighteenth-century neutrality legislation.

The commission proceeds to express its own opinion on page 46 as follows :

> "D'après l'opinion de la présente commission, la façon même dont est conçue la lettre-patente ne donne qu'une seule solution certaine, et c'est que les rochers qui sont toujours recouverts par la mer ne doivent pas en tout cas être comptés. Mais les mots peuvent d'ailleurs en eux-mêmes signifier : « qui ne sont jamais recouverts », « qui ordinairement ne sont pas recouverts », « qui ne sont pas recouverts en général », « qui ne sont pas continuellement recouverts », « qui ne sont pas recouverts en tout temps », et, suivant l'une ou l'autre de ces tournures et de plusieurs autres peut-être, ils peuvent être employés dans le sens de marée haute ou marée basse, en temps ordinaire ou en temps de grande marée, ou dans le sens de niveau d'eau moyen, de telle sorte qu'on comprenne ou exclue des rochers d'une nature toute différente, depuis ceux qui sont recouverts par la haute mer dans les grandes marées jusqu'à ceux qui, à ces époques, assèchent à mer basse."

It remains then, states the Rapport (p. 47), for the commission to form its own conclusions and it first relies on the Rescript of 18th June, 1745, which refers to "hauts-fonds" (shallow soundings) and "rochers" to show that rocks not continuously covered may be used, and proceeds :

> "Si l'on trouve trop faible la base de cette conclusion, on peut faire valoir un autre argument : à savoir que la lettre-patente laisse irrésolue la question relative au point de départ précis et qu'elle s'en tient seulement à la pratique internationale, telle qu'elle pouvait exister à cette époque (s'il en existait une), ou telle qu'elle devait être en tout temps. On arrivera à un résultat semblable si l'on prend surtout égard à la conception suivante : comme, depuis que la disposition a été prise, il ne s'est formé aucun usage certain, les règles générales de droit international (s'il en existe) ou la pratique internationale doivent en tout cas — quel que soit le sens primitif de la disposition — servir d'indication."

On this basis the Rapport (p. 48), without quoting any authority for its conclusions, recommends that rocks not continuously run over by the sea, including those only exposed at spring tides, may be made use of—rather on the basis *de lege ferenda*, than *de lege lata* [1].

On the further question whether any rocks, however far from the land, may be used, it is pointed out that the Rescript of 1812 contains no ruling : the commission's view as to what is equitable is that rocks which are less than two leagues away (i.e. 8 miles or double the distance applicable to the measurement to territorial waters) may be used (compare in this connection what was stated by M. Aubert at the Institute of International Law—para. 53

[1] The actual recommendation of the commission on this matter appears in fact to have been that use can be made of "islands, skerries and rocks which *are always above water at ordinary low tide*". (See Annex IX of minutes of London Conference of 1925, Vol. I, para. 3, Memorial, p. 160.)

above), but if a rock is found more than two leagues away its importance must be judged *according to the circumstances.*

There then follows the passage cited in paragraph 103 of the Counter-Memorial, which is clearly the interpretation given by the commission "on principle" to the words, in the Rescript of 1812, "les plus éloignés", the rescript itself offering no clear indication of what is intended. This is followed by the question what is the maximum distance that two rocks "les plus éloignés" may be the one from the other in order that a straight line may be drawn between them, and the answer is given that this may be done when the rocks are not more than two leagues apart, otherwise regard *must be had to the circumstances.*

The commission then states the circumstances to which regard may be had in the following words which are significant (at p. 49) :

> "Les différentes circonstances auxquelles il convient de prendre égard pour chaque endroit en particulier peuvent être d'ordre historique, économique ou géographique, par exemple : une vieille conception concernant la frontière ; une possession non troublée des pêcheries, exercée par la population côtière de temps immémorial et nécessaire à son existence ; les avantages pratiques d'une ligne facile à constater sur place ; la limite naturelle des bancs de pêche."

In fact, so far as any explanations have been given of the recommendations of the commission, no attempt appears to have been made to justify them on any other basis than these alleged special circumstances.

70. It has been necessary to refer to the Rapport at some length to show—as the Government of the United Kingdom now submits—

(a) that the approach of the commission to these questions is purely the approach of a Norwegian legislator or administrator considering what legislation may be passed which is consistent with previous legislation and with his view of Norwegian requirements. The "circumstances" of which account is to be taken are essentially of this character—no account is taken of the impact of foreign interests, or of international acceptance or recognition—and, although certain of these "circumstances" may no doubt be elements to be considered in deciding whether any internationally effective law or custom has been formed, they would not be considered in the form in which they are here expressed ;

(b) that previous Norwegian legislation, whether the Rescript of 1812 or subsequent enactments including the Decrees of 1869 or 1889, lays down no clear rules either as to the manner in which base-lines are to be drawn across bays or as to the manner in which rocks may be used—what rocks (whether submerging rocks or not) may be made use of, what is the maximum distance these may be one from the other and from

the land—all these are unsettled questions as to which not even learned opinion is unanimous ;

(c) the commission made certain recommendations as to the rules to be applied which were in effect finally adopted in the 1935 Royal Decree, although in the interval Norwegian official opinion had been in favour of the more moderate red lines. The commission, moreover, expressed itself in the report in a thoroughly tentative manner, and, it will be remembered, as was shown by the report of the Minister of Foreign Affairs to the Storting in 1927, had so little confidence in its views as to the permissible length of base-lines that it, apparently, made alternative recommendations based on lines of a maximum of 12 and of 10 miles. (See para. 58 A above.)

71. The Government of the United Kingdom notes that the Government of Norway has not published the second portion of the commission's report. It notes that the base-points afterwards adopted in the 1935 Royal Decree were in fact listed in Annex 1 to this report (see Annexes 36 and 37 of Counter-Memorial). The latter base-points correspond exactly with those later adopted with a very few minor exceptions, of which the most important is that Nos. 7 and 8 (1912) are combined in No. 7 (1935) [1]. The Government of the United Kingdom had of course no knowledge whatever of these base-points until 1935 and their existence was not referred to by the Norwegian Government at any time in the course of the numerous discussions and negotiations which took place in the period between 1912 and 1935, or at the Hague Codification Conference of 1930. Moreover, after these base-points had been recommended in 1912, it was 23 years before Norway took legislative action with regard

[1] It is difficult to compare exactly the positions given in the Decree of 1935 with those in Annexes 36 and 37 :

(a) because the latitudes in the latter are based on old Norwegian charts dating from approximately 1845 ;

(b) because the longitudes in the latter are reckoned from Christiania. The latest determination of the latter is 10° 43'·375 East of Greenwich. Making the nearest possible approximations there is—with a few specific exceptions—no greater discrepancy in latitude than 0·2 mile. The maximum differences in longitude are near Vardö where they amount to 0·5 and 0·6 minutes, otherwise there is a general discrepancy of about 0·1-0·2 minutes.

The only differences in position of the base-points which can be said to be noticeable are :

(a) Point No. 21 of the 1935 line—a difference in position of about 3 cables.

(b) Point No. 29 of the 1935 line ("the northern Svebae") is described in Annex 37, No. 9, as "the most westerly of the Barene". The positions are, however, at most 2 cables apart and the points are probably the same.

(c) With regard to Point No. 28 of the 1935 line (Glimmen), there appear to be two rocks in the vicinity. It is possible that the 1935 Decree and Annex 37 (No. 8) refer to different ones of these.

(d) The 1935 Decree (Nos. 17 and 18) refers separately to two dry skjærs which are referred to together in Annex 36 (No. 16).

to them. In the interval, as will be shown, Norway entertained different ideas as to the manner in which the necessary lines defining territorial waters should be drawn, those ideas taking shape during part of the period as the red lines; the latter were, admittedly, not authoritative or final. The history of those years demonstrates in fact the wholly unsettled and fluctuating character of the Norwegian attitude in this matter which lasted until 1933 or thereabouts when Norway, having apparently decided to adopt the blue lines, proceeded to depart from the "tacit *modus vivendi*". This view of the Norwegian attitude is supported by paragraph 106 of the Counter-Memorial, which reveals that a further commission, composed of the same members as the commission which dealt with the area that is the subject of this litigation, prepared in 1920 a confidential report covering the area between the southern end of the blue lines and that covered by the Decree of 1889. The question may be asked why, if the "Norwegian system" is so certain and so historically established as Norway now claims, this report has not been published and its recommendations have not been put into effect.

From 1913 until the end of the 1914-1918 War

71 A. The Government of the United Kingdom has no observations to make on paragraphs 107-112 of the Counter-Memorial and confirms the understanding of the Norwegian Government expressed at the end of paragraph 110 of the Counter-Memorial.

The period from 1918-1935

The situation after the 1914-1918 War (paras. 113-115 of the Counter-Memorial)

72. The Government of the United Kingdom need not comment at any length on the Norwegian observations on this part of the case because there is no substantial difference of view between the two countries. Both agree that arrests from time to time took place which were the subjects of protests by the Government of the United Kingdom and that it was evident that there was a difference of opinion as to the manner in which the fishing limits should be defined. The Norwegian Government, in paragraph 114 of the Counter-Memorial, makes certain observations with regard to a passage quoted from paragraph 12 of the Memorial. It does not dispute the fact that no decrees or charts defining the limits had been communicated, but says that the Government of the United Kingdom had been made aware of the principles applied by Norway. It has already been shown in earlier portions of the Reply that the so-called "principles" previously applied by Norway, if any such principles existed at all, were of far too uncertain a character to provide any sure basis for the drawing of any limits: the 1912 Commission in its Rapport made this abundantly clear (see paras. 68

and 69 of the Reply). Moreover, since it is the fact that the Norwegian administration, which had in its possession the detailed report No. 2 of the commission, to which were annexed specific proposals for base-points (now disclosed for the first time in Annexes 36 and 37 of the Counter-Memorial), was yet still at this stage uncertain as to the exact lines to be adopted, how could it be expected that the Government of the United Kingdom or British fishing vessels, which were not in possession of this information, should know where they stood ?

With regard to the conversation between Mr. Lindley (as he then was) and M. Esmarch in 1924 on the subject of the *Kanuck*, the Government of the United Kingdom entertains no doubt as to the good faith of M. Esmarch in relation to his statement contained in Annex 41, No. 1, of the Counter-Memorial. At the same time the Government of the United Kingdom has had long experience of the accuracy in reporting of Sir Francis Lindley—who is unfortunately no longer living—and must attach some importance to his contemporaneous statement, as compared with the present-day memory of M. Esmarch, as to events which happened 26 years ago. It would seem certain, with due respect to M. Esmarch, that the Norwegian Government attached more general importance to the limit of 10 miles than he now recalls since, as appears from the Norwegian Government's own statement (para. 95 of Counter-Memorial), the 10-mile rule had played some part—and an important part—in their policy with regard to fisheries since 1908. The instructions then issued showed clearly that the Norwegian Government considered it safe to enforce by reference to a 10-mile line. And in any event it is clear that Norway was not even at this time (in 1924) prepared to assert openly that she was entitled to draw lines between extreme headlands however far apart these might be, although, if her right to do so was so clearly in accordance with her historical and traditional position as she now represents, it might have been expected that she should do so.

The conversations of 1924-1925 (paras. 116-135 of Counter-Memorial)

73. The Norwegian Government has devoted no less than twenty paragraphs of its Counter-Memorial in an attempt to establish two propositions, namely :

(a) that the red lines are not binding upon Norway ;
(b) that the red lines did not represent Norwegian views in 1924 and that Norwegian policy with regard to enforcement in the years 1925-1931 was based solely on the "lenient enforcement" policy adopted in 1908 and had no reference to the red line.

The first proposition is not, and never has been, disputed by the Government of the United Kingdom which in its Memorial has

repeatedly in the clearest terms affirmed that the red lines were not authoritative and not binding on Norway.

The second proposition is so clearly contradicted by the report of the Foreign Affairs Committee of the Norwegian Storting in 1935 (see para. 75 *(b)* below), by the report of the Ministry of Foreign Affairs to the Storting in 1936 (see para. 75 *(c)* below) and by the facts with regard to arrests (see paras. 80 and 93 below) that it is remarkable that the Norwegian Government should still endeavour to maintain it.

74. The Government of the United Kingdom does not attach the same importance as does the Counter-Memorial (para. 118) to the question whether the discussions of 1924-1925 are described as "negotiations" or as "conversations"—it is quite content that they should be regarded as technical conversations between experts who had no authority to enter in any agreement binding their respective governments. In view, however, of the attitude of reserve adopted by the Norwegian Government as regards the purpose for which the Government of the United Kingdom has referred to these conversations in its Memorial, it is necessary again to make clear precisely what that purpose was.

The Government of the United Kingdom was then and is now concerned to show that in 1924, only ten years before the publication of the 1935 Royal Decree, there was no firm or clear opinion in Norway as to the manner in which the fishery limits off Finnmark and the rest of the area covered by the 1935 Decree should be drawn. This is in opposition to the Norwegian argument which is that definite rules had long been established, that it was merely necessary to apply to a different area those same principles as had already been applied in 1869 and 1889, and that so far as this particular area is concerned the lines had been fixed since 1911-1912 in all their details (see for example para. 134 of Counter-Memorial).

The diplomatic correspondence shows, continuously, that, although invited on many occasions to define her attitude, Norway was unable to do so (see note of 19th September, 1924, cited in para. 13 of Memorial ; note of 11th August, 1931, Annex 10, No. 2, of Memorial ; note of 30th November, 1933, Annex 12 of Memorial ; note of 31st May, 1934, Annex 14, No. 4, of Memorial). She could only give information without any commitment. But it cannot be denied that the information which she in fact gave represented her views at the time or that these views did not coincide with the recommendations of the commission in 1912.

There was in fact, in 1924, an exchange of the views of the two countries : Norway gave her views, as did the United Kingdom [1],

[1] It is, of course, quite incorrect, as was stated by one of the learned judges in the case of the *St. Just* (see Annex 13, Vol. I, Memorial, p. 180, line 37), to say that the map sent by the Norwegian Foreign Office was sent as "an offer of negotiation". It was, as is correctly explained by Judge Boye (*ibid.*, p. 179), sent as information of the (provisional) Norwegian attitude at the time.

and Norway's views were represented by the red lines drawn on the charts.

75. The evidence that the red lines represented Norwegian official opinion at the time is as follows:

(a) So far as the coast of East Finnmark is concerned, the red line was shown on the chart which was sent officially by the Norwegian Foreign Minister to the British Chargé d'Affaires at Oslo on 4th November, 1924 (Annex 43 of Counter-Memorial). In agreeing to forward this chart M. Mowinckel described it as "indicating the limits of Norwegian territorial waters according to Norwegian views" (Memorial, para. 13). The line drawn on this chart is the same as that drawn in the *Principal Facts*, figure 18, page 45—the document which was handed out by Dr. Hjort at the opening of the Oslo Conference. The importance of this line is that it was reproduced as what was afterwards known as the red line in this area, there being no difference between the two if the assumption (which the Counter-Memorial in paragraph 117, Vol. I, p. 304, states to be a permissible one) is made that the line, if continued, would reach the rock of Omgangsbaaen, which is a point on the red line. This portion of the red line, therefore, is directly established as representing Norwegian views.

(b) The report of the Foreign Affairs Committee of the Storting in connection with the 1935 Decree (Annex 15, No. 1, of Memorial) contains these words with reference to the red lines:

"They were drawn up (at the time of the Oslo discussions, which took place in 1924) in consequence of a British request, and constituted an attempt at showing the principles on which base-lines should be drawn according to the Norwegian point of view, but without in any way binding the Norwegian authorities as regards the final fixing of the base-lines" (Vol. I, Memorial, p. 191).

(c) The report of the Ministry of Foreign Affairs to the Storting upon the conversations in London and Oslo contains the following passage [1] on page 5:

"Before it was possible from the Norwegian side to estimate the extent of the Norwegian interests involved on such a basis of negotiation, it was clearly of the greatest importance first and foremost to have drawn on charts of the whole coast the manner in which the territorial waters which could thus be recognized by the British Government would appear in detail and in comparison with the territorial waters hitherto claimed by the Norwegian side. With this object and in order to illustrate the question, the said limits for fjords and the 3-mile belt were drawn along the whole

[1] See paragraph 58 A above regarding this document.

Norwegian coast in a manner averred by the British delegates to be acceptable to Great Britain. On the same charts Fishery Adviser Iversen and Captain Askim, after the special consent of the Ministry of Foreign Affairs had been obtained for the purpose, plotted the lines defining the territorial waters claimed by Norway. As far as possible these were based upon the principles and indications advanced in the Royal Resolution regarding territorial waters off the coast of Møre of 16th October, 1869, and 9th September, 1889" (St. med. nr. 8 (1926), p. 5).

76. In the face of this evidence the Government of the United Kingdom puts the following questions to the Norwegian Government :

(a) Does the Norwegian Government deny that the account given of the manner in which the red lines were drawn in the Maurice-Douglas report of the Oslo conversations is correct ? For convenience the relevant paragraph 6 is requoted in full.

6. "Our request for charts of the rest of the coast of Norway and adjacent waters correspondingly marked was received with evident embarrassment, and it became apparent that the Norwegian Committee could not undertake to draw the lines except at certain points of the coast where the limits had been defined by Norwegian Orders in Council. Eventually, we suggested that we should ourselves draw the lines for the rest of the coast according to such principles as we could evolve from the report of the Norwegian Royal Commission on Territorial Waters of 1912, and, rather than accept that solution, the Norwegian Committee secured permission from their Foreign Office for Fishery Inspector Captain Ivesen [*sic*], subsequently assisted by Commander Askim, of the Norwegian Admiralty, to prepare charts to indicate the Norwegian claims, with the proviso that the lines they drew were not to be regarded as authoritative. The lines so drawn appear on the charts annexed in this report, on which are indicated also the 3-mile line, drawn according to the British thesis, a 4-mile line, drawn according to the same thesis, *mutatis mutandis*, and the limits of certain areas of concentrated seasonal fishing, within which, it has been suggested, that trawling might be prohibited by agreement during specified seasons." (Annex 4 of Memorial, Vol. I, p. 108.)

(b) Does the Norwegian Government deny that the red lines were drawn (together with green lines) on charts during the course of the Oslo conversations ? It clearly appears that they were drawn from the résumé contained in the minutes of the 12th meeting, paragraph 3 *(c)* (Vol. I, Memorial, p. 135), § 6 of the Maurice-Douglas report (above), the despatch of Mr. Lindley dated 28th January, 1925 (Annex 5 of Memorial coupled with the note which proves that these charts in fact contained the red line), the report of the Storting Committee in 1935 and the report of the Ministry of Foreign Affairs (above).

(c) Does the Norwegian Government deny that the red lines were so drawn on the maps by Captain Iversen and Commander Askim when the Ministry of Foreign Affairs says that they

"plotted the lines defining the territorial waters claimed by Norway"?

(d) Does the Norwegian Government deny that Captain Iversen and Commander Askim plotted the lines with the approval of the Norwegian Government when the Ministry of Foreign Affairs says that they did so

"after the special consent of the Ministry of Foreign Affairs had been obtained for the purpose"?

(e) Does the Norwegian Government deny that Captain Iversen and Commander Askim were fully qualified to draw the lines according to Norwegian views and that they were acquainted with the proposals made in the Rapport 1912, or does the Norwegian Government still desire to make the objection that Commander Askim was not a member of the delegation? Does it deny the following facts regarding these officers?

Captain Iversen: held the position of adviser to the Norwegian Committee (see *Principal Facts*, on the page opposite the table of contents). He prepared the very detailed charts reproduced in the *Principal Facts* showing the fishing grounds at different portions of the Norwegian coast (pp. 14, 20, 21, 25, 31, 38, 41). He was the author of a publication entitled *Norsk Havfiske*.

Commander Askim: furnished "technical assistance with regard to charts and hydrography" to the committee (St. med. nr. 8 (1926), p. 3).

(f) Does the Norwegian Government deny that the report of the Storting Committee presented in connection with the Decree of 1935 referred to the "red lines"?

77. The Government of the United Kingdom does not wish to occupy the attention of the Court further on a matter which is so clear beyond dispute. It would add only the following observations:

(a) The Government of the United Kingdom was, it appears, in error in ascribing to M. Koht in his speech made on 24th June, 1935, the words quoted in paragraph 15 of the Memorial and which it believed were contained in the speech. This does not however avail the Norwegian Government in view of the passage quoted above (para. 75 *(b)*), from the report of the Storting Committee, which is precisely to the same effect.

(b) The Government of the United Kingdom does not understand the Norwegian objections to the use by the United Kingdom of the Maurice-Douglas report or of any other evidence bearing on this point. The Government of the United Kingdom is not here concerned to show that Norway was in the course of the 1924 conversations prepared, as a matter of negotiation, to make certain concessions and to use that against her—which would be contrary to the spirit of the discussions and the understandings expressed when they began. The Government of the United Kingdom is here concerned to show that in 1924 Norway put forward statements of what her views then were as to the territorial waters which she claimed. Admittedly these statements were not authoritative and the Government of the United Kingdom does not seek to say that Norway thereby bound herself not to put forward other and possibly wider claims at a later date. All that the Government of the United Kingdom seeks to show is that the best Norwegian opinion in 1924 considered that her claims could be defined by reference to the red lines and that these lines did not correspond either with the lines later embodied in the 1935 Decree or with the lines which had, as it now appears, been recommended by the Commission of 1912. It will be noted that the Norwegian Government itself makes use of the green lines drawn on the charts by the British representatives as an argument against the United Kingdom thesis in the case (para. 125 of Counter-Memorial).

(c) It is permissible to refer to evidence of a reliable character as to what took place during the 1924 conversations. The confidential report dated 30th December, 1924 (Annex 4 of the Memorial), drawn up by the British members of the committee jointly, is a contemporaneous record and accordingly is receivable as evidence. The protocols of the meetings were drawn up for the purpose of "recording the subjects discussed and any formulæ or points of agreement arrived at" (Protocol, 1st meeting: Vol. I, Memorial, p. 119) and for these purposes constitute no doubt the official record. The Government of the United Kingdom is not here concerned with anything which may or may not have been decided at the conference, but only with information furnished by certain Norwegian experts.

It is not in any way contrary to understandings given to make use of this evidence. The understandings were (para. 121 of Counter-Memorial) that nothing should prejudice in any respect whatsoever *the present Norwegian point of view* as to the extent of the territorial waters of Norway.

The only purpose of this evidence is to ascertain exactly what "the present Norwegian point of view" was.

Again, in the communiqué to the press *(ibid.)*, it was intended to make plain that neither country by anything it said or did "abandoned its point of view regarding the limits of territorial jurisdiction in the sea".

The Government of the United Kingdom merely seeks to show what the point of view of Norway in 1924 was.

78. In the light of the evidence cited above it is not without interest to compare the statements of the respective views of the United Kingdom and of Norway stated in paragraph 134 of the Counter-Memorial. The passage quoted from paragraph 17 of the Memorial is now shown to have been fully justified. In 1924 Norway was putting forward, as her claims in respect of territorial waters, the red lines. These represented—as a glance at the charts will show—considerably less extensive claims than those she afterwards embodied in the 1935 Decree. On the other hand to say, as the Norwegian Government does, in this paragraph (and the same argument is repeated in paragraph 140 of the Counter-Memorial) that the principles on which the 1935 Decree was based were fixed before British trawlers appeared off the coast of Norway and were essentially those proposed by the Commission of 1912 shows a determination in the face of overwhelming evidence to ignore what took place in 1924. If this is so, why was no legislation enacting these lines passed for 23 years? Why, when occasion arose for Norway to define her claims, was the answer given that these were represented by the (non-authoritative) red lines? These questions admit of only one answer. The true explanation is—as should at this point have been amply demonstrated—that Norway's claims are not based on any justifiable consistent or historical principle and that throughout the period which elapsed from 1912 to 1933 she was considering how far she could safely go in advancing claims which she feared were in excess of what would be permitted by international law.

One final point of some importance emerges from the passage quoted above (para. 75 *(c)*) from the report of the Ministry for Foreign Affairs to the Storting. It is there stated that the red lines were drawn as far as possible upon the principles contained in the Decrees of 1869 and 1889. Yet it is now claimed by Norway that the blue lines are based upon precisely the same principles. The conclusion must, however, be that the blue lines are not based upon these principles, as the Norwegian Government has been at such pains to contend, but rather represent a considerable extension of them.

From 1925 to the Hague Conference, 1930 (paras. 136-140 of Counter-Memorial)

79. With regard to the proposed publication of certain of the results of the conversations which took place in London in June-July 1925 (referred to in paragraph 136 of the Counter-Memorial), it should be understood that what was proposed by the Norwegian Government in the first place was that there should be published the principles stated by the United Kingdom representatives and set out in Annex X of the minutes of the conference (Memorial, Vol. I, p. 161). This was a complete and detailed set of principles which, apart from certain large bays and inlets which would have to be dealt with individually, would enable definite base-lines to be drawn. The Government of the United Kingdom in the face of this request asked for reciprocity of treatment, namely, that Norway should, for her part, publish a definite statement of the principles she considered applicable for the drawing of base-lines. The memorandum which Norway had submitted to the London Conference (Annex IX, Vol. I, Memorial, p. 160) contained no statement of principle at all; it merely quoted three definitions and an extract from a declaration between Norway, Sweden and Denmark. Moreover, the Government of the United Kingdom asked specifically for a statement regarding the "selection of the base-lines from which the limit is drawn in relation to inlets" (Annex 45, No. 3, of Counter-Memorial). It will be remembered that the Norwegian definitions in Annex IX *(supra)* contained no reference to this point (see para. 62 above).

The Counter-Memorial (para. 136) seeks to use this request to prove that the United Kingdom could not have received any information as to the Norwegian point of view in the course of the conversations of 1924-1925, but this does not follow and is not the case. The information given in 1924 was in the nature of lines drawn on a map, which were known to be not authoritative. The possession of this information did not make it any the less desirable to have an authoritative statement of the principles on which the lines should be drawn.

The Counter-Memorial, in the same paragraph, seeks to draw the further conclusion that the United Kingdom was reluctant to acquaint Norwegian organizations and individuals with the principles claimed by her in the course of the London conversations. This again is not justified: the United Kingdom was anxious—as it remained continuously up to 1935—to ascertain the Norwegian system and as a bargaining point it withheld its own system. It was not willing to publish its own principles unless the Norwegians did the same.

Moreover, the fact that Norway consistently refused to agree to a publication of both systems seems abundantly to justify the opinion (contested in paragraph 136 of the Counter-Memorial)

that Norway had at this time no settled opinion with regard to the delimitation of Norwegian waters.

Alternatively, if she had any such opinion, her reluctance to publish it shows that she appreciated full well that it would not be internationally accepted.

80. The Counter-Memorial in paragraph 137 denies the existence of any "tacit *modus vivendi*" between 1925-1933 based on the red lines and says that, with regard to enforcement in these years, the Norwegian Government was merely following the policy adopted in 1908. The Government of the United Kingdom attaches no importance to the terminology which may be used to describe the factual situation which existed in those years, but the Storting report referred to above demonstrates the Norwegian contention to be incorrect. It is, in fact, clear and cannot be contested by the Norwegian Government

(a) That during these years charts bearing the red lines were issued to British trawlers ;

(b) That British skippers were warned that they would not receive diplomatic support if they fished inside the red line ;

(c) That the number of arrests in these years up to 1933, when this "*modus vivendi*" began to break down, noticeably diminished ;

(d) When, in November 1933, an express *modus vivendi* was arranged, the Norwegian note agreeing to it (Annex 12 of Memorial) merely referred "to the practice which for years has been followed in this matter". Unless it was the case that there had been a well-understood practice in these years, the Norwegian note would certainly have specified in detail what the new arrangement was. In fact, this note makes it clear that the "tacit *modus vivendi*" was on the same terms as the "express *modus vivendi*". The latter was beyond doubt referable to the red lines, as proved by the report of the Storting Committee in connection with the 1935 Decree, paragraph 21 of which is quoted in full in paragraph 91 below.

80 A. However, arrests did take place and it must accordingly have become apparent to the Norwegian authorities from reports of the officers who boarded the British ships concerned, that these ships were operating on charts containing the red line. Moreover, it is admitted by the Norwegian Government that during this period the Norwegian authorities were acting with moderation in interfering with shipping beyond the limits of the existing legislation (para. 137 of Counter-Memorial), although the Norwegian Government asserts that its policy of "moderation" was based on the orders issued in 1908 and not on the red lines. It is clear, however, from an examination of areas of sea in which this policy

of "moderation" was applied that it was based on the red lines. A reference to the list (Annex 32) of ships which were arrested during the period which elapsed between 1925 and the period at the beginning of 1933, when the "tacit *modus vivendi*" began to break down, shows that of the eighteen ships concerned (those numbered 20-37 on the list) all were arrested inside the red line, while of the three ships that were warned two were warned for fishing actually on the red line (letters *(c)* and *(d)*). This may be contrasted with the two cases of warnings before 1924 (letters *(a)* and *(b)*), both of which took place *inside the red line*. After 1924, however, all ships found *inside the red line* (with the single exception of the *Alafoss* (letter *(e)*) were arrested. This evidence strongly supports the contention of the Government of the United Kingdom that the *modus vivendi* in these years was related to the red lines, and, as will be shown below, this argument is even more strongly confirmed by what took place after 1933.

It seems, therefore, to be not without justification that the British Legation, in 1933, described this situation as amounting to a "tacit arrangement" (Vol. I, Memorial, p. 37) based—as it certainly was on the British side—on the red lines drawn on the Oslo charts.

It may be added, in reply to the third sub-paragraph of paragraph 137 of the Counter-Memorial, that the red lines drawn on the London charts in 1925 were only drawn to illustrate the principles set out in Annex IX to the minutes. These charts were not sent to the two Governments after the conference and so were not comparable in authority to those used at the Oslo Conference. The fact that different lines were drawn for a particular purpose in no way invalidated the lines drawn at Oslo.

81. With regard to paragraph 140 of the Counter-Memorial, the United Kingdom was merely concerned to point out, in paragraph 37 of its Memorial, that the claims made by Norway in 1935 were considerably more extensive than those shown by the red lines. This cannot be contested and, as has been previously pointed out, it is particularly significant that some twelve years after the commission had decided in 1912 to recommend the adoption of the blue lines, Norway was putting forward the less extensive red lines as representing her claims.

The Deutschland, Loch Torridon *and* St. Just (paras. 141-149 of the Counter-Memorial)

82. The Counter-Memorial devotes paragraphs 141-145 to an attempt to negative the conclusions drawn by the Memorial (paras. 28-34) from the judgment of the Supreme Court in the *Deutschland* case. The Government of the United Kingdom, however, invites attention to what was said concerning this case in the Memorial and submits that the conclusions there set out are perfectly correct.

With regard first to the translation of the judgments, it was not claimed in the Memorial that the whole of the judgments were included in Annex 9 : it is not believed, however, that any relevant passage was omitted. The Government of the United Kingdom notes the alternative translation offered by the Counter-Memorial and, though in some cases preferring its own translation, is quite prepared to accept this as an adequate working translation for the purposes of the case. None of the suggested amendments affect in any way the argument developed in the Memorial. Since the preparation of the Memorial the Government of the United Kingdom has obtained a translation of the Opinion of Dr. Ræstad and a copy of this translation (omitting one irrelevant passage), made by Mr. Nansen, is attached—Annex 31.

83. In view of the full examination of the judgments given in the Memorial, the Government of the United Kingdom can restate its argument, in relation to the Norwegian objections, quite briefly :

(a) The Court, following the opinion of Dr. Ræstad, with only one dissentient, held that there was no evidence, in 1927, that Norway had appropriated any waters which did not lie within a fjord or within 4 miles from the mouth of a fjord, or from land, except in the two areas covered by the Decrees of 1869 and 1889 ; that the Rescript of 1812 furnished no clear guidance, and that no historic title had been shown.

(b) Dr. Ræstad, in his opinion, made it clear that he was not considering what areas Norway could legitimately claim under international law but only to what areas Norwegian title had in fact been established by legislation or historic usage. The conclusions which the United Kingdom draws from the opinion and the judgments similarly do not relate (directly) to what Norway could legitimately claim, but only to what she had in fact effectively claimed in 1927.

(c) Dr. Ræstad's examination of the Rescript of 1812 and of the Decrees of 1869 and 1889 leads to conclusions which are entirely in accordance with the arguments previously put forward in this Reply. He explains that the Rescript of 1812, as would be expected from the circumstances in which it was issued, gives no clear guidance as to the manner in which base-lines are to be drawn, and he treats the Decrees of 1869 and 1889 as particular legislation applicable to limited areas. He contrasts the Rescript of 1812 with some foreign regulations, which state that the sea territory is to be reckoned from "the coast and its bays" when it is possible to establish from historical evidence what is to be considered by "bays" or whatever other expression has been used. The rescript, he states, contains nothing similar. The indefinite character of the Rescript of 1812 has, he says, not been supplemented by usage.

"A rule in law which states that the sea territory is to be reckoned from base-lines, but not how the base-lines are to be drawn, can also not come into existence through usage : custom must relate to something fixed by practice."

(d) Dr. Ræstad treats it as an open question whether—on the assumption that the territorial limits are to be drawn outside the "skjærgaard" [1]—the method to be adopted is that of an envelope of circles with a radius of four miles, the centres of which are situated on the low-water line, including islets and rocks, or whether a system of parallel lines may be used. This is quite contrary to the present Norwegian contention that a system of the latter character has become historically established.

(e) With regard to fjords, Dr. Ræstad states quite clearly that, even admitting that Norway is entitled on principle to claim fjords as national territory, the question still arises how a fjord is to be defined and what limits can be taken.

(f) The Norwegian Counter-Memorial lays considerable emphasis on the fact that the case was a criminal proceeding and attempts to dismiss the opinion of Dr. Ræstad and the judgments of the Court as irrelevant, on this ground, to the present case. But this is a distortion of the facts. The fact that the case was a criminal proceeding was, of course, a relevant factor in the decision, but it only became relevant after the analysis had been made of the nature of Norwegian law on territorial waters. Both Dr. Ræstad's opinion and the judgments of the Court proceeded on the basis that, the law (derived from the Rescript of 1812, from historic usage, etc.) being, as in their view it was, uncertain, the accused must in a criminal proceeding be given the benefit of the doubt. Dr. Ræstad, moreover, clearly explained that the relevant question in deciding whether the accused had committed an offence was whether the limits of sea territory had been laid down either by legislation or by customary law, and it was precisely because no such legislation or customary law could be found, which clearly applied to the area in question, that he considered that the accused ought to be acquitted. The fact that the proceedings were criminal therefore in no way invalidated the analysis which was made by the Court and by Dr. Ræstad of Norwegian legislation (including the Rescript of 1812) and of Norwegian customary law. The emphatic statement in paragraph 144 of the Counter-Memorial is accordingly inaccurate in two respects ; first, in

[1] It may be noted that in paragraph 142 of the Counter-Memorial, the Norwegian Government has somewhat misinterpreted a passage from Dr. Ræstad's book *Kongens Strømme* (p. 353). The translation reads "Le skjærgaard forme rempart et *borne* contre la mer située au delà." The actual text, however, contains no reference to the word boundary *(borne)*.

stating that Dr. Ræstad considered it necessary that the limit should be established *in such a manner as to be clearly understood by the accused;* and secondly, in suggesting that Dr. Ræstad thought that the accused could only be convicted on a provision of *written law*. In fact, Dr. Ræstad did not mention the necessity of making the law understood by the accused and his opinion proceeded throughout on the basis that customary law, if, but only if, clearly established, would be a sufficient basis for conviction.

84. With regard to the case of the *Loch Torridon*, which is dealt with in paragraphs 146-148 of the Counter-Memorial, this was, as is pointed out in paragraph 93 of this Reply, a case of an arrest in the area between the red and blue lines ; it was made in 1933 when the "tacit *modus vivendi*" was breaking down, and when, as is now known, the Norwegian Government had decided to claim the blue line. It was for this reason, no doubt, that the Court, on evidence presented by the authorities, found that the base-line should be drawn from Tokkeboen to Glimmen.

The Court also found, as is stated in paragraph 39 of the Memorial, that there was no rule that a base-line could not be more than 10 miles in length and it was because of its decision on this point and with regard to the particular base-line that the Government of the United Kingdom protested against the condemnation of the ship after its second arrest and asked for the fine to be remitted—which the Norwegian Government ultimately agreed to do.

85. On the case of the *St. Just*, which is mentioned in paragraph 149 of the Counter-Memorial, the observations of the Government of the United Kingdom have already been fully presented in paragraphs 45-46 of the Memorial. With regard to the respective translations the Government of the United Kingdom repeats what is said above on the case of the *Deutschland*.

This case, like the *Loch Torridon*, arose in 1933 when the "tacit *modus vivendi*" was breaking down, and when, as is now known, Norway had decided to extend her claim to the blue lines. It was also an arrest in the area between the red and the blue lines. It was no doubt for this reason (as in the case of the *Loch Torridon*) that the majority of the Court, in spite of the fact that the Norwegian Government had in 1924 officially stated the red line to represent its claim, found in favour of a limit which coincided with the blue line, and accordingly adopted a different approach from that taken in the *Deutschland*.

The Government of the United Kingdom has already commented (para. 75, footnote, above) on the opinion expressed by one of the judges that the red line officially sent in 1924 was merely an "offer of negotiation". It was on the contrary a statement of the Norwegian Government's position.

History of the dispute from 1930-1933 (paras. 150-153 of the Counter-Memorial)

86. The Government of the United Kingdom notes with some surprise the instructions issued on 22nd February, 1933, to the Commander of the *Fridtjof Nansen* (Annex 49 of Counter-Memorial) and those issued on 12th April, 1934, to the Naval Commander in Chief (Annex 50 of Counter-Memorial), the nature of which was entirely unknown to the Government of the United Kingdom until their disclosure in the Counter-Memorial.

It appears from the first of these notes (Annex 49 of Counter-Memorial) that the Norwegian Government in February 1933 issued instructions to its officers to enforce, along a portion of the Norwegian coast, limits which corresponded with those afterwards embodied in the Decree of 1935. The base-points mentioned in the instruction in fact are identical (except for a small discrepancy between Ytre Fiskebåen and point No. 23 on the blue line which was amended by the Royal Decree of 10th December, 1937) with points 21-28 of the blue line [1]. The issue of this instruction no doubt explains the sudden and unexpected change which was noted by the Government of the United Kingdom at the beginning of 1933 when British ships began to be arrested outside the red line (see paras. 41-43 of Memorial). It is somewhat remarkable that in the note of the Norwegian Minister in London of 30th November, 1933—by which the "express *modus vivendi*" was established (Annex 12 of Memorial)—M. Vogt should have stated that "the attitude of the Norwegian Government in regard to the treatment of British trawlers had not been subject to any alteration during the last 18 months".

There seems to have been some confusion in Norwegian official circles at this time since—as appears from the despatch of Sir P. Wingfield of 21st December, 1933, an extract from which is contained in Annex 34, No. 4, of this Reply—the *Fridtjof Nansen* did in fact carry charts on which were marked lines corresponding to the blue lines. Possibly the explanation was that reported to have been given by M. Mowinckel to Sir P. Wingfield, namely that the Commission of 1912 made two alternative recommendations, one for a line more widely drawn than the other, the more extensive line which was recommended by the *minority* being the 1935 line.

However, the Norwegian Government did—as the note stated and as was confirmed by the report of the Storting Committee (see paragraph 91 below)—assure the Government of the United Kingdom that instructions had been given to revert to a policy of enforcement based on the red lines.

[1] As regards the base-points of the blue line, given in Annex 17 of the Memorial, the distance between points 13 and 14 should be 12·8 miles and not 2·8 miles as stated in the Memorial.

87. The second instruction dated 12th April, 1934, laid down for the coast of the County of Nordland that the limits proposed by the 1912 Commission should be applied. This instruction was expressed to be confidential, which is not surprising, since it was directly contrary to the assurance which the Norwegian Government had given in its note of 30th November, 1933.

88. The Government of the United Kingdom is not here concerned with the motive which may have inspired the Norwegian Government to issue such instructions to its officers, but it appears somewhat remarkable to claim, as does paragraph 151 of the Counter-Memorial, that these instructions bear witness to the "continuity of Norwegian jurisprudence". The Norwegian Government had prior to this date neither made known the recommendations in detail of the 1912 Commission nori ts intention to act upon them, had repeatedly given the answer to United Kingdom enquiries that the matter was still under consideration, and, when pressed to declare its attitude, had done so on the basis of the red lines. The Government of the United Kingdom cannot, therefore, understand how it can be said that jurisprudence is established or continued by the issue of confidential orders which were quite inconsistent with the attitude the Norwegian Government had taken in public prior to that date.

89. The Norwegian Government complains in paragraph 152 of the Counter-Memorial that, by referring in the Memorandum of 27th July, 1933 (Annex 11 of the Memorial), to "extending territorial waters even beyond the utmost limits claimed in 1924", the Government of the United Kingdom is seeking to bind the Norwegian Government by referring to the Oslo conversations contrary to the reservations made at the time. As has been shown above (para. 77), the Government of the United Kingdom is not seeking to do this, but merely to show that Norwegian opinion at a certain date was in favour of lines drawn as the red lines on the 1924 charts. In spite of the formal character of the Memorandum of 27th July, 1933, no reply was sent by the Norwegian Government nor was any denial made of the statement expressly referring to "the limits claimed in 1924" which is quoted in paragraph 152 of the Counter-Memorial.

It is evident that the Norwegian Government at the time was not prepared to challenge the statement that certain particular limits had been claimed during the Oslo conversations.

90. Paragraph 153 of the Counter-Memorial, referring to paragraph 42 of the Memorial, charges the Memorial with destroying the allegation already made that a tacit *modus vivendi* on the basis of the red line had been made in 1925. In fact paragraph 42 of the Memorial does nothing of the kind. It merely refers to the fact that *in 1933* the red line (tacit) *modus vivendi* was apparently breaking

down on account of Norwegian persistence in that year in arresting ships outside the red line and hazards the opinion that *this was because* Norway was already claiming the blue line. Not only are these contentions fully consistent with the existence of a tacit *modus vivendi*, but they are now shown to have been completely accurate since the orders now seen to have been issued by the Norwegian Government (Annexes 49 and 50 of the Counter-Memorial) prove that in fact Norway had determined to enforce the 1912 Report in 1933. Such inconsistency as there was lies in the conduct of the Norwegian Government, which in November 1933 led the Government of the United Kingdom to suppose that she would not take action beyond the red line (Annex 12 of Memorial) and at the same time issued orders to its officers to enforce the limit up to the blue line.

91. Paragraphs 154-155 of the Counter-Memorial consist substantially of attempts by the Norwegian Government to evade the conclusion, that agreement was reached in 1933 on an express *modus vivendi* on the basis of the red line. It is first said that the United Kingdom Memorial gives the impression that M. Asserson, the head of the Norwegian Fisheries Department, came to London to discuss the question of the limit of territorial waters. It is difficult to see how this impression can have been given since paragraph 43 of the Memorial clearly states that the object of the informal discussions was to reach a *modus vivendi*. The Memorial certainly intends to suggest nothing else. When M. Asserson arrived, the question of a *modus vivendi* was immediately raised ; the Norwegian Government alleges in paragraph 155 of the Counter-Memorial that M. Asserson was not prepared to discuss it, but, however that may be, the conversations ultimately resulted in the note of 30th November, 1933 (Annex 12 of Memorial). This note, after denying that Norway had changed her attitude in the past 18 months, continued :

> "In order to affirm this and desiring to avoid any friction, my Government have given instructions to the Norwegian control vessels enforcing *the necessity of maintaining the practice which for years has been followed in this matter.*"

The Norwegian Government, relying on the fact that the note does not refer expressly to the red lines, now seeks to maintain that the note did nothing more than to reaffirm the Norwegian alleged practice of acting with moderation.

There is fortunately no need for a lengthy argument on this point since the matter is put beyond doubt by the report of the Foreign Affairs Committee to the Storting which was made in connection with the 1935 Decree, to which reference has already been made. The relevant passage in the report (para. 21) is set out in full :

> "The committee are further aware that the base-lines which they recommend on certain points are somewhat longer than the so-called 'red lines' indicated on some British charts. These latter

lines have never been recognized by Norway, and they have no authoritative title except inasmuch as the Norwegian Minister in London, in a note of 30th November, 1933, promised that the Norwegian fishery inspection vessels would abide by these lines—which, however, were not directly mentioned in the note—until further notice : 'This step has been taken pending the decision of the Storting in regard to a Bill establishing the base-lines of the Norwegian territorial waters.' " (Vol. I, Memorial, p. 191.)

92. The Government of the United Kingdom did nothing more in its Memorial than to state the position as it is established in this report and does not easily understand why the Norwegian Government should have thought it appropriate to devote several pages of evasive argument in an attempt to obscure it. In the face of the report it is impossible for the Norwegian Government successfully to deny that the note of 30th November, 1933, referred to the red lines (without naming them) and not to some other practice of Norway for which there is no satisfactory evidence.

93. The documents accordingly show beyond doubt that, although Norway from 1933 onwards decided to enforce her claims up to the blue lines, she had not disclosed this intention but had—from November 1933—agreed to a *modus vivendi* under which British ships would not be arrested provided that they kept outside the red lines. Her actions in this period completely confirm this conclusion. Reference to the tables at Annex 32 shows that, of the eighteen ships warned *after* the coming into effect of the express *modus vivendi* (lettered h-y), *all except two were in areas between the red and blue lines*, the remaining two being, according to the Norwegian data, either on the red line or only just inside it (Nos. k and x). The practice is shown especially clearly in two areas situated between the two lines : first the area off Berlevaag (Annex 2, chart No. 5, of Counter-Memorial) in which no fewer than eight ships were warned (two before and six after the express *modus vivendi*) and secondly the area of *Loppehavet* (Annex 2, chart No. 8, of Counter-Memorial) where four ships were warned.

As a contrast to this, as can be seen by referring to the list of arrests, *not one single ship was arrested after the express* modus vivendi *became effective early in 1934 in any area between the red and blue lines*. The only ships at any time arrested in such an area were so arrested in one of two periods. The first of such periods was in 1933 *(Loch Torridon, Crestflower, Loch Torridon* again and *Emma Richardson)* when, as has been stated, the "tacit *modus vivendi*" was obviously breaking down : it was in fact the arrests of these ships in these areas which caused the Government of the United Kingdom to take the initiative which led to the "express *modus vivendi*". The second of these periods was in 1949 when Norway had announced a policy of full enforcement of the blue lines commencing with the *Kingston Peridot* (No. 58) and conti-

nuing with the *Arctic Ranger, Lord Plender, Equerry* and *Lord Nuffield*, arrests which led to the institution of the present litigation.

A more complete proof of the existence of the *modus vivendi* based on the red lines could scarcely be demanded.

94. The Government of the United Kingdom feels justified in submitting accordingly that its account of the situation relating to the red lines and the successive *modus vivendi* accord entirely with the facts.

Application of the Royal Decree of 1935 (para. 159 of the Counter-Memorial)

95. The Government of the United Kingdom agrees with what is said in paragraph 150 of the Counter-Memorial relating to the sphere of application of the 1935 Decree.

The period after 1935

Events subsequent to the Royal Decree of 1935 (paras. 159-172 of the Counter-Memorial)

96. The Government of the United Kingdom has no observations to make on the discussions which immediately followed the 1935 Decree. With regard to the meeting between the British Minister and M. Koht on 16th October, 1935, referred to in paragraph 163 of the Counter-Memorial, the actual text of the message which Mr. Dormer was instructed to communicate is included as Annex 34, No. 1, of this Reply. In Annex 34, No. 2, is contained Mr. Dormer's report of the meeting. The background to this message is provided by a minute of the conversation which Sir L. Collier (then head of the Northern Department of the Foreign Office) had with the Norwegian Minister in London on 28th September, 1935, and to which some reference is made in paragraph 163 of the Counter-Memorial. (This minute is Annex 34, No. 3, of this Reply.) It is seen from this that the British declaration that a fishery protection vessel might have to be sent was made necessary by the fact that trawlers were about to leave for the fishing grounds and no adequate assurance had been made by the Norwegian Government regarding the maintenance of the "red line" arrangements.

97. This British declaration is characterized by the Counter-Memorial as "a threat". It is, however, appropriate to point out that :

(a) in spite of the fact that Norway has, in the face of repeated British protests, forcibly arrested a large number of British ships during the years since 1925 and in spite of the strong feelings such action has given rise to in British fishing circles, the United Kingdom has never resorted to force throughout the course of this dispute but has always endeavoured to

settle it by peaceful means. The Government of the United Kingdom was in fact at this time suggesting that the difference between the two countries should be settled by arbitration (see para. 52 of the Memorial).

(b) Even if the Government of the United Kingdom had decided to send a fishery protection vessel to safeguard British interests in disputed waters, it would have been doing no more than the Norwegian Government actually did by sending armed vessels to those same waters to safeguard Norwegian interests.

(c) Had the United Kingdom not been fundamentally averse from the use of force on any pretext, the United Kingdom would not have been placed in the situation in which it now is during the proceedings of this case, which has resulted in British fishermen being excluded from the right to fish in waters which they claim are open to them, while Norway, which has been prepared to use force, tranquilly enjoys the benefit of exclusive rights in these same waters.

98. With regard to paragraphs 165-166 of the Counter-Memorial, the Government of the United Kingdom has no knowledge of the activities of German fishing boats during the German occupation of Norway. The Government of the United Kingdom would be surprised if German fishing off the Norwegian coasts assumed any noticeable proportions during a period of intense submarine and air action. As an indication of the German attitude during normal peacetime conditions, the Government of the United Kingdom prefers to refer to the official protest made on 23rd October, 1935. The French circular letter referred to in paragraph 166 appears to have been sent out by the Central Committee of French Shipowners with a view to ascertaining the views of French shipping interests on the practical advisability of protesting against the 1935 Decree. From its terms it does not seem as if the terms and effect of the decree were clearly appreciated. The letter at any rate fails to perceive the distinction between measures of conservation or police outside territorial waters (which is what the Decree-Law of 1862 was concerned with) and measures of extension of territorial waters. It would certainly be incorrect to say that France considered herself justified in extending her territorial waters—her signature of the Conventions of 1839 and of 1867 (unratified) and her adoption of the North Sea Convention of 1882 show the contrary. The circular at the most shows that French shipowners did not consider that the decree affected their interests to any substantial extent. So far as the legal position is concerned there is no reason to suppose that the French Government has departed in any way from the attitude so clearly defined by it in 1868 and 1870.

99. With regard to paragraph 168 of the Counter-Memorial, it is important for the sake of clarity to appreciate that there were four separate periods, of "lenient enforcement", namely :

(a) Under the instructions issued by the Government of Norway in 1908 (para. 95 of the Counter-Memorial, and para. 63 of the Reply).
(b) Under the red line "tacit *modus vivendi*" from 1925 until the arrangement began to break down in the beginning of 1933.
(c) Under the red line "express *modus vivendi*" which, by arrangements made in November 1933 (Annex 12 of Memorial), became effective in the beginning of 1934.
(d) Under the Royal Decree of 1935, which lasted from the promulgation of that decree until Norway announced a policy of strict enforcement in 1948.

The Government of the United Kingdom was of course fully aware that the "express *modus vivendi*" of 1933 had been brought to an end by the 1935 Decree—it had been so informed by M. Koht on 22nd August, 1935 (para. 57 of Memorial and para. 159 of the Counter-Memorial). Nevertheless it was justified in supposing and did suppose that the assurance given by M. Koht on 7th October, 1935 (Memorial, para. 52), that the decree would, provisionally, be leniently enforced, meant that, although the decree was in no way suspended, action against British trawlers was not to be taken beyond the red line. It was for this reason that British shipowners were informed that the Government of the United Kingdom regarded the red line as still effective (para. 53 of the Memorial). M. Koht's Press statement reported in paragraph 168 of the Counter-Memorial is quite consistent with this. He said that there "exists" no agreement regarding the red lines—which was literally correct since the "express *modus vivendi*" (which was such an agreement) had lapsed —and that Norway had never bound herself to accept the red lines as "lignes de démarcation véritables en mer" which the United Kingdom had never asserted they were. He agreed that there was a policy of lenient enforcement, without stating up to what limits : the Government of the United Kingdom naturally supposed these limits to be the red lines.

100. The Government of the United Kingdom has no observation to make on paragraphs 169-171 of the Counter-Memorial, except to say that the conversations which took place in 1948-1949 were embarked upon as the result of Norwegian initiative. The Government of the United Kingdom, being firmly of opinion that the blue lines were contrary to law, was desirous at this time of proceeding without delay to bring the question of their legality before the Court.

101. With regard to paragraph 172 of the Counter-Memorial, it is important to make clear that there were four sets of lines drawn on the charts of the Norwegian coast at various times. From the point of view of their significance, the relevant distinction is whether they were drawn before 1935, when Norway had not yet decided her policy, or after 1935 when she had done so. The latter group of

lines (those drawn in 1938 and 1949), having been drawn as compromises in the course of negotiations which proved abortive, are of course of no interest for the purposes of the present case. But the earlier group (i.e. those drawn during the Oslo and London conversations) are of considerable significance since they—in particular those drawn in 1924—provide direct evidence of the maximum extent of Norwegian claims at the time, and show that these claims did not coincide with the recommendations of the Commission of 1912 which were afterwards embodied in the 1935 Decree. The lines drawn in 1924 were *not* proposed as compromises.

Arrests and warnings (para. 173 of the Counter-Memorial)

102. The Government of the United Kingdom has already (paras. 80 and 93 of this Reply) drawn attention to the extent to which the places of arrest and of warnings from 1924 onwards confirm the argument submitted by the United Kingdom regarding the red lines. It has no further observation to offer on paragraph 173 of the Counter-Memorial or on Annex 56. Since the delivery of the Memorial one further arrest has taken place, of which details are contained in paragraph 517 of Part III of this Reply.

Conclusion of Part I (paras. 174-181 of the Counter-Memorial)

103. The case which is sought to be established by the Norwegian Government in the first part of its Counter-Memorial is that there were developed in the course of the nineteenth century certain fundamental rules for the delimitation of territorial waters for fishing purposes, which rules were clear and definite, were repeatedly stated by Norway, and which are simply carried into effect, in relation to the portion of Norwegian coast which lies north of latitude 66° 28′ 48″ N., by the Royal Decree of 1935.

In reply to this the Government of the United Kingdom has sought to show, in this Reply, that apart from the limit of four miles (one league) and apart also from certain rights over fjords and sunds which may admittedly have been acquired on historic grounds, there were no such clear and definite principles as would of themselves justify the Royal Decree of 1935. The Rescript of 22nd February, 1812, which was originally issued for purposes connected with neutrality, came, it is true, to be interpreted and applied for the drawing of fishery limits, but itself stated no rule as to the manner in which base-lines should be drawn, nor did it offer any solution to the problems which arise when base-lines are to be drawn across the mouth of bays, between islands or partially submerged rocks and points on land or other islands or rocks or in connection with coastal archipelagos. The Decrees of 16th October, 1869, and the 9th September, 1889, dealt only with small sections of the coast and established no principle applicable to other sections. They recognized the necessity for confining the claims of the coastal State,

even in relation to fishing banks as to which a case of immemorial user could be established, within limits authorized by rules of international law ; they admitted the necessity of justifying and, indeed, attempted to justify, certain apparent departures from these rules by special geographical and hydrographical considerations of a kind that would meet the legitimate requirements not only of the local inhabitants but of foreign fishermen. They established no rules as to rocks partially submerged or as to outlying rocks beyond a four-mile limit or as to the drawing of lines across the mouth of bays. If there were any principles inherent in these laws which applied particularly to Norwegian territorial waters, such principles had not been accepted or recognized internationally : France, while not disputing the particular limits defined, had explicitly refused to recognize any system on which they were based, and any implied acquiescence by other States could not do more than confer a title to the particular areas claimed.

In relation to the area of this present dispute, Norway had, before the first World War, claimed exclusive fishing rights in "Norwegian territorial waters", but had not specified her claims in any detail. The Norwegian Government has not, by the evidence produced, established either that local fishermen exercised an exclusive right of fishing over the area covered by the Royal Decree of 1935, or that Norwegian legislative or administrative authority was exercised over this area.

In 1908 Norway had given some indication that she regarded a ten-mile rule for bays as enjoying some status in international law.

In 1912 she had received the report of the Commission on Territorial Waters which had, in a document which was not published, recommended substantially the limits afterwards embodied in the 1935 Decree, but she hesitated for 23 years before applying these recommendations. After the first World War, although pressed on many occasions to do so, Norway had still not—for whatever reason —officially declared the nature of her claim but had, in 1924, as the report of the Storting Committee and the report of the Ministry of Foreign Affairs show, expressed her claims as at that date by the red lines—such lines not being authoritative—and had in the following years up to 1935, except for a short period in 1933, acted and allowed British vessels to act as if these lines represented the best information available at the time. Even these lines were at the time regarded by the United Kingdom as exceeding what was permitted by international law.

The Government of the United Kingdom does not dispute that Norway had fully reserved her right to claim other limits and does not assert that Norway is precluded, or bound, by virtue of the red lines, from putting forward wider claims. But the Government of the United Kingdom is entitled to point to the red lines for the purpose of showing :

(a) That Norway did not prior to 1935 state her claims as finally shown on the blue lines, but only stated claims as shown on the red lines (the latter being admittedly not authoritative).

(b) That the blue lines do not represent automatic and self-evident applications of any pre-existing principles there may have been : if they had done so, they would have been promulgated earlier, and would certainly have been given, instead of the red lines, as Norway's views in 1924. In fact both the red lines and the blue lines (and possibly other lines which could be drawn) can be said to be partially consistent with principles previously applied by Norway in view of the vague character of these principles : the blue line represents the most extensive claim yet put forward and it is for the Court to judge whether, even assuming that there were certain principles which, for traditional and historic reasons, it was entitled to apply, this particular application was justifiable.

It is significant to observe that the blue lines have professedly been drawn with the object of preserving for the coastal inhabitants the fishing areas of which they are said to have been in enjoyment—and in particular the fishing grounds off Berlevaag and Loppehavet thus departing in a vital respect from the principle followed by the Decree of 1869 which, as the Exposé des Motifs (Annex 16 of Counter-Memorial) shows, explicitly recognized that, even in respect of fishing areas where a claim of this nature could be sustained, there was no justification for extending Norwegian territorial waters beyond the limits recognized as proper by international law. Moreover, it is clear from the attitude of the local population in 1908 that it did not itself consider that protection could be obtained for these grounds without an extension of what was properly Norwegian territorial waters.

104. The facts stated in the preceding paragraph have already provided the answer to the argument set out in paragraph 176 of the Counter-Memorial that Norway should not be prejudiced by any concession made by her, on a basis of amicable understanding in applying her own legislation. The Government of the United Kingdom does not seek to prejudice her in this way. The Norwegian Government refers to a passage from the British Counter-Case in the *North Atlantic Coa st Fisheries Arbitration* in which, after stating that

> "She [Great Britain] has invariably coupled with these concessions a declaration of her full claim",

it proceeded to contend that Great Britain should not be prejudiced by such concessions having been made.

The Government of the United Kingdom fully accepts the principle there stated, but it does not apply to Norway's position in

this case. As above stated in paragraph 99, there were four separate periods in which "leniency" was applied by Norway. The principle does not apply to any of the first three periods, since Norway had never before 1935 stated the full extent of her claims, except in so far as she had assented to the non-authoritative expression of them in the red lines.

As to the fourth period, the Government of the United Kingdom, of course, seeks to make no use to the prejudice of Norway of any concessions she may have made since the publication of the blue line, in the enforcement of that line.

105. For the reasons above stated the Government of the United Kingdom, while admitting that Norway has an historic title to a territorial belt of a width of four miles and also that she has an historic title to certain fjords and sunds, submits that the base-lines as regards the coast generally (where Norway has no historic title) fall to be determined by the Court in conformity with the rules of international law. In regard to fjords where Norway has an historic title, she has no right to waters which are not within lines drawn between what may reasonably be considered to be the natural geographical entrance-points of the indentation in question. In the case of the Varangerfjord the Norwegian closing line is admitted.

The conceptions of the Government of the United Kingdom concerning the delimitation of Norway's maritime territory are shown in the charts contained in Annex 35 of this Reply and further explained in Chapter V of Part II.

PART II

The applicable principles of international law re-examined in the light of the Norwegian Government's contentions in the Counter-Memorial

CHAPTER I.—HISTORICAL EVOLUTION OF INTERNATIONAL MARITIME LAW

Introductory

106. The Norwegian Government, in Part II of the Counter-Memorial, criticizes the contentions of the United Kingdom Government in its Memorial concerning the principles of international law applicable in the present case. This criticism is shaped on the following broad plan. First, there is a preliminary argument, based on an historical account of the law of coastal waters, the general object of which is to persuade the Court that on the failure of the 1930 Conference there ceased to be any system of fixed limits

for determining the extent of a State's coastal waters. This somewhat anarchical argument is followed by a statement of the Norwegian concept of territorial waters which, thinly disguised, seems to amount to a theory that every State may fix its own coastal waters according to its own idea of what are its legitimate claims. Next comes an exposition of the characteristics said to be required in a rule of customary international law and of the methods available to prove a customary rule, the general object of which is to show the impossibility of establishing any customary rule applicable to the present case. The argument continues by contesting that the rule that the tide-mark along the coast is the base-line from which territorial waters are measured is the primary rule to which all other rules sanctioning a different base-line are exceptions. The Norwegian Government concludes these general arguments concerning the applicable rules of law by contending that the burden of proof rests on the United Kingdom in the present case in regard not only to the facts but also to the law. The remainder of the Counter-Memorial examines the contentions of the United Kingdom in regard to the exceptional rules for bays, islands, etc. It deals finally with Norway's claim to an historic title, which has, however, also been dealt with in Part I of the Counter-Memorial and has been answered to that extent in Part I of this Reply. The United Kingdom Government in this Reply will answer the criticisms of its own arguments and deal with the new contentions of the Norwegian Government in the same general order as is adopted in the Counter-Memorial. It will, however, depart from that order where it may seem desirable to do so for the proper presentation of its own argument.

Historical review of international maritime law

(Paras. 182-186 of the Counter-Memorial)

107. The Government of the United Kingdom naturally agrees with the Norwegian Government that the modern history of the law of the sea took shape at the end of the controversy between *mare clausum* and *mare liberum* and that, when this controversy first arose, several States claimed varying forms of maritime jurisdiction over large expanses of the oceans and seas. It is also common ground that when the controversy ended with the triumph of the principle of the freedom of the seas, these extravagant claims to maritime dominion were abandoned and that to-day the law of coastal waters represents a compromise between the claims of coastal States and the principle of the freedom of the seas.

108. Norway, however, disagrees with the contention in paragraphs 65 and 66 of the United Kingdom's Memorial that the compromise between the individual claims of coastal States and the rights of the international community in the oceans and seas is

to be worked out on the basis of a presumption in favour of the freedom of the seas. The United Kingdom's contention is said to be disproved by the historical development of the law of the sea since "it is not the sovereignty of the State which has encroached on the high sea but the free sea which has pushed back the sovereignty of the State". Even if this estimate of the historical development of maritime law contained the whole truth, it would scarcely be sufficient to demonstrate the error of the United Kingdom's contention. The fact that the maritime territory of coastal States has been compelled to retreat before the freedom of the seas would seem to indicate a presumption in favour of the latter principle and at any rate no presumption in favour of the former [1].

109. But the observation that it is the free seas which have pushed back the sovereignty of the coastal State is only a half truth. The triumph of the principle of the freedom of the seas destroyed the whole basis of the old claims to a wide dominion over the seas. Sovereignty over coastal waters under the modern law is far from being a simple abridgment of earlier and more extensive claims. It is clear, and is now generally recognized, that the modern law of coastal waters has not a single historical origin but has been woven from several different threads. The Norwegian jurist Ræstad, for example, summed up the development of the territorial seas in the following terms :

> "Mais la mer n'est pas un accessoire nécessaire de la terre en ce sens que tout État maritime doit nécessairement avoir un territoire maritime. L'histoire nous apprend que c'est par une évolution lente et tardive que les États ont affirmé leurs droits sur mer. Et c'est par une consolidation des droits ainsi acquis, consolidation qui est vieille d'un siècle seulement, que les États ont abouti à cette souveraineté maritime dont ils se targuent aujourd'hui. Au point de vue historique, la mer territoriale n'est pas sortie d'une occupation de la mer, mais des occupations successives de certains droits sur mer, réunis plus tard en un faisceau qu'on est convenu d'appeler souveraineté." *(La Mer territoriale,* p. 162.)

The United Kingdom will revert to the question of the presumption in favour of the freedom of the seas when replying to the observations in the Counter-Memorial concerning the burden of proof in the present case (see paras. 218-222 below). It only draws attention here to the fact that the historical movement from *mare clausum* to *mare liberum* confirms rather than disproves the primacy of the principle of the freedom of the seas.

[1] An analogous development may be perceived in the sphere of municipal law. At one time large numbers of people were slaves and many more were living under rigorous conditions of service. There was then a conflict between rights of property in slaves or serfs and the freedom of the individual, which ended in the triumph of the freedom of the individual. It does not follow that, because the "freedom of the individual" has pushed back the "right of property in slaves", that there is a presumption against freedom and in favour of rights of property over individuals.

The cannon shot and the 3-mile limit up to the early twentieth century

(Paras. 187-197 of the Counter-Memorial)

Norwegian arguments

110. Continuing its historical argument, the Norwegian Government next maintains that

(a) the 3-mile limit began and continued simply as an application of the cannot-shot rule by the Italian writer Galiani (paras. 188-189) ;

(b) it was introduced into international practice through Anglo-American practice (para. 189) ;

(c) until about 1860 the static condition of ballistics preserved the plausibility of the identification of the 3-mile limit with the cannot-shot rule (para. 190) ; but that

(d) with the progress of artillery, the 3-mile limit lost contact with the principle on which it was founded (para. 192) ;

(e) a choice between the rapidly diverging rules then became necessary (paras. 191-193) ;

(f) the cannon-shot rule was still sometimes invoked and that even Great Britain was hesitant about finally adopting the 3-mile limit (para. 195) ;

(g) proposals for extending the limit were made at the turn of the century, in particular by the Netherlands (para. 197) ;

(h) although the 3-mile limit had the support of "a respectable number of States, including most of the Great Powers", "numerous States" remained refractory about maintaining wider claims (para. 198) ;

(i) in consequence, the 3-mile limit at the dawn of the twentieth century rested on a narrow and fragile basis (para. 198) ;

(j) between 1900 and 1930 Great Britain embarked on a diplomatic offensive for the establishment of the 3-mile limit which ended in failure at the 1930 Conference (paras. 198-200).

111. The United Kingdom Government in these proceedings before the Court has accepted Norway's claim to a 4-mile maritime belt and in paragraphs 148-152 below it gives the reasons for its recognition of the Norwegian claim. The width of the belt of territorial sea which Norway is entitled to claim is not therefore in controversy between the Parties. Norway however has contended in her Counter-Memorial that neither the 3-mile nor any other fixed limit is of any legal relevance in determining the total extent of a State's coastal waters. It is not therefore possible to pass over without comment the inaccurate account of the history and status of the 3-mile limit which is given in the Counter-Memorial.

Researches of Ræstad

112. Among the important scientific studies of the history of territorial waters and, in particular, of the cannon-shot rule are those of the Norwegian jurist, Ræstad, who represented Norway at the 1930 Codification Conference. These studies of Ræstad seem to have been more profound on this point than those of previous writers, who seem to have studied the matter superficially. It was on the basis of these superficial studies that the statements in the British Parliament and elsewhere had been made, which the Counter-Memorial cites in support of some of the contentions enumerated in paragraph 110 above. The historical researches of Ræstad led him to express very different opinions concerning the development and status of the 3-mile limit from those found in the Counter-Memorial. His conclusions are to be found in an article published in the *Revue générale de Droit international public* (1912), pages 598-623, and in his book *La Mer territoriale*, pages 103-185, published the following year.

Ræstad, in the course of his historical studies, demonstrated that

(i) the cannon-shot rule was in no way founded on considerations either of occupation of the sea or defence of the land but *was concerned with the protection of neutral commerce in time of war* (*Revue générale de Droit international public* (1912), pp. 619-620) ;

(ii) coastal fisheries in the eighteenth century were with a few exceptions (these exceptions included Norway) free to all while smuggling was dealt with by a quite independent exercise of jurisdiction (*ibid.*, p. 610) ;

(iii) at first some States applied the range of vision as the limit within which belligerents must respect neutral commerce off their coasts, but under pressure from belligerents this limit was deliberately reduced to the smaller limit of cannon range (*ibid.*, pp. 600, 611 and 620) ;

(iv) cannon range was chosen not on any theory of effective exercise of power by the coastal State but simply as a well-known nautical measure—it being a standard measure of distance used in sailing manuals (*ibid.*, p. 601) ;

(v) the rule, which at first related only to fortified places where actual cannon existed, was extended during the eighteenth century notionally to the whole coast (*ibid.*, p. 620) ;

(vi) the science of ballistics having long been stationary, cannon range was adopted with the intention of *fixing a finite and moderate measure of distance* for the purpose of the neutrality rule (*ibid.*, p. 601) ;

(vii) when the Italian writer, Galiani, proposed that cannon range should be taken to be 3 miles, he was only giving precision to this finite limit (when he suggested the possi-

bility of a wider limit of 2 leagues he was suggesting an alternative and different method of fixing the distance) (*ibid.*, p. 613) ;

(viii) after the acceptance of Galiani's proposal in Anglo-American practice, the 3-mile limit, though developed from the cannot-shot rule, became an independent rule accepted by the majority of States (*ibid.*, pp. 617-619) ;

(ix) eighteenth-century statesmen had not contemplated an extension of the neutrality belt with an increase in the range of guns and that the 3-mile limit was intended to supersede the cannon-shot rule (*ibid.*, p. 621) ;

(x) where cannon range is afterwards found in diplomatic documents, it is used as the equivalent of 3 miles rather than that the measure of 3 miles is used as the equivalent of cannon range (*ibid.*, p. 621) ;

(xi) in any event cannon range had never been used in international practice with regard to fisheries and the 3-mile limit was applied to fisheries in the nineteenth century independently of the cannon-shot rule of the previous century (*ibid.*, p. 618). In short, Ræstad concludes that the generally adopted rule of international law in the nineteenth century concerning the extent of territorial waters was the 3-mile limit, not cannon range (*ibid.*, p. 619).

Researches of Ræstad confirmed by those of Walker

113. Ræstad's conclusions are in general confirmed in a more recent study of the cannon-shot rule by W. L. Walker [1] (*British Year Book of International Law* (1945), Vol. 22, pp. 210-231), which is based on the writer's researches into eighteenth-century records in the archives of the French Admiralty. Walker points out that in eighteenth-century practice the cannon-shot rule was still essentially a rule—mainly found in Mediterranean practice—forbidding capture of prizes within the range of the actual cannon of individual fortified places ; and that the concept of a definite belt along the whole coast was a feature of the practice of northern Europe, particularly of the Scandinavian countries. He concludes that the true origin of the modern concept of territorial waters is to be found in northern Europe rather than in the Mediterranean cannon-shot rule. He emphasizes that cannon range in Galiani's day was much less than 3 miles, so that identification of the 3-mile limit with cannon range does not carry conviction. He mentions that, when Galiani in 1782 proposed the fixing of cannon range at 3 miles, he had been engaged to write a book in defence of the armed neutrality of the northern Powers who had already adopted as their neutrality limit a Scandinavian marine league. Walker appears inclined to the view that the

[1] Barrister-at-law and editor of the fifth edition of Pitt-Cobbett, *Cases on International Law* (1937), Vol. II.

identification of cannon shot with the marine league of 3 miles may have been a fiction of eighteenth-century jurists striving to bring together Mediterranean and northern practice. In any event he shares Ræstad's opinion that the 3-mile limit is a rule independent of cannon range, for he says (p. 231) :

> "In its nature the 3-mile rule looks like a wholly independent growth from the cannon-range rule and one which, so far from being the direct descendant of the earlier rule, might properly be regarded as its supplanter."

Obsolescence of the cannon-shot rule

114. It is true that in the latter part of the nineteenth century, when the range of artillery was beginning to increase, the cannon-shot rule was again sometimes invoked as if it were a rule of international law. But this "historical reminiscence", to use Ræstad's phrase, was then employed simply as cover to try to justify pretensions to wider territorial limits than general practice recognized. It was an appeal to a dead formula in an attempt—an unsuccessful attempt—to unsettle the existing practice of States. But the rapid progress of artillery soon made it impossible to invoke cannon range even as a philosophic formula. Gidel, referring to the first World War, said :

> "La guerre mondiale a irrémissiblement relégué dans les notions périmées le critère de la portée de canon à tous les points de vue auxquels la technique juridique des relations maritimes internationales pouvait y avoir recours." (*op. cit.*, Vol. III, p. 59.)

The second World War has rendered cannon range, as a measure of territorial claims, only conceivable in inter-planetary relations.

Wide acceptance of the 3-mile limit

115. The fact that in Great Britain itself doubts were expressed as to the wisdom of fixing the 3-mile limit as the final boundary of British territorial waters is no proof that at the beginning of the twentieth century the 3-mile limit "rested on a narrow and fragile basis". It is one thing for doubts to be expressed in Parliament, whether by Ministers or others, on the score of national interests. It is quite another thing for the Government to abandon a rule regulating the practice of a large number of States or to admit that individual States may enlarge their maritime frontiers without any common agreement among States as to the proper limits of such encroachments on the high seas. Against the cautious doubts of Parliament must be set the solid application of the 3-mile limit by Great Britain in her international practice [1]. The fact that in 1896

[1] As stated above (para. 112), one of the reasons for the nature of the opinions expressed in Parliament on the cannon-shot rule may have been that, prior to the examination of this subject by twentieth-century writers, the study of territorial waters was comparatively superficial.

the Netherlands proposed the calling of a conference for the adoption of a 6-mile limit is also no evidence of the fragility of the 3-mile limit. On the contrary, it shows that no such extension was considered possible except by agreement.

116. The true position at the beginning of the present century was that the 3-mile limit was not narrowly but broadly based in international practice, being acted on by the great majority of States in everyday practice. On the other hand, it was not a universal rule. Norway and Sweden in particular maintained their claims to a league of 4 miles. What Norway calls Great Britain's subsequent offensive for the establishment of the 3-mile limit meant no more than that she had resolved her doubts in favour of the maintenance of the limit already generally accepted in international practice and wished to see it accepted as of universal application. The efforts of Great Britain and other States to secure the recognition of the 3-mile limit as a rule of universal application in a general convention admittedly failed at the 1930 Codification Conference.

The results of the 1930 Conference

(Paras. 201-206 of the Counter-Memorial)

Basic position of the 3-mile rule left unaltered

117. The failure of the efforts to make the 3-mile limit a universal rule did not, and could not, alter the basic position of the 3-mile limit in international practice as it existed before the conference. The failure of the conference demonstrated that the 3-mile limit was not accepted by some States as a rule of universal application. But, equally, the conference demonstrated that the only common measure of agreement among States was that every State recognized the right of others to assert their sovereignty within a 3-mile limit. The conference certainly did not create a new rule of international law permitting a State to assert its sovereignty over a maritime belt wider than 3 miles regardless of whether other States do or do not acquiesce in its claim. Customary law being founded on the assent of States, the basic rule of territorial waters remains the universal recognition of the right of every State to a 3-mile limit. Any wider claim must be made good either as an historic title universally valid or as a title acquiesced in by the particular State against which it is invoked. That exactly was the position taken by the United States Secretary Seward with great force and precision in 1864 in a communication to the Spanish Ambassador concerning Spain's claim to a 6-mile maritime belt off Cuba (Moore, *Digest*, Vol. I, p. 710). The passage reads :

> "Nevertheless it cannot be admitted, nor indeed is Mr. Tassara understood to claim, that the mere assertion of a sovereign, by an act of legislation, however solemn, can have the effect to establish

and fix its external maritime jurisdiction. His right to a jurisdiction of 3 miles is derived not from his own decree but from the law of nations, and exists even though he may never have proclaimed or asserted it by any decree or declaration whatsoever. *He cannot, by a mere decree, extend the limit and fix it at 6 miles, because, if he could, he could in the same manner, and upon motives of interest, ambition, or even upon caprice, fix it at 10, or 20, or 50 miles, without the consent or acquiescence of other Powers which have a common right with himself in the freedom of all the oceans.* Such a pretension could never be successfully or rightfully maintained."

That also was the view of Ræstad in 1913 expressed in his book *La Mer territoriale*, where in one passage he said (p. 167) :

"Le plus important, ce n'est pas, du reste, à mon avis, de savoir quand et comment a eu lieu l'occupation ou l'usurpation de tel ou tel droit sur la mer côtière. *L'important, c'est de savoir quand et comment a eu lieu le consentement exprès ou tacite des nations qui donne à l'occupation ou à l'usurpation la qualité d'un titre de droit.*"

Speaking of fishery limits in another passage, he said (pp. 180-181) :

"Lorsque la pêche côtière a été réservée, en Europe, aux habitants des pays respectifs, les grandes Puissances maritimes se sont arrêtées à la limite de trois milles. Elles sont également obligées de reconnaître aux autres pays le droit de s'approprier la pêche côtière jusqu'à ladite distance. *Mais, lorsqu'il s'agit d'une innovation, elles ne sont pas, à mon avis, obligées de respecter une zone plus large que celle de trois milles.* Les circonstances particulières peuvent être d'une telle nature qu'il serait considéré comme un acte peu amical de s'opposer à l'établissement d'une zone élargie ; mais d'obligation, il n'y en a pas. Par contre, lorsqu'une zone de pêche réservée plus étendue que de trois milles a existé et a été reconnue avant l'adoption, par les Puissances, de la limite de trois milles, alors elles sont bien obligées de la respecter : un régime originairement légal ne devient pas illégal du fait que la pluralité des Puissances en adoptent un autre."

Thus he was basing the validity of Norway's titles to a 4-mile belt upon the assertion of the claim before the 3-mile limit arose and the acquiescence of other States in the claim, in other words, upon its character as an historic title, and, as will be seen hereafter, the United Kingdom's attitude to the Norwegian claim to 4 miles is influenced by precisely these historic considerations.

Gidel's view that the 3-mile rule represents the lowest common measure of agreement

118. That the effect of the failure of the 1930 Conference is to leave international law only with a lowest common measure of agreement concerning the width of the maritime belt in the 3-mile limit is also the opinion of Gidel. The relevant passage has already been set out in paragraph 35 of the United Kingdom's Memorial,

but is important enough to be repeated here (see *Recueil des Cours de l'Académie de Droit international* (1934), Vol. II, p. 180) :

> "Pour le moment on se trouve conduit à n'attribuer à la fixation faite par un État de ses eaux territoriales au delà de la limite de 3 milles universellement adoptée comme minimum, qu'une valeur essentiellement relative. La fixation par l'État riverain de l'étendue de sa mer territoriale ou de ses zones spéciales côtières a bien une valeur absolue en droit interne à l'égard des nationaux de l'État riverain. *Elle n'a de valeur internationale que par l'assentiment individuel de chaque État et pour cet État seulement.*"

Claims in excess of 3 miles require assent of other States

119. The view that claims to a territorial sea in excess of the 3-mile limit can only obtain legal force through the assent of other States, either express or implied from an historic usage, does not depend on the validity of the United Kingdom's thesis that there is a presumption in favour of the freedom of the seas. Even if, as Norway contends, the freedom of the seas and the rights of a State in coastal waters are fundamental principles of equal value, the principles governing the formation of customary law, which are invoked by Norway in paragraphs 256-260 of the Counter-Memorial, lead logically and inevitably to the rule stated by Gidel, and indeed by Ræstad.

Views of Swedish and Danish Governments in regard to claims in excess of established limits in the Baltic

120. The principle formulated by Gidel appears in fact to be precisely the standpoint of the Swedish and Danish Governments in their recent notes to the Soviet Government concerning fisheries in the Baltic. The content of these notes [1] was described in a Press release issued in Stockholm by the Swedish Foreign Ministry on 25th July, 1950, as follows :

> "In the notes it is stressed that the two countries have never recognized the right of any littoral State on the Baltic Sea to establish a 12-mile zone. It is further recalled in the notes that the limits of the territorial waters of European States have been established for centuries, and as far as the Baltic States are concerned have been fixed at 3 or 4 miles. Thus, a legal order has been created according to which the sea outside such territorial waters must be regarded as open sea, i.e. under the law of nations not subject to occupation. *Any extension of territorial waters hence amounts to an encroachment on the freedom of the open sea, where citizens of any State have the right of fishing and of navigation, other States having no right to interfere therewith. The two Governments therefore fully reserve their position to a State extending its territorial waters beyond the limits historically established.*"

[1] So far as the Government of the United Kingdom is aware these notes have not been published.

It is the clear implication of these notes that, in the view of the two Governments, any claim to a particular width of territorial sea depends for its validity upon its acceptance by other States. A 3-mile limit is conceded by all States. The historic application of a 4-mile limit by some States in the Baltic also establishes this limit, in the eyes of Sweden and Denmark, as an accepted usage. But nothing more may be claimed except with the assent of other States.

Norway's misinterpretation of the significance of the failure of the 1930 Conference

121. Norway, on the other hand, appears in the Counter-Memorial to maintain that the failure of the 1930 Conference deprived all existing numerical limits accepted in the practice of States of any legal significance. That would indeed be a startling result of an abortive conference. The failure of the 3-mile limit in 1930 to gain adoption as a general conventional rule may have stripped it of its pretensions to be already a universal rule determining everywhere the width of the territorial sea. But the failure of the conference did not, and could not, wipe away all the existing recognition of numerical limits in international practice. Norway refers to the divergencies of view at the 1930 Conference concerning the width of the territorial sea and to the discussion of the contiguous zone concept as evidence of the absence of any agreement on this question [1]. But neither the voting at the thirteenth session of the Second Committee (*Minutes*, pp. 123 *et seq.*), nor the debates and still less the replies of governments (*Bases of Discussion*, pp. 23-24) provide any warrant for saying that international law recognizes a right in an individual State unilaterally to assign arbitrarily chosen limits to its territorial sea, which will be binding on other States regardless of whether or not they acquiesce in the particular claim. Nor do they suggest that States, although they disagreed concerning the adoption of a maximum limit, were in any way prepared to abandon the system of some prescribed numerical limits in favour of some indeterminate formula. On the contrary, the records of the conference and the strong effort made to secure a compromise through the adoption of the 3-mile limit with the addition of a contiguous zone provide clear confirmation of the fact that the large majority of States did not contemplate for a moment giving up the existing system of a numerically measured maritime belt. Indeed, Gidel was of the opinion that a majority of the conference would have voted for the 3-mile limit plus a contiguous zone. (*Recueil des Cours de l'Académie de Droit international* (1934), II, p. 192.)

[1] The contiguous zone raises an entirely different question, since it relates to rights possessed by the littoral State over a zone *of which it is not the sovereign*. The question of the contiguous zone is not in issue in the present case. It raises questions of jurisdiction, not of exclusive rights.

Irrelevance of the questions of sedentary fisheries and the continental shelf

121 A. With regard to the quotation from Professor Borchard in paragraph 202 of the Counter-Memorial it may be pointed out that questions of sedentary fisheries and continental shelf are irrelevant since they both relate to the surface of the bed of the sea and its subsoil (to land not water) and do not involve any claim to the sea or to fishing in the sea.

Recent tendencies of international maritime law

(Paras. 207-226 of the Counter-Memorial)

General remarks on State practice since 1930

122. Norway goes on to suggest that in any event a new tendency to claim enlarged limits of coastal waters has shown itself in State practice since the 1930 Conference. It is not denied that certain States have issued decrees since 1930 purporting to assume jurisdiction over larger coastal belts than they formerly claimed. It is, however, equally true that other States have expressly declined to recognize these claims. But these claims do not, and cannot, alter the fundamental principles of international law by which the validity of unilateral declarations of title to parts of the high seas is to be tested. These unilateral claims can only derive international legal force to the extent that they meet with the acquiescence of other States. Such claims do not always attract the notice of governments and, as a rule, it is only when a diplomatic incident occurs that protests receive publicity. Nevertheless, the reactions of some States to a number of the claims recited in paragraphs 208-225 show clearly that States closely affected by such claims have declined to regard them as effective in international law. Thus the United States protested against the Mexican Decree of 1935 extending territorial waters from 3 to 9 miles and reserved all its rights. (Para. 208 of the Counter-Memorial ; S. A. Riesenfeld, *Protection of Coastal Fisheries under International Law*, p. 237.) The United Kingdom made a similar protest. Indeed, it cannot be denied—least of all by the Norwegian Government, which, in paragraphs 199-200 of the Counter-Memorial, accused the United Kingdom Government of being in the van of "l'offensive de 3 milles"—that the United Kingdom has consistently made known its view that it cannot as a rule recognize claims to belts of territorial waters of greater width than the generally accepted limit of 3 miles. A recent expression of this unwavering attitude of the United Kingdom Government is to be found in paragraph 2 of the Memorial, where it is stated "the United Kingdom, *while not accepting as a general proposition that a State can have a belt of territorial waters wider than*

3 miles, does not, *for very exceptional reasons*, put Norway's claim to a breadth of 4 miles in issue in these proceedings".

Another example of the consistent attitude of the United Kingdom Government is to be found in the protest made to Honduras regarding the Honduras Constitution of 1936 (see para. 209 of the Counter-Memorial and Annex 36 of this Reply).

The Norwegian Government relies heavily on the famous proclamations by President Truman on 28th September, 1945, for supporting its contention that these and other decrees "attest new tendencies in international maritime law". That these tendencies, however, do not extend as far as the Norwegian Government's own claims is proved by the United States protests against Mexico (see above) and against Saudi Arabia (see para. 123 below).

The 300-mile security zone of the American republics (1939)

123. Again, when the 300-mile security zone was declared under the stress of war by the American republics at Panama in 1939, the three naval belligerents concerned, Germany, France and the United Kingdom, each took up the position that, whatever the practical merits or otherwise of the declaration, it had no basis in international law and could only become binding on the belligerents through their acquiescence. For the relevant extracts of the notes see Hackworth, *Digest of International Law*, Volume VII, pages 704-708 (Annex 37). In an article entitled "Definition of Territorial Waters and the so-called Epi-continental Shelf", published in *Armada* [1], the official journal of the Colombian Navy (No. 2 of May-June 1950, at pp. 24-26), Dr. Yepes, the distinguished Colombian jurist and member of the International Law Commission, said of this declaration of Panama that "if the European protest did not have greater consequences at the time, it was due to the state of war which then existed in the world, a war in which the American nations and the democratic European Powers had common interests. The fact is, nevertheless, that if this unilateral declaration had been made in time of full peace it would have given rise to intense Chancery debates among the nations of Europe."

This claim to a security zone is, of course, in any case, quite different in principle from the claims to territorial waters. As to the later proposal of the Neutrality Committee to extend territorial waters to 12 miles, it is enough to say that it was not put into effect and that one of the five members, the United States representative, Dr. Fenwick, strongly dissented from the proposal on the ground, *inter alia*, that the American States were incompetent to change the law of the sea by their own action alone (see *American Journal of International Law* (1942), Vol. 36, Supplement, p. 19). As to the

[1] When a translated copy of this article was first obtained it was believed that it had been written by Dr. Yepes. It is now known that the article, whose Spanish title is "Definición del Mar territorial y del llamado Zócalo Epi-continental", was in fact unsigned. The error is regretted.

Texas Law of 1941 purporting to extend Texan territorial waters to a distance of 27 miles from shore, it is enough to say that it is of no significance in international relations and is in flat contradiction with the international practice of the United States Government which continues to protest against extensions by other States beyond the 3-mile limit. Thus, the United States Government, in addition to the United Kingdom Government, recently protested against the Saudi-Arabian Decree of 1949 set out in Annex 63 of the Counter-Memorial which purported to extend Saudi-Arabian territorial waters to a distance of 6 miles from shore. The Swedish and Danish protests made only a few weeks ago in regard to the limits of territorial waters in the Baltic are final and cogent proof that States decline to admit that the coastal waters of a State can be extended into areas of the high seas without the acquiescence of other States. (The gist of these protests has been given in paragraph 120 above.)

Claims relating to the continental shelf

124. Undoubtedly, the various claims to the resources of the continental shelf, which are mentioned in paragraphs 216-225 of the Counter-Memorial, represent an important new development. These claims are clearly on a different basis from claims to the sea, they relate to the sea bed and subsoil only—to land not water. It is impossible to draw from these claims the conclusion that international law now permits a State to enlarge its coastal waters without regard to the attitude of other States. The Anglo-Venezuelan Treaty of 1942, despite the narrow enclosed nature of the Gulf of Paria, strictly confined the claims of the two contracting States to the bed and subsoil of the sea and repudiated expressly any intention of assuming sovereignty over the superjacent waters. Article 6 of the treaty reads (see Annex 39 of this Reply for the full text of the treaty) :

> "Nothing in this treaty shall be held to affect in any way the status of the waters of the Gulf of Paria or any rights of passage or navigation on the surface of the seas outside the territorial waters of the Contracting Parties."

Similarly, the final sentence of President Truman's proclamation in 1945 concerning the resources of the continental shelf reads (*American Journal of International Law* (1946), Vol. 40, Supplement, p. 45) :

> "The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."

So, too, the United Kingdom's Orders-in-Council for the Continental Shelf of the Bahamas and Jamaica (see Annex 62 of the Counter-Memorial) and the several proclamations issued by countries of the Middle East concerning the resources of the sea bed and subsoil

are all expressly confined in their operation to the sea bed and subsoil of the Persian Gulf. (For the Saudi-Arabian decree see Annex 63 of the Counter-Memorial ; for the Bahrain decree, which is typical of the proclamations of the British-protected States of the Persian Gulf, see *American Journal of International Law* (1949), Vol. 43, Supplement, p. 183.)

Claims by certain Latin-American States

125. It is, on the other hand, true that some Latin-American States, apparently misinterpreting the true effect of the proclamations of the United States, have advanced claims to the superjacent waters as well as to the sea bed—for example, Chile, Peru and Costa Rica (for the Chilean proclamation see Annex 61 of the Counter-Memorial)[1]. But, from what has been said in paragraphs 122-123 above concerning the attitude of States in regard to recent attempts to extend territorial waters, it is evident that other States do not consider themselves bound by such unilateral claims without their acquiescence. The United States and United Kingdom Governments have in fact lodged protests against these purported appropriations of the waters of the high seas. Paragraphs 5 to 7 of the United Kingdom's note to the Chilean Government (a copy of which is attached as Annex 40 to this Reply) set out concisely the United Kingdom's attitude in regard to any such claim. In brief, the United Kingdom contested the extension of Chile's territorial jurisdiction beyond the 3-mile limit and, while recognizing Chile's interest in the protection of fisheries and conservation of resources, declined to accept as binding on United Kingdom nationals any measures of control promulgated without discussion and agreement with the United Kingdom Government.

The question of the conservation of fisheries

126. Norway also refers (para. 217) to the United States proclamation concerning conservation of fisheries which was issued on the same date as the proclamation dealing with the continental shelf. (See Annex 58 of the Counter-Memorial.) But the important feature of this proclamation is that the United States Government, despite pressure from fishery interests on the Pacific coast, declined to advance claims to larger coastal waters and approached the problem of conservation of resources through regulatory measures in which interested States would co-operate. The basis of the proclamation is the announcement of an intention to establish national and international control of off-shore fisheries, not to assume exclusive sovereignty over the high seas. In pursuance of this intention the United States in 1949 convened an international conference at

[1] The United Kingdom has protested against all these claims. As examples, copies of the protests made to Peru and Chile are set out respectively in Annexes 38 and 40 of this Reply.

Washington for the regulation of the fisheries in the North-West Atlantic. The conference, which was attended by no less than eleven interested States, including the United Kingdom and Norway, resulted in the signing of an international convention for the establishment of a permanent fisheries commission and the regulation of specified conservation zones of fisheries off the coasts of the North-East American continent. (Annex 41 of this Reply.) The convention creates conservation areas *by agreement between the contracting parties*. It contemplates the supervision of these areas by panels composed of the States with current fishing interests in the particular areas but provides for the annual review of the composition of the panels to allow for changing interests. The commission, on the basis of recommendations from the panels, is to formulate proposals for the control of the particular panel-areas which are to become binding only on their unanimous acceptance by the States represented on the panel concerned. Under Article XII action to give effect to the proposals is left to each contracting State. It is unnecessary to dwell further on the detailed machinery of this convention the text of which is attached as Annex 41 to this Reply. The relevant fact is that this multilateral convention for the regulation of the off-shore fisheries of the North-West Atlantic takes as its legal foundation the consent of each contracting State to the establishment of special conservation zones in areas of the high seas. This fact is, if anything, underlined by the provision in Article XIII, which reads :

> "The contracting Governments agree to invite the attention of any government not a party to this convention to any matter relating to the fishing activities in the convention area of the nationals or vessels of that government which appear to affect adversely the operations of the commission or the carrying out of the objectives of this convention."

In short, the convention to which Norway is a party shows unmistakably that States have not changed their views as to the legal régime of off-shore fisheries outside territorial waters, although recognizing the need for increased international co-operation in the regulation of high seas fisheries and for the reasonable safeguarding of existing fishing interests.

127. It is further to be observed that the above-mentioned convention, whilst not denying the right of nationals of any State to fish in waters off the coast of the North-East American continent, recognizes the interests of no less than eleven States situated on both sides of the Atlantic and, in the case of Italy, even within the Mediterranean. Norway herself claims, and legitimately claims, an interest in the Greenland area. Norwegian fishermen are also known to visit the high seas fisheries off Iceland, while her whale catchers are famous in the Antarctic. Indeed, it was a year or two before

British trawlers began to visit the fisheries off Norway that Norwegian whalers, having temporarily exhausted the whale resources of the Arctic, turned their attention to the other extremity of the world. The ensuing threat to the whaling resources of the Antarctic has been and is being met, not by the recognition of national monopolies, but by the progressive international regulation of whaling. At any rate it is clear that fishing in international waters off foreign coasts is not anathema to all Norwegian fishermen.

The failure of the 1930 Conference has not affected the validity of the traditional system

128. The Government of the United Kingdom, for all the foregoing reasons, submits that the traditional system, under which the limits of a State's coastal waters are regarded as determinable by fixed rules of law and as dependent upon their recognition in international practice, has by no means passed away with the failure of the 1930 Conference. Norway herself in the present dispute professes that the 1935 Decree adheres to a specific determinable Norwegian system dating from the eighteenth century and her claim to a 4-mile belt of territorial waters, as the United Kingdom does not dispute, has been consistently advanced from the eighteenth century until to-day.

Norwegian argument that modern technique has considerably changed the nature of the problem

(Paras. 227-234 of the Counter-Memorial)

Norwegian argument

129. Norway, in paragraphs 227 to 234 of the Counter-Memorial, says that everyone is now agreed about the right of innocent passage through territorial waters and that the factors upon which attention is now centred are defence of the coast and exploitation of the resources of the sea. She then maintains that new trends are showing in the law of territorial waters for the reason that modern technical developments in methods of warfare (ballistics) and in methods of fishing have profoundly affected these two basic factors in the problem of territorial waters. The limited nature of the new trends and the very limited recognition given to them in international practice has been explained in the previous section. It is, however, worth examining whether the basic factors of the problem of territorial waters have really changed so as now to justify demands for wider limits in the interests of *(a)* defence and *(b)* fishery conservation.

Increase in the range of guns

130. On the first aspect, defence of the coast, Norway makes use again of the opinion expressed by four out of the five members of

the Neutrality Committee of the American States in 1942. The contention of the quoted passage of the opinion is that the increased range of guns has rendered the 3-mile limit, and presumably also the Scandinavian 4-mile limit, completely inadequate from the point of view of defence. If this is really the case, it is a matter of some surprise that, in the not wholly tranquil world of to-day, Denmark and Sweden are so insistent that precisely these limits should be maintained in the Baltic. But, in fact, it is a complete fallacy to suppose that the range of guns is, or has ever been, a basic element *determining the extent of the coastal waters needed by a State*. As Ræstad, whose work on this point has been confirmed by the very recent study by Walker (see para. 113 above) explained (*La Mer territoriale*, p. 165), the cannon-shot rule in origin had nothing whatever to do with defence of the land but related to the sanctuary from belligerent capture enjoyed by maritime commerce off neutral shores [1]. Just as the Scandinavians chose the 4-mile league, so other States adopted cannon range as a fixed measure with the deliberate purpose of *restricting* the area of neutral sanctuary given to merchant shipping in time of war. It is true that the increased range of guns may be said—theoretically—to increase the area within which the coastal State is able to compel observance of sanctuary. But, as Ræstad also said, the cannon-range measure has always been largely a fiction when applied to the whole coast, for normal States do not maintain guns all along their shores. The function of the cannon-range measure was to set a limit, and a narrow limit, to immunity of merchant shipping from belligerent action at sea.

131. The basic point at issue, the reconciliation between belligerent rights and respect for neutral sovereignty, is unaffected by an increase in the range of guns, whether of coastal batteries or of belligerent warships, and has always really been a question of neutral economics and belligerent policy, not of ballistics. The experience of the two World Wars indicates that it is extremely difficult for neutrals to exercise adequate supervision even over a 3-mile limit and that any increase in the neutrality belt will only increase, not diminish, the danger of violations by belligerents and involvement of the neutral in the war.

132. The Pan-American security zone of 1939, which Norway mentions (para. 213) as a development after the Hague Codification Conference, had no kind of connection with the range of guns, but aimed at the restriction of all forms of belligerent action in wide areas of the Atlantic as a matter of general policy in the belief that it might isolate the States concerned from the impact of the second World War. It is unnecessary to discuss the legal aspects of the

[1] As stated above (para. 112) a complete scientific study of the subject was not made before Ræstad.

zone. It has no bearing on the question before the Court, and was derived from a concept of neutrality which belongs to a past era.

The enormous increase in the range of modern artillery has, as Gidel said (para. 114 above), completely destroyed any relation that cannon range may have had to the fixing of territorial waters. It is invoked only by those who *for reasons quite other than defence* advocate an extension of territorial sovereignty over the high seas.

The development of trawling

133. On the second aspect, the conservation of the resources of the sea, Norway invokes (Counter-Memorial, para. 229) the changed situation brought about by the development of modern techniques, particularly trawling. She recites opinions expressed by individuals and by international gatherings to the effect that fishery resources are threatened with serious depletion by reason of the new methods, and that the 3-mile limit is inadequate for fishery purposes. The effects of trawling on fishing-grounds were misunderstood in many quarters, particularly in Norway (see para. 9 *(d)* above), and its effects on stocks of fish have been exaggerated by those representing interests adverse to the trawlers. It is, however, conceded that the introduction of new fishing techniques created in some areas an international problem of conservation of resources and brought about the regulation of the conduct of fishing by such arrangements as the North Sea Convention, 1882, and the North-West Atlantic Convention of 1949. It is also agreed that there is now increased knowledge of oceanography and its effect on fish life. But neither of these two new facts require us to conclude that the only or the right solution of the fisheries problem is an extension of territorial waters or any other form of exclusive national fisheries in the high seas.

High seas fisheries are a common heritage

134. The Institute of International Law at the Lausanne Conference of 1927 declared that the principle of the freedom of the seas comprises four things, the first two of which were expressed as follows (1927, Annuaire III, p. 339) :

> "1) Liberté de navigation en haute mer, sous le contrôle exclusif, sauf convention contraire, de l'État dont le navire porte le pavillon ;
>
> 2) Liberté de pêche en haute mer, sous les mêmes conditions."

The second part of this resolution merely gave expression to a long-established rule of customary law under which high seas fisheries are a common heritage of States. The international character of high seas fisheries has many illustrations in well-known international conventions and in the day-to-day operations of fishermen in many areas of the world. Thus, Iceland said at the 1930 Conference that no less than ten other States were interested in the Iceland area (*Minutes*, p. 142). The extension of national fishing monopolies

beyond the existing limits of territorial waters therefore necessarily derogates from the common heritage of States and raises in any particular fishing area serious questions of international policy and of the interests of States other than the coastal State.

International co-operation in the matter of conservation, not the unilateral extension of territorial waters, is the real solution

135. Moreover, such an extension is not the only possible, nor indeed an acceptable solution of the problem of conservation. Gidel, in a work written when all the opinions cited in the paragraphs of the Counter-Memorial here being answered were before him (with the exception of Leonard's work), referred to the new factors which are invoked in the Norwegian Counter-Memorial, and expressed the following views (*op. cit.*, Vol III, pp. 301-302) :

> "D'où la nécessité d'une réglementation devenue d'autant plus urgente que la fausseté du caractère inépuisable de la mer s'est trouvée démontrée. Mais cette réglementation n'est, on le sait, en vertu du principe de la liberté de la haute mer (voir tome I du présent ouvrage), applicable par l'État riverain au delà de la limite de sa zone de souveraineté ou « mer territoriale » qu'à l'égard de ses nationaux. Cette situation juridique, confrontée avec la nécessité que la réglementation s'étendît à tous les pêcheurs sans distinction de nationalité, pouvait conduire à deux conclusions bien différentes : l'une c'est qu'il y aurait lieu de procéder à l'établissement d'accords internationaux rendant obligatoire la réglementation pour les nationaux de tous les États contractants ; l'autre c'est qu'il y aurait lieu de procéder à l'extension des limites de la mer territoriale afin d'assurer *de plano* dans l'étendue de celle-ci l'application intégrale de la réglementation édictée par l'État riverain. Cette seconde solution ne présente qu'en apparence l'avantage de simplicité dont elle voudrait se prévaloir. La possibilité juridique pour l'État riverain d'exclure les étrangers de la pêche dans la mer territoriale et de réserver cette pêche à ses seuls nationaux aurait la plupart du temps comme conséquence effective cette exclusion des pêcheurs étrangers et leur éviction de lieux de pêche où ils ont accoutumé de pratiquer leur industrie. Il résulterait ainsi, d'une manière à peu près certaine, de cette extension de la mer territoriale pour y assurer une réglementation générale de la pêche, des difficultés internationales graves qui feraient rapporter les mesures prises en admettant même qu'elles aient pu passagèrement être mises en application."

Then, having remarked that the fishery experts of countries with a relatively narrow continental shelf tend to advocate extensions of territorial waters, Gidel repudiates such a solution (*ibid.*, pp. 302-304) :

> "Ces solutions ne sauraient être retenues non seulement parce qu'elles porteraient atteinte à des situations séculaires intéressant de nombreux États, mais parce qu'elles ne peuvent être qu'arbitraires. Il est en effet impossible de prendre d'une façon générale

la limite du plateau continental comme limite de la mer territoriale même si l'on accepte la notion, assez arbitraire, que le plateau continental s'étend jusqu'aux fonds de 200 mètres, la limite de 200 mètres n'ayant été adoptée que parce qu'elle correspond environ à 100 brasses et est habituellement marquée sur les cartes marines. Assez rapprochées de certaines côtes, les limites du plateau continental s'en éloignent de plus de deux cents kilomètres dans d'autres régions d'Europe. Les données physiques relatives à la configuration des fonds ne sauraient donc fournir par elles-mêmes la solution à la question de savoir jusqu'à quelle distance il convient de réserver la pêche aux nationaux.

Nous répétons ici ce que nous avons dit à propos de la détermination de la largeur de la mer territoriale : la fixation de cette largeur procède d'une manifestation de volonté de l'État riverain ; mais il faut que cette volonté rencontre l'accord formel ou tacite des volontés des autres États intéressés."

136. The alternative and acceptable solution is progressive international co-operation in conservation and protection of fisheries and this is the solution which is gradually being worked out in State practice as conventions like that of 1949 for the North-West Atlantic area testify. The relationship between Norway and the United Kingdom in the last three decades clearly shows the latter's desire to reach agreement on fishery regulation and conservation measures.

At the close of the 1924-1925 discussions the United Kingdom informed Norway that it was prepared to conclude a convention dealing with territorial waters and another on the lines of the Anglo-Danish Convention of 1901 regulating fisheries outside territorial waters north of latitude 61° north. Norway was also invited to accede to the North Sea Fisheries Convention, but in the event no agreement was reached. After the promulgation of the 1935 Decree the United Kingdom Government again approached the Norwegian Government with suggestions for the regulation of fishing off the Norwegian coast. A draft fishery convention on the lines of existing regulatory conventions was formulated during discussions held between experts of the two countries in 1938 and was, by agreement, submitted for the information of the respective fishing interests. The war intervened before any agreement was reached, but during the International Fishery Conference of 1943 and subsequently, further efforts were made by the United Kingdom to formulate another draft convention, but without success. No doubt, conservation and protection measures must take account of actual fishing interests, but conservation and fishing monopolies are two wholly different objectives. The problems of territorial waters and of conservation of the resources of the high seas have no necessary connection although they are often confused (Leonard, *International Regulation of Fisheries* (1944), published by Carnegie Endowment for International Peace, pp. 5-6). When every effort is being made to increase international co-operation in the economic

field, it would be a retrograde step to extend national monopolies in the sphere of fisheries. Such extensions require the concurrence of other States and international practice gives no indication that States in general are willing to give that concurrence. The United Kingdom Government has frequently displayed its readiness to participate in international measures of conservation and strongly maintains that it is along the path of international co-operation, not unilateral encroachments, that the solution of new problems is to be found.

Freedom of navigation on the high seas and of flight through the free air space above those seas are basic principles of international law. The undue extension of territorial waters by States necessarily involves the limitation of both these freedoms

137. The Norwegian contention that the whole nature of the problem of territorial waters has been changed by new developments in ballistics and in fishing techniques is therefore very far from being true. In any event, the argument that the third, and most vital, basic factor, freedom of international navigation, need no longer be regarded, because everyone is agreed about the right of innocent passage, is altogether inadmissible.

The right of innocent passage is certainly an established rule of international law, but for foreign merchant shipping there is a vast difference between a régime of high seas and a régime of territorial waters. On the high seas a ship is subject only to the jurisdiction of its own flag State—apart from the question of a contiguous zone in customs and similar matters. Within territorial waters, however, a ship is in addition absolutely subject to the laws and administration of the coastal State with all the liability to interference which that position entails. Unhappily, the attitude of States towards foreign merchant shipping is not always such that extensions of State sovereignty over the high seas can be considered as unattended with prejudice to the freedom of international navigation. It would therefore be a grave mistake in approaching the problem of territorial waters to-day to exclude from the calculation the importance of securing the maximum freedom of international navigation.

The truth is that modern technical progress has greatly increased, not diminished, the importance of the principle of the freedom of the seas in its aspect of freedom of navigation. The volume of world shipping in the half-century between 1886 and 1936 trebled in size, rising from just over 21 million tons to 65 million tons, and is now in the region of 80 million tons. Moreover, the modern tendency has been for more and more individual States to establish their own ocean-going mercantile marines so that an increasing number of States is vitally interested in the maintenance of the boundaries of the high seas as the free waterways of international maritime traffic.

Another consideration is the development of international air traffic, since the boundaries of the high seas are equally the boundaries of the international air space. Every encroachment of State sovereignty on the high seas is thus equally an encroachment on the free air space.

Sedentary fisheries as an exception to the freedom of high seas fisheries

(Paras. 235-237 of the Counter-Memorial)

138. Norway, in paragraph 235 of the Counter-Memorial, draws attention to the well-known claims of certain States to different forms of sedentary fisheries such as pearl, oyster and sponge fisheries. In this connection it is important to observe

(a) that claims of this kind relate to things which are attached to the sea bed. (Gidel in the quotation cited in paragraph 235 of the Counter-Memorial mentions two meanings to "sedentary fisheries", but in fact it is the first meaning mentioned by him which is the correct one) ;

(b) such claims go with claims to the bed of the sea itself and are in fact claims to land which may previously have been *res nullius* but was in fact capable of occupation ;

(c) such claims are analogous to and indeed perhaps the forerunner of claims to the continental shelf ;

(d) the claims do not affect in any way the waters above the sea bed or the fisheries in these waters.

It is not, however, clear from the Counter-Memorial what is the particular conclusion that Norway asks the Court to draw from the existence of such sedentary fisheries because Norway has not in this case claimed that she possesses exclusive fisheries outside the coastal waters over which, in her view, she is entitled to assert full sovereignty under the rules of international law. Certainly, the existence of these exceptional claims to fisheries on the sea bed is no indication that international law recognizes any right in a State to appropriate exclusive fisheries in the free waters of the high seas without the assent of other States. The States which make the claims disclaim any intention of appropriating fisheries other than the sedentary fisheries on the sea bed. Thus a Foreign Office statement in the House of Commons on 30th May, 1923, explaining the United Kingdom Government's attitude in regard to the Ceylon pearl fisheries said (*Hansard*, Vol. 164, columns 1261-1262) :

> "Some of these [pearl] banks are more than 3 miles from the shore, but where they are situated under the high seas, the claim to sovereignty and control is limited in extent to the area of the banks, and does not affect the rights of navigation or of ordinary fishing in the waters above the banks."

The numerous writers who recognize the exception also restrict the fisheries absolutely to the sea bottom. (Gidel, *op. cit.*, Vol. III, pp. 488 *et seq.* See also Hurst, *The British Year Book of International Law* (1923-1924), Vol. 4, pp. 41 *et seq.*) The passage from Vattel, cited in paragraph 237 of the Counter-Memorial, is, as Gidel has pointed out (*ibid.*, p. 496), irrelevant to the question of sedentary fisheries, since Vattel's argument is directed to the question of territorial waters.

It may also be observed that, if it were true to say that there was no international law at all defining the extent to which territorial waters can be claimed, there is no greater authority for holding *(a)* that a State can claim what areas it pleases as territorial waters, than for holding *(b)* that no State is obliged to recognize a claim of any other State to territorial waters which is larger than that which it makes itself. For reasons which have already been given, there is no presumption, as Norway alleges, in favour of State sovereignty over the sea as against the rights of the community of nations over the sea (i.e. in favour of *(a)* as against *(b)*), and none of the writers quoted in paragraph 240 in the Counter-Memorial state that there is any such presumption. Norway does not, in terms, state that there is no international law defining how territorial waters are to be drawn, but the principles which she advances (para. 242) are so vague and come so close to maintaining that there is no international law at all that Norway is forced to rely strongly on unsupported arguments as regards the burdens of proof.

Norway's formulation of the principle determining the extent of a State's coastal waters and the reasons why this formulation is defective

(Paras. 238-242 of the Counter-Memorial)

The Norwegian formula of "legitimate interests"

139. Norway, basing herself on the arguments which have been answered in the preceding paragraphs of this Reply, represents that all the formulæ for giving precision to the limits of coastal waters have lost any validity that they may once have had (para. 238). These formulæ are said to have failed to consolidate their hold in international law because they do not express the true norm of a State's maritime territory (para. 239). Having thus eliminated all the rules governing the determination of the limits of territorial waters which are supposed to exist in theory and in the practice of States, Norway does not feel quite able to contend that there is no law at all which defines how these limits are to be drawn. And indeed, if this were this position, the result would not necessarily follow that coastal States were free to put forward any claim they thought fit—nor is this the conclusion to which M. Anzilotti and the other writers referred to in paragraph 240 of the Counter-Memorial point. It would, on the contrary, be open to all other

States to deny the claim of the coastal State to any territorial waters at all.

Norway does not, as has been stated, go as far as this. She agrees —as she is bound to do if she is to retain any area of exclusive rights in coastal waters—that the exercise of sovereignty over the sea is confined within certain limits and that, in fixing the extent of its maritime territory, a State must conform to a principle of customary law.

140. The applicable principle of customary law is said by Norway to be that a State's maritime territory is restricted to adjacent waters, namely, to those waters which may be considered as accessory to the land. Waters accessory to the land are then further defined as those waters *which the coastal State has the power to appropriate or occupy* [1] and in regard to which its legitimate interests [2] justify its pretensions. The points contained in Norway's definition of the true principle are no doubt considerations which have played some part in the development of the doctrine of territorial waters. But they are quite inadequate to express the modern principles of customary law regulating the limits of a State's maritime territory [3]. Norway herself maintains that the modern law is a compromise between the freedom of the high seas and a coastal State's right to maritime territory. There is little trace of this compromise in Norway's formula, which treats the law of territorial waters solely from the point of view of the coastal State and takes no account of the interest of the community of States in the freedom of the seas.

141. The Norwegian formula of "legitimate interests" apparently means that the interests of the coastal State are to be adjudged legitimate or illegitimate simply by reference to the supposed needs of the coastal State as determined by the State itself. In that event the formula is nothing but a polite way of saying that the fixing of its territorial waters is at the discretion—and at the arbitrary discretion—of the coastal State [4]. Indeed, if this is what the formula means, it has almost less legal content than the Norwegian-Swedish formula for base-lines proposed at the 1930 Conference, to which reference was made in paragraph 138 of the United Kingdom's Memorial. Gidel's comment on the latter formula applies with the same force to the so-called principle of customary law for coastal waters now advanced by Norway, namely :

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[1] This appears to be based on a quotation from Verdross.

[2] This second element in the proposition appears to be based on quotations from François and Westlake.

[3] Nor did Verdross, François, or Westlake put these considerations forward as such.

[4] This is virtually equivalent to saying that there is no law on the subject at all and that international law on this point simply allows every State to claim what it likes and *obliges other States to recognize the claim*, a proposition denied by Gidel and not affirmed by any authority which the United Kingdom has been able to trace.

"S'il n'était contenu par la loyauté et la modération des États appelés à l'appliquer, un tel texte en effet serait *la négation de tout état de droit*. Car il pose en principe que chaque État riverain fixe pour ses côtes les lignes de base ainsi qu'il veut." (*Op. cit.*, Vol. III, p. 640.)

142. If, on the other hand, the formula of "legitimate interests" is intended to mean that the interests of a coastal State are to be considered as legitimate or illegitimate by reference also to the interest of the community of States in the freedom of the seas, then it lacks any element which may act as a solvent of the inevitable conflict between the two opposing interests. Indeed, to put the matter more tersely, the Norwegian formula is too vague to be of any practical value in the relations between States. It is beside the point that in some other connections international law may merely lay down a general principle such as the *effectiveness* of occupation. In the law of territorial waters there is potentially a constant and universal opposition between the two interests—freedom of the seas and the exclusive coastal sovereignty. The facts of the situation require a certain degree of precision in the rules of international law regulating these opposing interests, and international practice shows beyond any shadow of doubt that States in their relations demand this amount of precision in the determination of the extent of a State's maritime claims. Evidence that States expect claims to coastal waters to be formulated by reference to some precise accepted measures is to be found in the whole history of territorial waters. Norway's own maritime claims were formulated upon this assumption in the eighteenth century [1] and they are still formulated on this assumption, although in the matter of base-lines she now claims recognition of an exceptional system.

143. Norway invokes in support of her principle a sentence from the Second Committee's report at the 1930 Conference which, having declared that a State has sovereignty over a belt of sea round its coasts, went on, "cette zone de souveraineté doit être considérée comme indispensable à la protection des intérêts légitimes des États" [2]. This passage does not, of course, say that the extent of the zone must be determined by reference to the legitimate interests of the coastal State as determined by that State alone. The immediately preceding paragraph contained a most emphatic re-statement of the principle of freedom of navigation and the sentence cited by Norway is merely an explanation of why *some* maritime zone of sovereignty is *nevertheless* allowed to a coastal State. No one disputes that the individual interest of the coastal State is the reason why *some* derogation from the freedom of the seas may be permitted in restricted waters close to its shores.

[1] The reference is to a Norwegian rescript of 18th June, 1745, set out in Annex 6, No. 4, of the Counter-Memorial.

[2] In addition she refers to a sentence from Westlake dealt with in the next paragraph.

144. Westlake's treatment of the law of territorial waters (see para. 242 of Counter-Memorial) admittedly explains the philosophical basis of the coastal State's rights by reference to its ability to appropriate the waters and its legitimate interest in doing so. It is unnecessary to consider whether occupation is the basis of the doctrine of territorial waters; Ræstad strongly denied this. In any case Westlake, in succeeding paragraphs, indicates clearly that other States have a say in any attempt by a coastal State to extend its territorial waters beyond its existing limits.

The Territorial Waters Jurisdiction Act, 1878

145. In paragraph 242 of the Counter-Memorial certain observations are made with regard to the British Territorial Waters Jurisdiction Act. It is first of all desirable to recall the circumstances which caused the passing of this Act. In a well-known case (*R.* v. *Keyn;* 1876, L.R. Exchequer Div. 63; often referred to as the case of the *Franconia*), a majority of the English Court of Crown Cases Reserved held that English municipal law had not conferred on the Courts in the United Kingdom jurisdiction to deal with criminal offences committed in territorial waters, though the Court indicated that by international law it might be permissible for the Crown to exercise such jurisdiction [1]. On the other hand, there was no doubt that the English Courts under the existing law had jurisdiction over all criminal offences committed in bays or other national waters. The purpose, therefore, of the Act was to deal with jurisdiction in the belt of territorial waters running outside the coast line and outside the limits of internal waters. In other words, the expression "territorial waters" used in the Act is used in a strictly correct and technical sense and not as a general expression covering bays as well.

The following are the provisions of the Territorial Waters Jurisdiction Act which may be said to be relevant:

Preamble

"Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions:

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:"

. . . . . .

"2. An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial

[1] There is a certain similarity between this case and the decision of the Norwegian Supreme Court in the case of the *Deutschland*, which is discussed in paras. 82-83 above.

waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly."

"5. Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships."

"7. 'The territorial waters of Her Majesty's dominions', in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

As is natural, the Norwegian Government bases most of its comment upon the first recital in the preamble which states "the jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions". No doubt, this recital in the preamble was influenced by the incorrect view of the cannon-range principle which was to be found very much in the books of the time but which, as stated in paragraphs 112-113 above, the researches of Ræstad and Walker have shown to be totally incorrect. Speeches made in Parliament during the passing of the Act indicate that this was so. While this recital in the preamble is evidence of views entertained by some people in the United Kingdom at that time, the preamble has no operative force and the Crown has not exercised jurisdiction outside the 3-mile limit, in the nineteenth century or later, except that there had been earlier in the nineteenth century a contiguous zone jurisdiction exercised under what are often referred to as the Hovering Acts but which had already been repealed in 1876 [1]. Indeed, the

[1] The principal Hovering Acts were as follows:

(i) An Act of 1736 (9 Geo. II, c. 35). This fixed a 5-mile distance from the coast for the enforcement of customs and excise laws.

(ii) An Act of 1764 (4 Geo. III, c. 15). This provided that, if a ship was found hovering within 2 leagues of the shore, the vessel and goods were liable to be forfeited.

(iii) An Act of 1825 (4 Geo. IV, c. 78). This fixed 2 leagues from the shore as the distance for quarantine regulations.

(iv) An act of 1853 (16 and 17 Vict., c. 107). This provided for the forfeiture of any ship belonging wholly or in part to Her Majesty's subjects, or having half the persons on board subjects of Her Majesty, found with prohibited

United States member of the League of Nations Committee of Experts said of the preamble in 1926 (*A.J.I.L.*, Vol. 20, Special Supplement, p. 136), "This broad declaration is, so far as the undersigned has been able to discover, supported by no modern authority and is no longer maintained by the Government of Great Britain."

The first paragraph of Section 5 is merely designed to preserve any rights of jurisdiction vested in the Crown under international law by treaty or otherwise. (Section 6 specially saves jurisdiction over piracy.)

The other provision which calls for comment is the definition of territorial waters (Section 7), and it will be seen that it falls into two parts. First, the definition says that territorial waters means such part of the sea adjacent to the coast as is deemed by international law to be within the territorial sovereignty of Her Majesty. The second part of the definition fixes 3 miles for the purpose of the criminal jurisdiction conferred on the Courts by the Act in question. It is the last part of the definition which, together with Section 2, is really the one operative provision of the Act, and the question may be asked why this operative part was so carefully limited to one particular form of jurisdiction. The explanation lies in the fact that it was uncertain at that time whether or not 3 miles would remain the limit under international law, and, indeed, whether the policy of Her Majesty's Government would be to advocate the retention of a 3-mile limit or to urge a wider limit. So the legislature carefully limited the Act to the precise purpose for which it was enacted. If, by convention or otherwise, international law were after the Act to develop in the direction of allowing a wider limit, it would not have been necessary to amend the Act of 1878 unless, of course, the United Kingdom desired to make use of the new possibility to extend its criminal jurisdiction to a wider limit.

The United Kingdom has consistently protested against extensions of territorial waters beyond the 3-mile limit

146. The idea that under international law territorial waters might be extended up to the limit of cannon range has completely disappeared, while the practice of the United Kingdom from 1841,

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articles on board within a distance of from 4 to 8 leagues of the coast (according to the different regions specified in the Act). This Act, it is to be noted, distinguished between British and foreign vessels, imposing more severe regulations on the former.

All this legislation was repealed by the Customs Consolidation Act, 1876 (39 and 40 Vict., c. 36). (See section 288 of the Act and Schedule A.) Section 179 of the new Act continued to impose penalties on British or largely British vessels up to 3 leagues from the shore; but all customs and revenue regulations outside the 3-mile limit were removed so far as foreign vessels were concerned. Therefore, in its Memorandum of the 14th July, 1923, to the United States Government, the United Kingdom Government correctly described this Act as the Act "by which British municipal legislation was made to conform with international law" (see Jessup, *The Law of Territorial Waters*, p. 79).

when disputes arose with Spain concerning Spain's claim to a 6-mile limit of territorial waters (Smith, *Great Britain and the Law of Nations*, Vol. II, p. 180), up to the present day, shows that she has consistently protested against extensions of territorial waters beyond what she conceived to be the legal limit of 3 miles established by the consent of nations.

Reasons why the Norwegian Government's formulation is defective

147. The United Kingdom accordingly submits that the Norwegian Government's formulation of an alleged basic principle governing the determination of a State's coastal waters is vitally defective because *(a)* it omits to allow any weight to the interest of other States in the settlement of the frontiers between the high seas and exclusive national waters (paras. 139-142 above) ; *(b)* the formula disregards the element of the consent of other States, and is thus in conflict with the most fundamental norm of customary law which Norway herself invokes in paragraphs 256-260 of the Counter-Memorial (paras. 117-119 above) ; *(c)* it is in fact contradicted by the whole long history of the law of territorial waters and of international disputes regarding the limits of maritime territory (paras. 110-116 above) ; *(d)* it is contradicted by the work of the 1930 Conference, the great object of which was to achieve a precise fixation of the limits of the territorial waters of every State as limits universally accepted by all States and thus put an end to disputes between individual States (paras. 117-121 above) ; *(e)* it is contradicted by modern practice and most recently of all by the Danish and Swedish notes concerning territorial waters in the Baltic (para. 120 above).

To put the matter more simply, the alleged doctrine of maritime territory advanced by Norway is not, and never has been, a rule of law.

The United Kingdom Government, in the light of the above observations, does not think it necessary to cite further authority for the proposition that the established concept of maritime territory in international law is of a zone of territorial sea of an even and determinate width appended to the territory (including its inland waters) of a State. That there is no lack of high authority may be judged from the following language used by Professor (now Judge) Basdevant in an article cited more than once by Norway (*Revue générale de Droit international public* (1912), Vol. XIX, at p. 566), where he writes of :

> "la conception classique de la mer territoriale qui voit en elle une bande de mer d'une étendue déterminée sur laquelle l'État riverain exerce la souveraineté ou des droits de souveraineté".

CHAPTER II.—VIEWS OF THE UNITED KINGDOM GOVERNMENT CONCERNING THE PRINCIPAL LEGAL ISSUES IN THIS CASE

Attitude of United Kingdom Government with regard to the Norwegian claim to a 4-mile limit

(Para. 243 of the Counter-Memorial)

148. The Norwegian Government, in paragraph 243 of the Counter-Memorial, asks for a clarification concerning the acceptance of the Norwegian claim to a 4-mile fisheries zone by the United Kingdom Government in the present proceedings. In fact, two questions arise: (1) why the United Kingdom now adopts a different attitude from that which it previously adopted: (2) what is the exact effect of the admissions contained in paragraph 2 of the Memorial? It may be convenient to answer the second question first. The United Kingdom Government is not asking the Court to give a judgment dependent for its effect on a hypothesis which the United Kingdom Government could afterwards repudiate by its unilateral act. Such a course would be unacceptable to the Court. Moreover, it would be inconsistent with the United Kingdom Government's own purpose in having recourse to the Court—namely, a *final* settlement of the dispute. The admission now made cannot be withdrawn after the judgment; the judgment given on the basis of the admission will be binding on both Parties.

The answer to the first question is given in the immediately following paragraphs, but it may be remarked here that the change in the attitude of the United Kingdom was not so abrupt as might appear. In the first place the red line, about which so much is said in Part I of the Memorial, Counter-Memorial and Reply, was based on four miles, and had Norway chosen to maintain the red line *modus vivendi*, it is likely that it would have remained indefinitely in force. Secondly, the United Kingdom after 1930, in her efforts to settle the dispute by agreement (viz. the talks in Oslo in 1938 and in London in 1948-1949), did not insist on any proposals under which Norway would accept the 3-mile limit as a general principle. The proposals then produced were for lines on the chart put forward merely as *ad hoc* compromises and not as following any defined principles of delimitation. There is no doubt, however, that these lines were easier to reconcile with a 4-mile than with a 3-mile limit.

149. The explanation of the United Kingdom Government's attitude in regard to the Norwegian 4-mile limit is to be found in its conclusions concerning the implications and results of the failure of the 1930 Conference, which are set out in paras. 117-121 above. The failure of that Conference, as has there been pointed out, did not, and could not, sweep away the existing practice and still less could it alter the consensual basis of customary law. In consequence every State is entitled to a 3-mile zone of territorial sea as against

every other State because all accept at least that limit. But a claim to a zone in excess of 3 miles is valid against another State only if it can affirmatively be shown either to have been acquiesced in by the State concerned or to have become an established part of the international order by long usage so as to raise a presumption of acquiescence. In other words, a claim in excess of 3 miles, if it is to be legally enforceable, must be shown in one way or the other to be an established right with respect to the State against which it is asserted.

150. The Norwegian claim to a 4-mile belt, as has been shown by Ræstad and other writers, can be traced back to dates in the eighteenth century (the Rescript of 18th June, 1745, quoted in Annex 6, No. 4, of the Counter-Memorial) before the adoption of the 3-mile limit in international practice and indeed before Galiani's proposal that 3 miles should be substituted for the rough measure of cannon range. During most of the nineteenth century the difference between the Scandinavian limit as being a 4-mile league and the generally applied limit of a marine league of 3 miles made little impact on the consciousness of non-Scandinavian States. Towards the end of the century, when the question of extending the 3-mile limit was agitated both between States and among jurists, the distinct Scandinavian practice became more widely realized. But by then the policy of the United Kingdom and certain other States was being oriented towards universalizing what many had assumed was an accepted limit in the practice of States. The United Kingdom declined to recognize the larger Norwegian limit. The misuse of neutral territorial waters and, in particular, of Norwegian waters by German U-boats in the 1914-1918 War did nothing to make the United Kingdom change her mind and during the Anglo-Norwegian negotiations of 1924-1925 the United Kingdom attempted to induce Norway to accept 3 miles. At the 1930 Conference, the United Kingdom maintained her resistance to the recognition of Norway's 4-mile limit as an exceptional historic claim hoping for a general decision in favour of 3 miles. But the conference failed to reach such a decision and as a result the United Kingdom has had to consider whether the Norwegian claim to 4 miles is established on historic grounds. So far as concerns fisheries the 4-mile limit has been operated in practice for a number of years under the red line *modus vivendi*.

151. The United Kingdom Government therefore decided in these proceedings to recognize Norway's right to a 4-mile maritime belt and in doing so it thus acquiesces in Norway's exceptional claim to a zone of territorial sea extending over a Scandinavian league of 4 sea miles [1]. The reasons which had finally led the United Kingdom

[1] International law does not admit, except by convention or prescription, exclusive fishing rights outside territorial waters and Norway's historic title is not to a 4-mile limit for fishing but to 4 miles limit for territorial waters generally, with the possible exception (a point not in issue in this case) of neutrality in time of war.

Government in the particular case of Norway to acquiesce in this exception to the 3-mile limit are :

(a) the antiquity of the Norwegian claim reaching back to a period before the formulation of the 3-mile limit which indeed may have drawn its inspiration in the mind of Galiani from the eighteenth-century Scandinavian practice ;

(b) the persistent advancement of her larger claim by Norway throughout the period of the existence of the 3-mile limit and its unbroken assertion against other States except in regard to neutrality during the two World Wars ; and

(c) the increasing disposition to-day to acquiesce in Norway's title to a 4-mile zone of territorial sea on the two grounds stated in *(a)* and *(b)*.

152. The United Kingdom Government at the same time reaffirms that in its view the only limit for the width of the maritime belt which has the general agreement of States in international practice is the 3-mile limit. The United Kingdom Government declines to regard as binding on itself or its nationals any claim to a belt in excess of 3 miles which it has not accepted *vis-à-vis* the particular State asserting the claim. The Norwegian claim which it has now recognized extends *to 4 sea miles and no more* and, in the submission of the United Kingdom Government, Norway is only entitled to assert against the United Kingdom in these or any other proceedings a fixed zone of precisely 4 sea miles.

United Kingdom view as to the proper limit of Norwegian territorial waters

(Para. 244 of the Counter-Memorial)

153. With reference to paragraph 244 of the Counter-Memorial, the United Kingdom Government is now filing the charts (Annex 35) showing where, in its submission, and in accordance with the principles of international law applicable in the matter, including Norway's claims on historic grounds, the outer limit and the base-points should be drawn for the zone off the Norwegian coasts which is now in dispute. A full explanation of these charts is given in Chapter V of Part II of this Reply. Briefly, the pecked green line on these charts represent the outside limit of Norwegian territorial waters. A firm green line represents the base-line where it departs from the coast because of bays or fjords which are internal waters. In addition the base-points on the mainland islands or rocks which are significant for delimiting the outer line are shown as green dots. It was necessary for the Government of the United Kingdom to know, before definitely filing these charts, what case on prescriptive or historic grounds (the onus is indisputably on Norway here) the Norwegian Government would make—particularly to fjords or other enclosed waters.

United Kingdom view that the legal validity of the base-lines of the Royal Decree of 1935 is the sole issue in the present case

(para. 245 of the Counter-Memorial)

154. The exclusive fisheries to which a State is entitled under international law—apart from sedentary fisheries—are restricted to its national waters [1] together with the belt of its territorial sea which in Norway's case is 4 sea miles wide. The United Kingdom admits the Norwegian claim to a belt of 4 miles but emphatically denies that Norway can claim more. It is common ground that for fishery purposes the distinction between national and territorial waters is immaterial in the sense that foreign fishermen may be excluded from either form of coastal waters. But the total area of a State's exclusive fisheries under the settled practice of States is obtained by delimiting its maritime belts along the whole length of its national territory including its national waters. The so-called base-lines of the territorial sea are nothing but the limits of the coastal State's land territory and internal waters and, as such, are a cardinal factor in determining the total extent of its exclusive fisheries.

155. Norway, on the assumption that there are no rules of international law determining the width of the maritime belt, argues that it is nonsensical to attach any importance to base-lines. If a State can fix its own breadth of territorial waters, international law, so Norway contends, is only concerned with the total area of coastal waters [2]. It has already been shown that the assumption on which this argument is based is without any foundation in international law because Norway is entitled to a zone of territorial sea 4 sea miles in extent and no more. Consequently this argument also is without any foundation.

It is indeed difficult to believe that Norway's argument concerning the irrelevance of base-lines is seriously intended. For no principle is better, or more clearly, established than that a State's coastal waters consist of national waters plus a belt of territorial sea extending along the boundaries of its land territory and internal waters. It is unnecessary to cite authority for a principle which has manifested itself in the unbroken practice of States for at least 150 years and to which the Norwegian Royal decree under litigation in the present case itself bears witness [3]. The only exceptions to this practice are a few recent claims to areas of sea superjacent to the continental shelf which are novel and contested (see para. 125 above).

[1] Wherever the expressions "national" or "internal" waters are used in this Reply, it refers to waters other than territorial waters and the high seas.

[2] I.e. territorial waters plus internal waters.

[3] Since the decree purports to be based on the Royal Rescript of 1812 and the latter is based on a limit of four miles.

156. It is also difficult to understand how Norway's argument that base-lines are of no relevance in fixing the limits of coastal waters can be reconciled with her own formulation of the true norm of a State's maritime territory. (Counter-Memorial, para. 242.) If maritime territory consists of the waters properly accessory to the coast of a State, it is presumably necessary to know what in law constitutes the coast of a particular State.

The function of the Court in deciding Norway's base-lines

(Para. 246 of the Counter-Memorial)

157. Norway, in paragraph 246 of the Counter-Memorial, complains that the United Kingdom Government in its application to the Court has to some extent invoked the jurisdiction of the Court *ex æquo et bono* under Article 38 (2) of the Statute without the agreement of Norway. She contends that if the Court lays down precise rules for fixing the base-lines, these will trace themselves on the map automatically. On the other hand, if the Court only lays down general principles which leave the Norwegian Government a measure of choice in the lines which it may prescribe for safeguarding Norway's legitimate interests, then there is no occasion for the Court to be asked to exercise a jurisdiction which belongs to Norway.

158. The United Kingdom Government, in inviting the Court to delimit the base-lines, which are the subject-matter of the dispute, had no intention of invoking and does not invoke Article 38 (2) of the Statute. It had in mind the possibility that, if the Court lays down precise rules for the delimitation of the base-lines there may still be minor differences as to the geographical facts to which the rules apply. It also had in mind the possibility that the precise determination of the extent of any historic waters, to which Norway may be found to be entitled, may depend on evidence as well as rules of law. The United Kingdom Government is accordingly of the opinion that it is legally proper under Article 38 (1) of the Statute of the Court, and that it may be practically convenient for the Court, in certain circumstances, actually to delimit the Norwegian base-lines. It is, however, content at this stage to reserve its right to take up the matter again later in the light of all the evidence adduced by Norway or, at the end of the case, in the light of the Court's decision.

159. On the other hand, it recognizes that if the Court's decision should leave Norway with a measure of discretion in the choice of its base-lines, then the only right possessed by the United Kingdom will be to challenge the exercise of Norway's choice if it should have been exercised inconsistently with the rules laid down by the Court.

Article 38 (1) (b) *of the Statute of the Court and "international custom as evidence of a general practice accepted as law"*

(Paras. 247-252 of the Counter-Memorial)

160. The United Kingdom Government agrees with the statement in paragraph 250 of the Counter-Memorial that the law applicable in the present case is essentially customary international law which means that, under Article 38 (1) *(b)* of its Statute, the Court is to apply "international custom, as evidence of a general practice accepted as law". The United Kingdom Government also recognizes that, for a custom to be applicable as law, it must involve the element of *opinio juris* in the limited sense that it must be distinguishable from a usage of mere convenience or comity. The United Kingdom Government does not, however, understand the Permanent Court of International Justice to have decided in the *"Lotus" case* (Series A, No. 10) that whenever a practice is invoked as having the character of law, specific proof must be given of the subjective intentions of States in regard to the practice. The Court, dealing with an argument that the absence of the exercise of criminal jurisdiction by States against persons on foreign merchant vessels in regard to occurrences on the high seas indicated a rule of customary law that no such jurisdiction existed, said (in a passage the last three lines only of which are quoted in paragraph 251 of the Counter-Memorial) :

> "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent of the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom" (p. 28).

It is to be observed that the Court was here merely declining to deduce a rule of customary law negatively from the absence of action by States on the ground that in the particular circumstances it was impossible to infer that the inaction resulted from a conviction of legal obligation rather than from an exercise of discretion. Indeed, the majority of the Court had reached the conclusion that such evidence of practice as there was pointed to the opposite inference. Furthermore, as Sørensen (also quoted in paragraph 251 of the Counter-Memorial) has said (*Les Sources du Droit international*, p. 109), the above is the only time when the Court has referred in its judgment to the subjective element in customary law. In all the other cases in which the Court has concerned itself with customary rules it has made no mention of the subjective element. It did not do so for instance in the *"Wimbledon" case*, an example mentioned by Sørensen. There the Court deduced a customary rule

that it is not inconsistent with neutrality for a belligerent warship to pass through an international canal from the practice in regard to the Suez and Panama Canals (Series A, No. 1, p. 25). Another example not cited by Sørensen is the Court's decision in the *Eastern Greenland case* that the act of a Minister for Foreign Affairs falling within his province is binding upon his State (Series A/B, No. 53, p. 71). It is unnecessary to multiply authorities because the International Court itself in deciding three separate and important points [1] of customary law in the *Corfu Channel case* did not concern itself with the specific proof of *opinio juris* in the individual cases of observance of a customary practice (I.C.J. *Reports 1949*, pp. 18, 22 and 28).

The United Kingdom Government accordingly submits that the phrase in Article 38 (1) *(b)* of the Statute means no more than that the Court must be satisfied that a customary practice, which is invoked before the Court as law, is one from which it is proper in all the circumstances to infer that *States now generally accept it as binding in law*. The Court in determining whether this inference ought to be drawn has held itself free to make a broad appreciation of all the relevant facts and circumstances of the international practice invoked in the particular case.

Generality of the practice accepted as law

(Para. 253 of the Counter-Memorial)

161. It is common ground that, as Article 38 (1) *(b)* prescribes, a customary practice invoked as law must be general but that the generality is relative and does not connote universality. It is also common ground that, when a general practice is established as customary law, it is binding on a State without proof of the assent of the particular State against which it is asserted—Norway reserving, however, the question of the position of a State that persistently rejects the rule. The United Kingdom, in addition, need only draw attention to the fact that the Court's freedom to appreciate all the circumstances alleged to establish a customary rule also extends to appreciating the relative significance of the quantity of the usage and the quantity of its acceptance as law by other States. Thus Sørensen rightly says (*op. cit.*, p. 98) :

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[1] The three points were:

(1) "that a State on whose territory, or in whose waters, an act contrary to international law has occurred may be called upon to give an explanation" (p. 18);

(2) "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (p. 22) ;

(3) "it is in the opinion of the Court generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State" (p. 28).

"Ce n'est pas une considération quantitative qui est décisive, car la coutume constatée dans l'affaire du *Wimbledon* relative au passage par les canaux internationaux ne s'appuyait que sur deux cas."

Position of a State persistently declining to accept a customary rule

(Paras. 256-261 of the Counter-Memorial)

The right of a State to dissent from a customary rule is not absolute; account must be taken of the rights of the international community

162. Norway, however, contends that, although a customary rule is binding on any particular State without proof of its individual assent to the rule, the case is quite different where the State has from the first declined to recognize the rule. The dissenting State, so Norway claims, is then not bound. She cites distinguished authority in support of her contention pointing out that this opinion is expressed not only by extreme positivists but by writers of different schools. The reservation of the United States Government concerning the statements of law in the award of the Permanent Court of Arbitration in the case of the Norwegian shipowners' claims referred to in paragraph 259 of the Counter-Memorial can hardly, however, be regarded as authority for the contention. The reservation was directed not to excepting the United States from observance of rules accepted by other States but to questioning the tribunal's understanding of the rules that were accepted by States (*Recueil des Sentences arbitrales* [1], Vol. I, 1948, pp. 344-346). Similarly Professor Basdevant's comment upon the reservation related to the effect of the reservation on the value of the award as a precedent not to the principle now contended for by Norway. Indeed, the views expressed by M. Basdevant in the lectures, in which the dictum cited in the Counter-Memorial occurred, are far from reflecting a strict positivist approach to the problem of customary law.

The weight of the authority supporting the principle contended for by Norway merits respect and the views as to the nature of international law expressed by the Court in the *"Lotus" case* may also be invoked in its support, although the extreme positivism of these views has been criticized. It is, however, to be observed that in the years which have passed since 1927, when the *"Lotus" case* was decided, the trend in international relations has been towards an increased regard for majority opinion. Precisely how far this trend has affected or may affect the formation of customary law it is unnecessary here to consider. It is enough to say that the right of a State to dissent from a customary rule cannot be regarded as absolute. There is universal agreement that a new State has no option but to adhere to generally accepted customary law. In

[1] Published by the Registry of the Court.

addition, where a fundamental principle is concerned, the international community does not recognize the right of any State to isolate itself from the impact of the principle. On the other hand, a State may acquire an exceptional position with regard to some general rule of customary law by some process which is analogous to that of acquiring an historic title.

163. Even if the freedom of the seas and the right to coastal waters are regarded as principles of equal weight, there is an inevitable, constant and universal impact of each principle upon the other in which the rights of the whole community of States in the high seas are at stake. The delimitation of territorial waters, in short, is not a sphere in which it is possible to isolate the legal attitude of one State in regard to customary law from the attitude of the whole community of States. If the individual State maintains one point of view and the international community another, there is a necessary and continuous unresolved conflict as to territorial boundaries. The dissent of the individual State cannot diminish the rights of the international community. This conflict can only be resolved by giving effect to one point of view or the other and, it is submitted, the view representing a practice generally accepted by other States and preserving the interests of the international community as a whole must prevail over the view of an individual State—unless the latter can show acquiescence in its exceptional claim. In other words the individual State has to show express acquiescence or an historic title.

164. The United Kingdom Government does not, on this ground, contend that Norway cannot be entitled in any circumstances to any coastal waters in excess of those allowed by the customary rules of international law. On the contrary, the United Kingdom admits on historic grounds the Norwegian claim to four miles and to the waters of fjords and other enclosed waters. It only contends that Norway is not entitled to go beyond what is permitted by customary law unless she can show the acquiescence of other States either by particular agreement or by establishing an historic title. The whole concept of historic waters assumes, and has as its foundation, the universality of the rules for the delimitation of coastal waters. The persistent holding out of one State for larger coastal limits is thus, in the submission of the United Kingdom Government, only relevant to the extent that it is an element in establishing the acquiescence of other States. Indeed, the central core of the present case is considered to be the question over what precise areas Norway can show the establishment of a special title by long usage.

Duration and continuity of the international custom

165. Norway, in paragraph 261 of the Counter-Memorial, contends that a custom, to have force as law, must show a certain

duration in the practice making up the custom, although she concedes that the antiquity of a custom is a relative matter varying with the circumstances and character of the case. She refers to three phrases, used in cases before the Permanent Court of International Justice in three separate cases, in which the French word "constante" is used to express the element of the duration of the practice. In none of these cases, however, was anything said to suggest that the more or less long duration of a custom is essential to its qualifications as a binding custom. The adjective appears to have been used descriptively and by way of emphasis without the special meaning attributed to it in the Counter-Memorial. Moreover, the Permanent Court has even more often referred to international custom without any reference to its duration. Indeed, in the *Eastern Greenland case*, from which the Counter-Memorial cites the dissenting opinion of Judge Anzilotti (p. 91) concerning a State's responsibility for the acts of its Foreign Minister, the judgment of the Court said simply that this point was beyond dispute (p. 71). The International Court itself, in the *Corfu Channel case*, also referred to international custom on three occasions without any reference to its duration. (See footnote to para. 160 above.)

Article 38 (1) *(b)* of the Statute of the Court contains nothing to make the long duration of a custom essential to its legal force. What the Statute requires is that the custom should be evidence of a general practice accepted as law. To what extent the duration of a practice will be important in establishing its acceptance by States as law necessarily depends on the circumstances of each custom invoked before the Court and the practice of the Court shows that in this point also it exercises a wide freedom in appreciating the status of a particular custom. M. Basdevant summed up the position thus *(Recueil des Cours*, 1946, Vol. IV, pp. 512-513) :

> "C'est à ce point de vue qu'apparaît l'importance de la répétition des précédents ; aussi le juge international ne manque pas, le cas échéant, d'invoquer l'ancienneté, la constance d'un usage. Cependant, la longue durée n'est pas un élément indispensable, *car ce qui est essentiel, c'est d'arriver à prouver que telle règle est reconnue comme faisant droit.*"

The above observations apply equally to the element of continuity which indeed the phrase "pratique constante" expresses rather than the element of long duration. Uniformity in the observance of a custom is, naturally, important as tending to put the legal character of the custom beyond dispute. Conversely, lack of uniformity, no doubt, tends to put in dispute the recognition of the custom as law. But, ultimately, the critical question must always be whether, at the time when a custom falls to be appreciated in litigation before an international tribunal, it has come to be accepted as law and that is a question which the Court is entitled to decide on a broad review of all the circumstances of the

relevant State practice. This is indicated by the very terms of Article 38 (1) *(b)* of the Statute which does not require the custom to be evidence of a universal but of a *general* practice accepted as law.

In any case, it is evident that *lack of uniformity in the earlier stages of the development of a customary practice is much less material than evidence of the general recognition of the practice as law in the period immediately before the international tribunal is called upon to appreciate its status as law.* For the rest the Government of the United Kingdom contests the Norwegian arguments in paragraph 260 of the Counter-Memorial that Norway has followed a long-established custom in her 1935 Decree and that she has an historic title to a special method of drawing base-lines for territorial waters (see para. 103 of Part I of this Reply, and see further paras. 412-431 of Part II).

Mode of establishing a rule of customary law

(Counter-Memorial, paras. 262-266)

The views of Lord Alverstone

166. Norway, in paragraphs 264 and 265, draws attention to the need for caution in seeking to deduce customary law either from particular treaties or from the opinions of jurists. She refers especially to the views expressed by Lord Alverstone in the well-known case of *West Rand Central Gold Mining Company* v. *The King* (Scott, *Cases on International Law*, p. 7). The points made by Lord Alverstone are not without some substance, but he gives a somewhat unreal picture of the utility both of particular treaties and of the opinions of writers as evidence of customary law. His words have to be read in the light of the fact that he was a judge applying international law in a municipal court and advisedly took as his starting point a constitutional principle that he was not entitled to apply any rule of international law without clear evidence of the assent of Great Britain to the rule. In fact the language of Lord Alverstone emphasizing the dangers of using these sources as evidence of customary law for this reason underestimates the value of these sources in the practice of international tribunals. Further, a somewhat different view of these sources is expressed by the Judicial Committee of the Privy Council in the case of *In Re Piracy Jure Gentium* [1934] AC 586 at page 588, where the following passage occurs:

> "The sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament and the decisions of municipal courts and last, but not least, opinions of jurisconsults, or text-book writers."

United Kingdom view that particular treaties are evidence of customary law

167. It would be presumptuous to dwell on these matters which form an essential part of the normal judicial functions of the International Court. The United Kingdom Government feels bound, however, to emphasize that it entirely rejects Norway's estimate of the value of particular treaties as evidence of customary law, in which she appears virtually to ask that they should be excluded from the Court's consideration as an inadmissible form of evidence. Most State acts in the international sphere concern the handling of particular situations, and bilateral treaties are only one form of such State acts. Like any other State acts, bilateral treaties may either deal with particular situations purely *ad hoc* and remain quite unrelated to other State acts or they may form one of several similar State acts indicating the development of a practice of some sort. A practice is none the less a practice because it manifests itself in the handling of particular situations. Whether the treaty practice indicates a sense of conforming to a legal rule is a matter to be decided after appreciating all the circumstances. There does not appear to have been any intention in the Permanent Court of International Justice, in the passage from the "*Lotus*" *case* cited in paragraph 264 of the Counter-Memorial, to exclude the use of particular conventions as evidence of customary law. The Court was there directing its attention primarily to the question whether in the particular instance the conventions had any relevance to the point being argued in the case.

The proper use of legal material is such an integral part of the judicial function that the citation of authority is scarcely called for. By way of contrast, however, to the views of Lord Alverstone, it may be not unfitting to refer to the endorsement by Judge Drago in the *North Atlantic Fisheries Arbitration* (Wilson, *Hague Arbitration Cases*, p. 198) of the following passage from Bynkershoek :

> "The common law of nations can only be learnt from reason and custom. I do not deny that authority may add weight to reason, but I prefer to seek it in a constant custom of concluding treaties in one sense or another and in examples that have occurred in one country or another."

The Hague Codification Conference of 1930

(Counter-Memorial, paras. 267-282)

Depreciation by Norway of the work of the 1930 Conference (Counter-Memorial, paras. 267-282)

168. The Norwegian Government in paragraphs 267 to 282 of the Counter-Memorial impeaches on two main grounds the value

of the work of the 1930 Codification Conference as evidence of the rules of customary law which are invoked in the United Kingdom's Memorial. First, it is said that the task of the conference was not to declare the existing law but to draw up a convention legislating for the future. Secondly, it is said that the actual work of the Second Committee and of its sub-committees was not of sufficient intrinsic value to warrant deductions being made from them of the existing rules of customary law in regard to the matters now being litigated before the Court. (This second contention is dealt with in paragraphs 175-179 of this Reply.)

Was codification of international law the task of the 1930 Conference ? (Counter-Memorial, paras. 267-269)

169. The United Kingdom Government does not in the least dispute that the task entrusted to the conference was codification not in the sense of a mere registration of existing rules but in the sense of a formulation of agreed rules for the future involving, where necessary, modifications of existing law. Nor does it dispute that the conference, when it met, envisaged its task as the negotiation of an agreed set of rules for the future without formally deciding in each case what was the existing rule of international law. Nor does it dispute that, as a result, some of the work of the conference contains elements of compromise. These are the very reasons which render the Norwegian argument that the failure of the conference swept away the existing system of principles for delimiting territorial waters and apparently even the existing practice of States a completely untenable argument.

It is, however, a complete distortion of the true position to suggest that the task and work of the conference were more concerned with the *lex ferenda* than the *lex lata*. The subject of territorial waters was chosen for codification because it was considered to be "ripe" for codification. This phrase did not, of course, denote that the practice of States in regard to territorial waters showed no disagreements, for then the subject would not have been worth codifying. But it did denote that there existed a substantial body of State practice showing a sufficient measure of general agreement to give hopes of the conclusion of a general convention. That these hopes were falsified primarily by a vote taken concerning the recognition of the 3-mile limit as a universal maximum for the width of the maritime limit is a matter of history. This does not, however, mean that the normal basis of the work of the Second Committee on territorial waters was political negotiation of new law. On the contrary, the starting point of all the work of the conference was the existing practice of States and, for the most part, the committee and its sub-committees were engaged, with due regard to divergencies of view, in formulating what seemed to them the acceptable rules indicated by international practice.

170. In short, the United Kingdom Government, while fully recognizing the need for care in appreciating individual parts of the work of the 1930 Conference—as, indeed, it emphasized in the *Corfu Channel case*—insists that the value of the records of the conference is much greater than that attributed to them in paragraph 269 of the Counter-Memorial. The suggestion that the only useful evidence of existing law lies in the declarations of individual States as to their policy and law and that even these give no indication of customary law unless consolidated in a unanimous resolution of the conference, is in the view of the United Kingdom Government, refuted by the records of the conference. In point of fact some of the declarations of individual States, notably some of those made when voting concerning the width of the maritime belt, were advisedly statements of *lex desiderata* and not of the State's own practice. The reason why the records of the Second Committee constitute important evidence of existing law is that, although the conference took powers to modify the law, the Second Committee was essentially engaged in codifying the law in a field where there was a large body of State practice and where there were already general understandings as to the existing law in many matters. Inevitably, the committee and its sub-committees normally framed the texts of their proposed rules on the basis of existing practice and in accordance with what they understood to be principles generally accepted as law. No codification conference, dealing with a subject like territorial waters, could possibly do anything else than try to proceed from principles with the greatest existing common measure of agreement to texts universally acceptable. In consequence, the records of the conference are no less valuable for the evidence which can be found therein of general understandings of existing principles of law than for declarations by individual States as to particular points.

171. A good example of the inference of a generally accepted principle from the written records of the conference is to be found in the part of Sub-Committee No. II's report (*Plenary Meetings*, pp. 133-134) dealing with straits, which formed part of the evidence from which the Court deduced a rule of customary law in the *Corfu Channel case*. No reference was made in the report to existing practice but, equally, nothing was said either in the draft article or in the accompanying "Observations" about the introduction of a new rule. The inference, endorsed by the Court, was that the right of innocent passage of warships through straits used for international navigation was understood by members of the sub-committee to be a practice generally accepted as law. Another example is the clear inference from the records of the Second Committee and Sub-Committee No. II that it was understood to be a practice generally accepted as law that a State is entitled to certain parts of the sea as national waters and, in addition, to a belt of territorial

sea of some prescribed even width. No State, not even Norway, then questioned this assumption as to the existing law, though Norway appears to do so now. Attention will be drawn to other inferences from the records of the conference in dealing with Norway's detailed criticisms of the principles invoked by the United Kingdom in its Memorial.

172. The United Kingdom Government has not, and does not, contend that any particular text in the records of the conference *creates* new legal obligations for Norway. It contends that the records of the conference provide pointed evidence of principles, derived from practice, which were generally accepted by States as law, and that by these principles Norway is bound. Moreover, it emphasizes that the records of the conference do not stand alone as evidence of the principles on which it relies. The United Kingdom Government relies on the records of the conference not by themselves but in conjunction with the practice of States and the opinions expressed by jurists.

Results of the 1930 Conference (Counter-Memorial, paras. 270-274)

173. The Norwegian Government emphasizes that (1) the thirteen draft articles produced by Sub-Committee No. I were only approved by the Second Committee provisionally; (2) the rules for the delimitation of the territorial sea proposed by Sub-Committee No. II were not even discussed by the Second Committee and were not therefore adopted even provisionally; and (3) the examination of the question of the width of the territorial sea in the Second Committee failed to produce any conclusion. It also states—and the statement is accepted—that paragraph 36 of the Memorial gives a wrong impression in appearing to attribute the work on the draft thirteen articles to Sub-Committee No. II in addition to its work on the delimitation of the territorial sea. This means, as was in fact acknowledged in another paragraph of the Memorial (para. 82), that the work of Sub-Committee No. II was not endorsed by the Second Committee—the main committee of the conference dealing with territorial waters. It does not, however, vitiate the observation in paragraph 36 of the Memorial that the work of Sub-Committee No. II is treated by Gidel and other writers as possessing the highest degree of international authority. In Volume III of Gidel's classic work on the law of the sea, the chapters which deal with the delimitation of the territorial sea attach the greatest weight to the work of Sub-Committee No. II.

The emphasis placed by the Norwegian Government on the lack of formal agreement at the 1930 Conference does not entirely accord with its argument, advanced equally emphatically, that the work of the conference was *de lege ferenda* rather than *de lege lata*. If the work of the conference was really all *de lege ferenda*, what does it now matter in a case concerned with the existing law whether the

new proposals had greater or less measure of *formal agreement ?* In fact, Norway's argument depreciating the value of the work of the conference misses the whole point of the use of the records of the conference in the Memorial. The United Kingdom does not seek to hold Norway bound by any text proposed at the conference *in virtue of its formal adoption.* Indeed, it does not essentially rely on any texts by themselves but on the whole records of the conference for the evidence contained in them of what were then regarded as generally accepted principles of law.

174. But the account given in paragraph 273 of the Counter-Memorial dealing with the work of the Second Committee as almost complete disagreement among the States at the conference on nearly all points is a travesty of the truth. The "Survey of International Law", prepared by the Secretary-General of the United Nations in relation to the codification work of the International Law Commission, found it possible, when dealing with the régime of territorial waters, to describe the work of the Second Committee in the following somewhat different terms (A/CN.4/1/Rev. 1 of 10th February, 1949, p. 43) :

> "In this branch of international law the task of codification will probably proceed on the basis of the achievements of the Hague Codification Conference of 1930 and of the preparatory work which preceded it. No expression of opinion is called for here on the question whether the results of that conference may legitimately be called a failure. It will be noted that the conference produced *some agreed instruments* in the form of Articles on the Legal Status of the Territorial Sea—a detailed and valuable document—*and on the base-line, both in general and with regard to the particular cases of bays, islands, groups of islands and straits.* There is general agreement that the Bases of Discussion, the documentation on which they were based and the discussions in the relevant committees provide material of the utmost usefulness."

(The words in italics in the above quotation relate to the work of Sub-Committee No. II.)

In paragraph 273 of the Counter-Memorial Norway goes near to saying that almost the only tangible point of agreement was the recognition by the Second Committee of a State's sovereignty over its territorial sea, and it is worth examining this point for a moment. Certainly, it was useful to have the principle of sovereignty clearly stated and removed from doctrinal controversy in which some still talked of jurisdiction rather than of sovereignty. But most people regard the formulation of this principle in Article 1 of the draft provisions as essentially a statement of existing law.

Value of the work of the 1930 Conference as evidence of existing law
(Counter-Memorial, paras. 275-282)

175. The Norwegian Government, in paragraphs 275-282 of the Counter-Memorial, addresses itself particularly to the value of the

work of Sub-Committee No. II, urging that its value is materially less than the work of Sub-Committee No. I, which produced 13 draft articles which were adopted by the main committee, whereas Sub-Committee No. II produced a report which was not discussed in the main committee but merely annexed to its report. Regarded from the point of view of progress towards a universally binding convention on territorial waters, it is true to say that the work of Sub-Committee No. I reached a greater state of maturity in its texts. It is again, however, emphasized that this is not the point of view from which the work of the sub-committees has to be regarded in the present case, which falls to be decided under the existing law and where, therefore, the question is whether the work of Sub-Committee No. II provides evidence of existing law.

176. The Norwegian Government continues its attack on the value of the work of Sub-Committee No. II referring to dicta of M. Gianinni and M. Spiropoulos at the 15th meeting of the Second (Plenary) Committee concerning the element of compromise in the draft articles prepared by the First Sub-Committee. It also cites a passage from the argument of the Agent of the United Kingdom Government in the *Corfu Channel case* to the same effect [1]. But these dicta only go to the dangers of *uninstructed* use of the records of the conference without taking care to distinguish between elements of compromise and elements of existing law. It is also to be observed that both of these dicta were not directed primarily at the work of Sub-Committee No. II but related to a certain small portion of the work of Sub-Committee No. I. In the *Corfu Channel case*, the United Kingdom Government, which had disputed the authority of a draft article prepared by Sub-Committee No. I on the ground that it was demonstrably a compromise, relied, and successfully relied, on another portion of the records of Sub-Committee No. II relating to the rights of passage through international straits *to assist in establishing an existing rule of customary law* which was vital to the whole case.

177. The Norwegian Government next depreciates the work of Sub-Committee No. II on the grounds that only 13 out of 40 delegations were represented on it, that the records do not show the degree of unanimity within the sub-committee and that the Second Committee recommended that governments should give further study to the problem of the extent of territorial waters and be asked for further information in regard to their base-lines. As to the first two points, it is pertinent to recall that Sub-Committee No. II was appointed essentially as the technical sub-committee of the Second Committee. Bases of Discussion 6 to 18 concerning the

[1] The argument was in answer to a contention of the Albanian Government concerning a draft provision contained in the articles adopted by the full committee, relating to the passage of warships through territorial waters and which was relied on by the Albanian Government *as if it were a binding treaty provision.*

delimitation of the base-lines were referred to it without previous discussion precisely because it was assumed that there was general agreement on the main principles and that political negotiation of important points was not necessary. How could that assumption have been made if it had not been thought to be justified by the state of the existing law ? The work of Sub-Committee No. II was intended to be primarily that of giving precision to accepted principles. Some technical problems proved less tractable than had been hoped and some differences as to principle were manifested in regard to archipelagos. The sub-committee's report scrupulously notes the points of controversy and the general balance of opinion, although the views of particular delegations are not recorded. The idea, which is suggested in the Counter-Memorial, that there was no general agreement about the main principles for drawing base-lines, is certainly not warranted by the work of Sub-Committee No. II. The area of difference lay mainly in the problem of giving precision to the basic rules. Some of these problems of detail are important but the fact that they exist does not mean that there are no principles.

178. As to the recommendations for further study and for the provision of information by individual States as to their own base-lines, no one disputes that the work of Sub-Committee No. II was unfinished and that some problems were unsolved. Similarly, the work of Sub-Committee No. II showed that the solution of some technical problems such as the definition of bays might be assisted by more information as to the actual base-lines claimed by States, of which information, as Norway more than once emphasizes, very little has been published. The fact that further study and further information was thought to be required is no warrant for saying that there was no measure of general agreement in 1930 concerning the main principle of base-lines. The report of Sub-Committee No. II is plain testimony to the contrary.

179. The particular criticism in paragraph 282 of the Counter-Memorial that the United Kingdom in its pleading juxtaposes Article 1 [1] of Sub-Committee No. I's draft provisions with paragraph 1 of the report of Sub-Committee No. II [2] again misconceives the use made by the United Kingdom of the records of the conference as evidence of existing law and not as texts formally binding on Norway. The two texts in fact express concepts so well established that authority for them is scarcely required at all. The Memorial merely cites the texts as showing what the two separate sub-committees said, without apparent objection from any of their members about the belt of territorial sea and the base-line, respect-

[1] Which reads : "The territory of a State includes a belt of sea described in this convention as the territorial sea."

[2] Which reads : "Subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast."

ively. It is also to be presumed that the two sub-committees knew of each other's existence.

In conclusion, the United Kingdom repeats that it lies with the Court to appreciate the value of evidence adduced to establish the existence of a rule of customary law. It submits that, in the case of the law of territorial waters, the records of the 1930 Codification Conference inevitably contain valuable indications of the existing customary law.

The fundamental rule of the tide mark and its exceptions

(Counter-Memorial, paras. 283-327)

Effect of the fundamental rule

(Counter-Memorial, paras. 283-288)

180. In paragraphs 283-289 the Counter-Memorial begins the argument developed in later paragraphs continuing to paragraph 316 that there is no fundamental rule (subject to limited and confined exceptions) requiring States to take the *coast* as their base-line for measuring territorial waters—the rule producing the result that (save where the exceptions apply) the *base*-line *(not the outside limits of territorial waters)* follows the sinuosities of the coast. There are two questions here: *(a)* must the *base*-line in general follow the sinuosities of the coast? (the major question); and *(b)* assuming that the base-line does follow the coast, does the base-line follow low-water mark or high-water mark? (the minor question). The minor question raises a third (and still more restricted) point, namely (supposing it is low-water mark), is the correct low-water mark that of spring tides, neap tides or medium tides? Norway is arguing against the *major* proposition (i.e. that the base-line in general follows the coast): she does not dispute the minor proposition (low tide). But she quotes in paragraph 286 statements by the authors—Oppenheim, Cavaglieri and Baldoni—to the effect that there is no agreement on the *minor question* (low tide or high tide) to prove that there is no agreement on the *major question.* In fact *none* of the authors quoted in this paragraph express any doubt on the *major* question at all (i.e. that in principle the coast is the base-line), though two of them also indicate that there is no agreement on the breadth of territorial waters. In fact no State to-day—not even Norway herself—disputes that any measurement from the coast is from low-water mark. As Ræstad has said (*La Mer territoriale*, para. 140), the low-water mark, which is entirely inconsistent with the cannon-shot concept of territorial waters, came in through fisheries treaties and then displaced the high-water mark in State practice for all purposes.

181. The statement of Gidel that there is no rule of international law defining low-water mark and other statements concerning the need for such a definition contained in the German, Finnish and Roumanian replies to the Preparatory Committee's *questionnaire* are also cited in the Counter-Memorial as indications of the fragility of the rule of the low-water mark. But what better evidence is there of the firm establishment of the low-water mark rule than the fact that the point made by Gidel and the only point made in the replies of governments was as to the *precise definition* of the line of the low-water mark which is only exceptionally of practical importance? The Norwegian Government as a further argument recalls first that the report of Sub-Committee No. II contains the observation that the "traditional—*traditional* be it noted—expression low-water mark may be interpreted in different ways and requires definition"; and, secondly, that the sub-committee's text embodying the formula of the low-water mark was intended for a convention which never materialized and was never approved by the conference or the Second Committee. But, again, what better evidence is there of the general acceptance of the rule as law than the fact that Sub-Committee No. II never thought of questioning the rule itself but concentrated its attention on the technical definition of low water? In point of fact almost every line of the sub-committee's observations on its formula for the base-line testifies to the acceptance of the low-water mark rule as an existing rule of law (*Plenary Meetings*, p. 131).

182. The fact that Norway herself, as is acknowledged in paragraph 288 of the Counter-Memorial, adopts in her own practice the low-water mark as the test of the limit of the land, gives cause to wonder what is the reason why she, nevertheless, thinks it worth while to challenge the legal basis of that test in the present proceedings. The reason is that Norway, whose object is to dispute the *major* proposition that the base-line in principle follows the coast, is arguing that *this* cannot be a rule of international law if there is uncertainty on the point whether the coast here means high-water mark or low-water mark. This argument is, of course, completely fallacious and goes contrary to the general manner in which all law and indeed most other sciences are developed—such development generally and indeed necessarily taking the form of additional precision to established principles. It is, moreover, completely inconsistent with the pontifical assertion in paragraph 240 of the Counter-Memorial:

> "Le droit — spécialement le droit international — s'abstient souvent de concrétiser les notions normatives dont il se sert."

Norway, however, concedes in paragraph 288 of the Counter-Memorial that the tide mark is a secondary question and develops a further argument against the major proposition, i.e. that in general the base-line should be traced *following the sinuosities of the coast*.

The Norwegian argument that neither the method of the "tracé parallèle" nor "the envelope of arcs of circles" method is applicable to an indented coast

(Paras. 289-295 of the Counter-Memorial)

183. This argument from paragraphs 289 to 295 is founded on what can only be a complete misconception of statements by Gidel and by Boggs, the Geographer of the United States State Department, which were made in a quite different connection. Complete confusion is introduced into the whole matter because the Norwegian Government launches its attack on the generally accepted rule that the *base*-line is in principle the tide mark along the coast by criticizing the "tracé parallèle" and "courbe tangente" (arcs of circles) methods of delimiting the *exterior* limit of the territorial sea. The questions how you fix the base-line and how, having fixed the base-line, you delimit the maritime belt from the base-line are entirely different. In consequence, the whole of this argument from paragraphs 289 to 295 is misconceived and, as will be shown, the work of Gidel and Boggs, when correctly interpreted, entirely supports the United Kingdom's thesis that in principle the base-line is the tide mark along the coast.

183 A. Before examining the work of Gidel and Boggs, it may be useful to give a brief explanation of the "tracé parallèle" and "courbe tangente" methods of delimiting the maritime belt from the given base-line. The object of both methods is to arrive at the *outer* line of territorial waters and both assume that the base-line is the coast. The so-called "tracé parallèle" method would merely make the outer line of territorial waters reproduce faithfully, at exactly 3 (or in Norway's case 4) miles' distance, every sinuosity, that is every twist and turn, of the base-line. The "tracé parallèle" is not practical because under this method it is not possible to ascertain whether a given position is within territorial waters simply by taking a 3-or 4-mile arc from the position to the nearest land. It is necessary first to carry out the difficult task of tracing a faithful replica of the base-line at 3 (or 4) miles' distance. In consequence, it is not a method which—so far as the United Kingdom Government is aware—is recommended by any expert or adopted by any country. On the other hand, the "courbe tangente" —or, in English, "envelope of arcs of circles"—method is the method which the United Kingdom considers to be the correct one and the one recommended by the experts, including Gidel and Boggs. This method consists essentially of taking arcs of 3 (or 4) miles' radius from every permissible base-point and treating the outer envelope of all the resulting curves as the outer line of territorial waters. Its advantage is that the status of any position in the sea can be ascertained by simply taking an arc of 3 (or 4) miles' radius from the position and observing whether it passes

through any base-point. The method is described more fully in Annex 42, where it is also illustrated by diagrams. It is sufficient to say here that it prevents the minor sinuosities in the base-line from being reproduced in the outer line because every position on the outer line must be 3 (or 4) miles from the *nearest* point on the base-line and *at least* 3 (or 4) miles away from *every* point on the base-line. Where, as frequently happens in the case of minor sinuosities, the arcs taken from the more prominent points intersect, they render irrelevant the arcs taken from the less prominent intervening points on the base-line. The reason is that the arcs taken from the intervening points fall inside the intersecting arcs from the more prominent points. (See Annex 42, Figure 2.) The result is that minor concavities in the base-line are not reflected in the outer limit of territorial waters.

184. The Norwegian argument, as has been said, is entirely off the point because it criticizes the "tracé parallèle" and "courbe tangente" (arcs of circles) methods as if they concerned the tide mark along the coast rule. In fact, these methods only came under consideration *after the base-line has been fixed.* The Norwegian Government's criticism of the "tracé parallèle" in paragraphs 290 and 291 is based on citations from Gidel, all of which are taken from his chapter on the drawing of the *exterior* limit of the territorial sea and do not touch the question of the base-line. Gidel criticizes—and the United Kingdom Government is with him in this criticism—the unscientific assumption by some people that the rule of the tide mark along the coast means that the exterior line of territorial waters reproduces faithfully every sinuosity of the coast line. In other words, he was rejecting the idea of the "tracé parallèle". But to say, as the Norwegian Government says in paragraph 291, that Gidel in these passages was condemning the principle of the tide mark along the coast as inadmissible, is the opposite of the truth. Gidel, throughout his chapter, was *assuming the validity of the tide-mark principle* and was only concerned to examine the different methods of delimiting the maritime belt from the tide mark.

185. The use (in para. 290, third sub-paragraph) of one passage from Gidel (pp. 504-505) dealing with the objections to the "tracé parallèle" method as if these objections related to the fundamental rule of the tide mark is particularly astonishing. The full text of the passage (of which a few phrases only are quoted in the Counter-Memorial) runs :

> "La *méthode du parallélisme* verse d'ailleurs dans l'arbitraire. Il est facile de le démontrer. Supposons que la côte présente une série d'indentations de faible largeur. Le parallélisme exigerait un *tracé en dents de scie de la limite extérieure de la mer territoriale.* Ce tracé devrait de toute évidence être rectifié. Il le sera sans tenir compte du plus ou moins de profondeur des diverses indentations. On aura finalement un tracé fait d'une manière assez arbitraire

suivant la direction générale de la côte. (*general trend* des auteurs anglo-saxons)."

A careful reading of this passage in its context shows that Gidel was objecting to an *exterior* line strictly parallel with the base-line on the ground that its absurd results would compel rectifications which might lead to somewhat arbitrary lines following the general direction of the coast *instead of the actual line of the coast.* This is made even plainer by the footnote on page 505 in which he adds that "the general direction of the coast" idea may nevertheless be useful in special cases *and refers to his chapter on bays.*

186. The views of Gidel on the base-line are not, however, only a matter of implication because he opens his next chapter, which does deal with the tracing of the base-line, with the following passage (*op. cit.*, p. 517) :

> "La ligne à partir de laquelle se mesure dans la direction de la haute mer la largeur de la mer territoriale est désignée par les expressions ligne de base, ou ligne de départ de la mer territoriale. *La ligne de départ de la mer territoriale peut correspondre à des données physiques immédiates, ou résulter médiatement seulement des éléments naturels par l'intermédiaire d'une construction géométrique* [1].
>
> Il n'y a pas de divergences fondamentales parmi la pratique ni parmi les auteurs concernant les données physiques qui déterminent immédiatement la ligne de base de la mer territoriale. Il existe aussi un accord de principe sur les cas où l'on admet qu'il n'est plus possible de partir immédiatement des données physiques et qu'il faut une construction géométrique pour déterminer la ligne de base. Le rapport de la Sous-Commission n° II mentionne trois cas de ce genre : 1° cas des baies ; 2° cas des îles à proximité de la côte ; 3° cas des groupes d'îles. Ces cas sont pour le moment réservés. On ne considère ici que le principe général concernant le tracé de la ligne de base de la mer territoriale à l'aide de données physiques immédiates.
>
> Les données physiques immédiates permettant de déterminer la ligne de départ de la mer territoriale sont en principe la laisse de basse mer."

The views expressed by Gidel concerning the base-line are almost indistinguishable from those advanced in the United Kingdom's Memorial and refute absolutely the implications sought to be drawn in the Counter-Memorial from his chapter on the exterior line of the territorial sea.

187. The same criticism applies, *mutatis mutandis*, to the treatment in paragraph 292 of passages from an article by Boggs. This article takes as its starting point the United States doctrine that the territorial sea extends to 3 miles measured from low-water mark along the coast. (*American Journal of International Law* (1930), Vol. 24, p. 542.) The whole article is devoted to the delimitation of

[1] The words in italics are quoted in para. 284 of the Counter-Memorial.

the *exterior* line of the territorial sea by the arcs of circles method ("courbe tangente"). Under the "arcs of circles" method the arcs are taken from a base-line fixed in accordance with the generally accepted rules ; that is, the arcs are taken from the tide mark subject to the exceptions allowed in the case of bays, islands, rocks, etc. Thus, under this method the problem of the indented coast is met, first, by the fact that the method in any case smoothes out the exterior limit where there are minor indentations (para. 183 A above) and, secondly, by the fact that the straightening of the base-line across bays under the 10-mile rule also smoothes out the exterior limit in the case of larger indentations. *Boggs entirely supports the view of the United Kingdom*—which is the orthodox view—*that the base-line is the tide mark subject to an exception in the case of the 10-mile rule for bays.* The novelty of his proposals lies in (1) a formula for determining what indentations qualify as bays for the purpose of the 10-mile rule and (2) a claim that the "arcs of circles" method of delimiting from the tide mark would solve all the technical problems created by bays, islands, etc., if combined with a principle for the elimination of any small pockets of high sea left after employing the "arcs of circles" method.

Gidel's criticism of Boggs was not directed at the "arcs of circles" method, which he himself advocates. It was directed at the claim that Boggs' method would get rid of all difficulties *and avoid rectifications of the base-line.* He pointed out, with justice, that Boggs accepted and acted on the 10-mile rule for bays which was itself a major rectification of the base-line from the tide mark. In other words, while approving the arcs of circles as the method for delimiting the maritime belt from the base-line, Gidel disputed the claim of Boggs' system to be a more simple method of solving every problem than the traditional system. He considered Boggs' system to involve as much "correction" and "elimination" in the case of bays, islands, etc., as the traditional system which deals with these questions as exceptions to the tide-mark rule.

But, that part of Boggs' proposals which was novel and was advanced *de lege ferenda* related to the delimitation of the *exterior* line. It had nothing to do, as Norway argues, with the tide-mark line. Boggs was on common ground with Gidel in assuming that (1) the fundamental rule for determining the base-line is the tide mark along the coast ; and (2) the 10-mile rule applies for bays. Thus, these two authors cited by Norway directly support the two principal contentions of the United Kingdom in regard to the law applicable to base-lines.

The characteristics of the "Norwegian method"

(Paras. 296-303 of the Counter-Memorial)

188. The third argument, advanced in paragraphs 296 to 306 of the Counter-Memorial to challenge the fundamental character of

the rule of the low-water mark amounts to the contention that, even if that rule is generally applied by States, international law does not forbid the adoption of the different headland principle, at any rate in the Norwegian version of this principle [1]. The Norwegian Government, in this instance, does not disdain to seek for what help it can get in the records of the 1930 Conference representing that the conference left entirely open the manner in which base-lines could be drawn. Its method of using these records, even if unconvincing, is instructive as to the implications of the existing law—implications much more speculative than any drawn by the United Kingdom—which Norway thinks may properly be drawn from the work of the conference in support of a Norwegian contention.

189. It is urged in paragraph 297 of the Counter-Memorial that the Preparatory Committee's *questionnaire* to governments mentioned expressly the tracing of base-lines between the extreme points of the coasts, islands, islets or rocks as one of the possible formulas for determining the base-line of the territorial sea and that therefore the committee cannot have considered this method to be forbidden by international law. This conclusion is entirely unwarranted. The codification projects of the League of Nations would have died even before they were born if the Preparatory Committee had taken upon itself expressly to condemn as illegal the claims of individual governments before the convening of a codification conference. The intention of the Preparatory Committee was simply to frame its question in a form wide enough to cover all possible types of formula. This intention is perfectly plain, if question 4 is read as a whole. It runs as follows (L. of N. Doc. C.74. M.39.1929.V., p. 35) :

> "IV.—Determination of the base-line for calculation of the breadth of territorial waters.
>
> *(a)* Along the coasts. Is the line that of low tide following the sinuosities of the coast ; or a line drawn between the outermost points of the coast, islands, islets, or rocks ; or some other line ? Is the distance between islands and the coast to be taken into account in this connection ?
>
> *(b)* In front of bays. Breadth of the bay to be taken into account. Historic bays. Bays whose coasts belong to two or more States.
>
> *(c)* In front of ports."

[1] The United Kingdom Government criticized the alleged Norwegian "system" in paras. 123-140 of the Memorial and explained the very limited sense in which it is based on the "headland theory". In fact, the "system" is the same not as the "headland theory" but as that of the "King's Chambers" which has been long abandoned by the United Kingdom. The Government of the United Kingdom will also discuss the theory of the "outer coast line" (paras. 311-334 below) but in fact the main issue in this case here is not the "*outer coast line theory*" but how the base-lines may be drawn along the *outside* of what Norway called her "outer coast line" (i.e. the long base-lines which depart from the sinuosities of the land).

190. The actual opinion of the Preparatory Committee is expressed in the Schücking report drawn up before the *questionnaire* was issued. Article 2 of the draft convention attached to the report ran (*American Journal of International Law* (1926), Vol. 20, Special Supplement, p. 141) :

> "The zone of the coastal sea shall extend for three marine miles (60 to the degree of latitude) from *low-water mark along the whole of the coast.*"

Article 4 dealing with bays bordered by a single State *(ibid.)* :

> "The territorial sea shall follow the sinuosities of the coast, except that it shall be measured from a straight line drawn across the bay at the part nearest to the opening towards the sea where the distance between the two shores of the bay is 10 marine miles, unless a greater distance has been established by continuous and immemorial usage."

What could be clearer ? Apart from historic waters, the committee did not envisage any straight lines other than those resulting from the 10-mile rule for bays.

191. It is, however, further urged in paragraph 298 of the Counter-Memorial that, although the majority of those governments which replied to the question favoured the main principle that the tide mark on the coast is the base-line, Norway, Sweden and Poland favoured the extreme points method, while the Soviet Union afterwards notified that this method was applied in its legislation. The preference of the others for the view that the coast line is the base-line, so it is said, does not imply that they thought the other method prohibited by international law. In their replies governments were asked to give their views and not to criticize the views which might be inconsistent with them. By implication by stating view *(a)* as in their opinion right they would be indicating that view *(b)*, inconsistent with *(a)*, was wrong.

192. In any case, to what do these four exceptional cases amount ? Norway's extreme point claim, which is the subject of the present case, will be examined at length later. Sweden, however, does not, in fact, appear to apply the same extravagant extreme point theory as Norway. The Swedish reply to the *questionnaire* (*Bases of Discussion*, pp. 189-190) distinguishes between the coasts and bays and only contemplates the enclosures of bays within national waters by lines drawn across their opening when these lines are not excessive, indicating a width of not much more than twelve miles as what she had in mind. Moreover, this view of the Swedish claim is strongly confirmed by M. Löfgren, the Swedish Minister for Foreign Affairs, in his opinion on the status of Laholm Bay. (See Annex 43 and Jessup, *Territorial Waters*, pp. 413-424.) Apart from coastal islands, Sweden appears to join the headlands of particular

bays, not arbitrarily selected extreme points. Thus M. Löfgren, writing in 1925, said (*ibid.*, p. 417):

> "In general, the outer limit of the territorial waters *will be parallel with the coast's main outline*, so that—with the reservations which will be given below—bays and gulfs which are included in the land territory belonging to one and the same State will be regarded as this State's water territory."

He then went on to make it plain that, even in regard to bays, Sweden relied primarily on "century-old custom" where the bay exceeded certain unspecified dimensions.

193. Poland, no doubt owing to her brief existence as a separate State, had not promulgated any decrees concerning her territorial waters before 1926. The Polish reply to the *questionnaire* (*Bases of Discussion*, p. 182) mentioned extreme points on the ordinary coasts but it also treated bays as a special case and only contemplated the enclosure of bays as national territory "Should the shores of a bay opening out into the sea be *so close to each other that the bay is obviously under the sovereignty of the coastal State.*" Clearly the Polish reply did not have in mind anything like Norway's extreme point notional coast line. In any case Poland did promulgate a decree *after the 1930 Conference*. The base-lines which she then prescribed in her law of 1932 were:

> *Article 1.* "La limite des eaux territoriales de l'État est formée par la ligne parallèle à la côte et la frontière des eaux intérieures à une distance de trois milles marins jusqu'au point situé...."
>
> *Article 2.* "Le golfe de Puck, fermé par la ligne reliant le cap de Hel au cap de Redlowo, fait partie des eaux intérieures de l'État."

We can only speculate whether the Polish reply before the conference failed to give clear expression to Poland's views concerning the existing law or whether this young State formed the view at the 1930 Conference that international law forbids the joining of extreme points except in the case of particular bays.

194. Nor does the Soviet Union's reply suggest a general adherence to the extreme point line. The passage reads (*Bases of Discussion Supplement* C.74 *(b)*. M.39 *(b)*. 1929.V):

> "Les lignes mentionnées dans la législation ou dans les traités de l'Union sont calculées, soit à partir de la laisse de basse mer, soit à partir des frontières des eaux intérieures, soit enfin à partir des points les plus éloignés des rochers émergeants."

It is to be remembered that it was against the application of this Russian practice in northern waters Norway herself protested in 1923.

195. Next, the Norwegian Government relies on the phraseology of the observations of the Preparatory Committee explaining its

choice of the low-water mark rule. The material paragraph of the passage cited in paragraph 299 of the Counter-Memorial runs :

> "The majority of the States which have supplied information pronounce for the first formula [1], which has already been adopted in various international conventions. The second formula would necessitate detailed information as regards the choice of the salient points and the distance determining the base-line between these points. The replies received do not furnish such details. In these circumstances, the first formula is the only one which can be adopted."

It is claimed in the Counter-Memorial that the rule that the base-line follows the tide mark (hereafter called the "tide-mark rule") is not binding on all States because, apart from the preference of the majority, the only reason given in its favour was the fact that it had already been adopted in certain international conventions. It is enough to say that the Norwegian Government in seeking to make this deduction from the observations of the committee is simply declining to ask itself why the majority—the very large majority—favoured the tide-mark rule. The reason is that by 1930 this rule had come to be regarded as the settled rule of almost all States. But the Norwegian Government also says that the Preparatory Committee, in failing to keep the headland method as part of the basis of discussion, is not to be thought to have condemned it as illegal because the committee merely said that this method "nécessiterait certaines précisions" which the replies did not give. It has already been pointed out that the Preparatory Committee would scarcely be expected to show such bad diplomatic manners as in terms to condemn as illegal the method of tracing base-lines advocated by Norway and that its own opinion excluding that method from consideration is to be found in its report. The polite formula used in its observations on Basis of Discussion No. 6 for the obvious purpose of rejecting the method advocated by Norway is now converted by the Norwegian Government to evidence of an admission of the legality of that method !

The argument answers itself and such is also the view of M. Gidel, who commented on the above-cited paragraph of the Preparatory Committee's observations with gentle irony and in a very different sense from the Norwegian Government (*op. cit.*, p. 509) :

> "On ne saurait dire mieux et énoncer plus élégamment un avis. Lors des travaux de la conférence elle-même la sous-commission n'a pas non plus donné son agrément à l'adoption comme méthode de principe de la méthode des lignes droites (headland theory ou tracé polygonal). Elle a estimé qu'il ne devrait y être recouru que dans des cas particuliers, spécialement lorsqu'il s'agit de baies."

[1] I.e. the rule that the base-line is the line of "low tide following the sinuosities of the coast" (see para. 189 above).

196. The Norwegian Government lastly urges in paragraph 300 that the fact that the low-water mark rule was adopted in the report of Sub-Committee No. II is no evidence that it is a general rule binding on all States or that international law condemns the headland method favoured by Norway. It largely repeats its arguments concerning the value or lack of value of Sub-Committee No. II's report. It complains that the report was not discussed in the Second Committee, was not adopted even on a provisional basis and only constituted a study to bring about a future general convention. These arguments misconceive the relevance of the records of the 1930 Conference which provide evidence not of a new rule binding on Norway, but of the general acceptance of the low-water mark rule as an existing rule of international law. They have already been answered at length in paragraphs 175-179 above.

The Norwegian Government complains in particular that the joint Norwegian-Swedish amendment proposing the headland method was sent to Sub-Committee No. II for study, but was never discussed in a plenary session of the Second Committee owing to the abrupt termination of the conference. In consequence, claims the Norwegian Government, it is impossible to interpret the work of the 1930 Conference as having condemned the headland principle. Another view of the outcome is that the termination of the work of the conference saved the headland method from being expressly and formally condemned. Some so-called principles are, however, so inadmissible in modern international law as to condemn themselves, and one of these is the headland theory in the extravagant form in which it is invoked by Norway. Some of the considerations which led Sub-Committee No. II to reject the Norwegian-Swedish proposal are forcefully explained by Gidel (*op. cit.*, Vol. III, pp. 507-508):

> "Les délégués de ces États ont fait valoir pour appuyer ce système la considération qu'il était susceptible de s'appliquer à toutes les configurations de côtes et à tous les cas particuliers, tels que littoral creusé de baies ou parsemé d'îlots, alors que le système traditionnel doit trouver des règles particulières pour chacun de ces cas. En admettant que ce soit vrai, cette simplicité apparente n'existe qu'au prix de l'arbitraire de l'État intéressé ; il n'est plus besoin de règles générales lorsque chacun assume de se fixer à lui-même celles qu'il entend suivre.
>
> C'est une première et grave critique contre le système. Mais le mérite que l'on veut faire à ce système de répondre à tous les cas n'est aucunement fondé ; contrairement à ce qu'affirment ses partisans, le tracé polygonal n'est pas susceptible d'une application générale. Il ne peut être pratiqué que si la côte présente des concavités ; partout où elle est convexe il faut y renoncer. Comme l'observe Boggs, la méthode de construction polygonale est rendue d'une application pratique difficile par le fait qu'il y a des convexités et des concavités des côtes de toutes sortes entre lesquelles le passage se fait par des dégradations insensibles.
>
> Enfin — et c'est là une dernière critique —, pratiquement cette méthode du tracé polygonal ou headland theory augmente d'une

manière indue les eaux intérieures, ce qui a pour conséquence finale une extension corrélative de la mer territoriale et la réduction des espaces de haute mer."

197. The Norwegian Government, in challenging the fundamental character of the tide-mark rule, challenges a rule which was adopted as a matter of course by the Institute of International Law and the International Law Association in 1894-1895 and again by both bodies in 1926-1928, by the American Institute in 1927, by the Japanese Institute in 1926, by the Harvard Research Committee in 1929, by the Preparatory Committee of the League of Nations in 1926 and by Sub-Committee No. II in 1930. This is a formidably consistent body of doctrine covering a period of over 50 years. Norway seeks to get rid of it by saying that the opinion of jurists is only admissible to the extent that it reflects existing law and by alleging that the suggestion at the 1930 Conference of the need for further official information in regard to base-lines shows all the practice of States in regard to base-lines to be purely conjectural. The idea that most of the work of jurists is nothing but an invention of their own genius—an idea which recurs elsewhere in the Counter-Memorial—is quite fanciful when applied to the best twentieth-century writers. Certainly no one can accuse Gidel of mere speculation whose whole work is based on a study of practice. Gidel, whose authority is invoked in aid of the Norwegian contention by the simple expedient of misrepresenting his views, says in the passage reproduced in paragraph 186 above with absolute firmness and without argument that there are no fundamental differences of *practice* as to the base-line being the low-water mark or as to the cases when geometrical construction is to be used instead of the low-water line. And yet throughout his three volumes Gidel is always at pains to examine conflicting practice *where any conflict exists.*

198. There is, of course, abundant evidence of the general adoption of the low-water mark in practice quite outside the replies of governments to the Preparatory Committee's *questionnaire*, in the shape of published neutrality and fisheries legislation and constitutional laws declaring territorial limits. It would waste the time of the Court to retail all the evidence additional to that in the records of the 1930 Conference, but attention may perhaps be drawn to material in the Harvard Research Draft (*American Journal of International Law* (1930), Vol. 23, pp. 254-257). The decrees of Chile (1857), Argentine (1871) and Ecuador (1889) (cited on p. 257) are of particular interest as showing the length of time during which the rule has been adopted in the practice of some Latin-American States which did not reply to the Preparatory Committee's *questionnaire*.

199. The Norwegian Government concludes its argument concerning the tide-mark rule by drawing attention (in para. 303) to

the distinction between the physical and political coast line emphasized in North Atlantic Fisheries Arbitration of 1910 and the Alaska Boundary Arbitration in 1903. This distinction does not, however, carry the matter any further. The United Kingdom does not contend that the physical line of the coast—legally fixed at low-water mark—constitutes the base-line along every part of every coast. It agrees that the base-line in certain circumstances departs from the physical shore line (e.g. across bays). But it insists that these departures are made by geometrical construction from the true physical coast under rules laid down by international law. The whole controversy in the present case is whether the "political coast" of Norway is to be fixed at her own choice or by the rules of international law. It is to be observed that the passage from the United States Argument in the Alaska case (cited in para. 303 of the Counter-Memorial) speaks of the political coast line being *superimposed* on the actual coast line *by operation of international law*.

The "headland theory" and international law

(Paras. 304-306 of the Counter-Memorial)

200. Norway contends that modern international law does not forbid the superimposition on the geographical coast line of a political coast line having no contact with the actual coast except at extreme points selected by the coastal State. As this contention is irreconcilable with modern practice and with the whole basis on which the 1930 Conference worked, Norway invokes a ghost from the sixteenth century, James I's King's Chambers, which indeed is the nearest—perhaps the only—"precedent" for the present Norwegian claim. The clanking of the chains of this ghost from the days of *mare clausum* may have been heard for a moment when Sir William Robson spoke in 1910 but, as is explained in paragraphs 132 to 137 of the Memorial, King James's claim had by then been long and truly dead.

201. Fauchille (*Traité de Droit international*, Book I, Part II, p. 198), as paragraph 306 of the Counter-Memorial states, refers to the nineteenth-century "headland of bays" theory as a form of "King's Chamber" claim. (The headland theory of the nineteenth century in reality was a different principle confined to indentations and not contemplating the simple joining of selected extreme points.) However the King's Chamber claim (and with it any headland theory not confined to reasonable bays of reasonable width) was utterly condemned by Fauchille:

> "Elle ne saurait juridiquement prévaloir: elle est une atteinte manifeste à la liberté des mers."
>
> "En dépit des promontoires qu'une côte présente, c'est donc le long de son rivage même, à la laisse de haute ou de basse mer, que doit être comptée la distance de la mer territoriale."

It is true that Fauchille then admits exceptions to the tide-mark rule in the case of "petites anfractuosités" when he allows that a line may be drawn between the points of the indentation. It is also true that he cites the Norwegian coast as an example, mentioning, indeed, the 1869 Decree. But in his next paragraph (p. 199) he shows clearly that he is taking the orthodox view that bays of small extent constitute an exception to the tide-mark rule :

> "Mais il se peut que, tout en n'ayant pas en largeur l'étendue d'un littoral séparé par deux promontoires, ces échancrures et ces fjords aient une dimension qui en fasse de véritables baies et de véritables golfes. Sera-ce encore, dans ce cas, à partir de la ligne de leur ouverture qu'on devra mesurer la distance de la mer côtière ? La condition des baies et des golfes est soumise à des règles particulières, et celles-ci feront l'objet de développements spéciaux (*Renvoi.* V. nos 516 et s.). Ce sont de même des principes particuliers, dont il sera aussi ultérieurement parlé, qui régissent les anfractuosités constituant des embouchures de fleuves *(Renvoi)*."

And then he refers the reader to his section on bays where he examines the evidence for the 10-mile rule and the claims to historic bays of larger dimensions. Fauchille's authority can hardly be invoked in support of the legality in modern international law of a general headland principle such as that which Norway now puts forward when he speaks (p. 380) of the 10-mile rule for bays as "le principe qui paraît aujourd'hui dominant dans la science et le droit conventionnel". Fauchille in fact *condemns* any such headland principle as contrary to the principle of the freedom of the seas and takes the orthodox view of allowing 10-mile bays plus certain historic claims.

Conclusions on base-lines

(Counter-Memorial, para. 307)

202. The United Kingdom Government accordingly submits that :

(a) There does exist a general rule of international law requiring a State in principle to delimit its maritime belt by reference to the tide mark on its physical coast and that any departures from this base-line have to be justified as falling under one of the specifically recognized exceptions.

(b) Norway is bound by this general rule except to the extent that she can bring herself within the permitted exceptions or can establish an historic right entitling her to exceptional maritime territory.

(c) International law does specifically condemn the method of constituting an imaginary coast line by the joining of lines between extreme points selected arbitrarily along the coast.

Norway herself maintains that the true principle of maritime territory is that a State is entitled to such adjacent waters as can be considered accessory to the *terra firma*. What becomes of the *terra firma* and what meaning has her principle if the *terra firma* consists of nothing but widely separated pin-points of land joined together by invisible notional lines ? As the tide-mark rule, however, is merely the actual *terra firma* defined in terms of law it is no wonder that in international practice this is the fundamental rule for determining the base-line of territorial waters. The exceptions to the rule are cases where the configuration of the shore so far encloses areas of the sea as to place the areas in fact and in law within the coast line of the State. The United Kingdom Government submits that in modern international practice departures of the political coast line from the line of the actual *terra firma*, frequent though they may be in heavily indented coasts, are a matter not of choice but of law. Such departures from the tide-mark line are inadmissible unless justifiable as an exception recognized by international law.

The relation between the fundamental rule of the tide mark and its exceptions

(Paras. 308-316 of the Counter-Memorial)

203. The Norwegian Government, in paragraphs 308 to 316 of the Counter-Memorial, contends that, even if the rule of the low-water mark along the coast is an established rule of customary law, still its relation to the rules for bays, islands, etc., is not that of a principal rule to its exceptions. In substance, the tide-mark rule and the other rules are represented to be simply separate rules dealing with different types of physical configurations.

In paragraph 311 the Norwegian Government concedes that the various draft codes of learned societies appear to state the tide-mark rule as the general rule which is to receive the widest application. It suggests, however, that this phenomenon is easily explained by the facts that these societies were less concerned to state the existing law than to guide its evolution, and that after 1926 they had in their mind's eye the semi-legislative task of the 1930 Conference. Here again is the naïve picture of the jurists of all the learned societies proposing the same principal rule which is said by Norway to have no foundation in practice, without giving the slightest hint that there was anything novel in their proposal. As to the drafts of learned societies between 1926-1930 being particularly affected by the legislative task of the 1930 Conference, it is enough to say that no one could imagine during those years that the 1930 Conference was to have a *carte blanche* to write a new law of territorial waters. On the contrary, everyone supposed that the conference would work on the basis of the existing law. It is curious that Norway finds it unnecessary to explain why all the drafts should formulate the same rule without controversy or why the rule

proposed in 1894-1895 should be the same as in 1926-1929. Nor does she explain why individual writers noted for their attention to State practice, such as Fauchille (para. 201 above) and Gidel (para. 186 above), should equally in their books adopt the rules endorsed by the learned societies. But the contention that learned societies adopted the low-water mark rule as the principal rule *de lege ferenda* is, of course, entirely unfounded, as has already been shown in paragraphs 197 and 198 above.

204. An argument of a somewhat different kind is advanced in paragraph 312 of the Counter-Memorial. It is first said to be a cardinal point in the system contained in the United Kingdom's Memorial that the exceptions to the low-water mark should be limited in number and definite. It is then claimed that in several of the drafts adopted by learned societies the exceptions are not listed exhaustively and that it is difficult to see in these drafts an intention to state the sole exceptions to the rule. The assumptions on which this argument is based are quite unwarranted. The thesis of the United Kingdom Government is simply that the low-water mark along the coast is the principal rule which has to be applied unless a departure from the physical coast line by reason of its geographical configuration is justified by an international custom generally accepted as law. The fact that the exceptions may not all be finally listed or fully defined cannot derogate from the primacy of the principal rule. The most that it can do is to render the establishment of a dubious or ill-defined exception more difficult for the State called upon to justify a particular departure from the physical coast line. Similarly, the fact that learned societies in their drafts may not have finally listed or fully defined the exceptions cannot possibly derogate from the primacy of the rule formulated by them as the principal rule. The most that it could do would be to cause doubt in regard to an omitted or ill-defined exception. In short, this argument for impeaching the primacy of the low-water mark rule is altogether extraordinary.

205. The Norwegian Government, however, has in any event to concede that the report of Sub-Committee No. II at the 1930 Conference does set out both the principal rule of the tide mark and its exceptions with some measure of precision. This awkward fact it seeks to get rid of in the first instance by its usual depreciation of the value of the report as evidence of existing law which has been refuted in paragraphs 169-170 and 197-198 above. It then argues that to deduce the primacy of the low-water mark rule from the verbal form of the report (or from the form of the drafts of learned societies) would be dangerous on the ground that the endorsement of a draft by collective vote is not always the result of a close and penetrating study. And, citing an observation of the United States delegate, made with reference to the work of a different sub-committee, namely, of Sub-Committee No. I, that the texts of the

articles had not been examined in detail, it asserts that this observation applies with even greater force to the work of Sub-Committee No. II.

This argument, viewed simply as a technical criticism of the form of the texts of Sub-Committee No. II and of the learned societies, is not very convincing. Whatever validity the criticism may have in regard to the work of some kinds of committee, it applies least to the work of a committee of jurists who may be expected to pay some attention to the form of their phrases and the structure of their drafts. The learned societies, naturally, contained a galaxy of eminent jurists. Sub-Committee No. II, as already explained, was a technical committee and in fact it was a mixed committee of jurists and hydrographers. So far as concerns the language of the report of Sub-Committee No. II, the formulation of the low-water mark rule and its exceptions bears every trace of deliberate legal drafting.

206. But the Norwegian Government, in paragraph 314 of the Counter-Memorial, attacks the actual text of the report on the ground that the rule is stated to be subject to two exceptions—bays and islands—whereas the report itself shows that the rule does not apply to ports, roadsteads, estuaries or ice-bound coasts. Even if this criticism of the drafting were fair, it would not suffice to undermine the position of the low-water mark rule in the report as the principal rule. But is the criticism entirely fair ? The point dealt with in the rule for ports was how far artificial harbour works may properly count as part of the actual coast line. Treated in this way, the rule for ports did not require a further qualification of the rule of the low-water mark. Again, as the appended "Observation" points out, the rule for roadsteads was not concerned with the base-line at all but with a special extension of the territorial sea [1]. It therefore required no qualification of the base-line rule. No rule was formulated for estuaries clearly for the reason that for legal purposes estuaries are regarded as a form of bay both in international practice and by writers. No further qualification of the base-line rule was

[1] The text of the Observation reads as follows :

"It had been proposed that roadsteads which serve for the loading and unloading of vessels should be assimilated to ports. These roadsteads would then have been regarded as inland waters and the territorial sea would have been measured from their outer limits. It was thought, however, impossible to adopt this proposal. Although it was recognized that the coastal State must be permitted to exercise special rights of control and of police over the roadstead, it was considered unjustifiable to regard the waters in question as inland waters, since in that case merchant vessels would have had no right of innocent passage through them. To meet these objections it was suggested that the right of passage in such waters should be expressly recognized, the practical result being that the only difference between such 'inland waters' and the territorial sea *would have been the possession by the roadsteads of a belt of territorial sea of their own*. As, however, such a belt was not considered necessary, it was agreed that the waters of the roadstead should be included in the territorial sea of the State, even if they extend beyond the general limit of the territorial sea." (Minutes of the Second Committee, p. 219.)

therefore considered necessary than was already covered by the exception for "bays". As to ice-bound coasts, it is a somewhat pedantic criticism that the committee which, in its report, indicated that it had excluded the special question of ice-bound coasts from its draft, should not have also covered the point in its formula for the base-line. Until the rule for ice-bound coasts was decided, its claim to be an exception was equally undecided. Was the drafting of the committee—simply as drafting—so very defective ? Actually, the points on which the drafting is criticized in the Counter-Memorial, when closely examined, only serve to show that Sub-Committee No. II—in whatever way its drafting might be improved —were perfectly aware of the implications of their texts.

207. Finally, in paragraphs 315 and 316 of the Counter-Memorial, two dicta by distinguished men are fired as Parthian shots at the primacy of the lower-water mark rule and both shots go very wide of the target. First, Mr. Miller, the United States delegate, describing the work of the conference in the briefest and most general terms and having referred to the attempt to define "bays" as "rather notable", said "we must still recognize that there are indentations of the coast which may perhaps require special treatment although they are not to be called in a technical sense bays". At best, this statement only means that there may be indentations which escape the definition of a bay and yet require special treatment analogous to that given to bays. If anything, the statement testifies directly to the primacy of the tide-mark rule, since Mr. Miller was afraid that, unless these indentations were specially covered in the convention, no amendment of the base-line would be allowed in their case. In fact, there can be no doubt that he was merely echoing the anxiety of the United States delegation that the exception of "historic bays" should not be absolutely limited to "bays" in the geographical sense but should include historic "sounds". This anxiety again is clear testimony to the primacy of the low-water mark rule. A departure from the physical line of the coast *must be brought within the four corners of an admitted exception.*

208. Secondly, a dictum of Lord Salisbury is wrenched out of its context in a House of Lords debate fifty-five years ago and he is represented as holding the view that there is no general principle applying all along the coast. All he said was that different principles apply in determining the *extent of territorial waters* where there are indentations than where the coast is open. His remark was made as an interjection in debate because he suspected—unjustly as it turned out—one of his fellow Peers of thinking that British legislation could be made to apply to foreign fishermen up to 18 miles off open coasts in Scotland. He had not in mind the base-line question at all nor indeed the distinction between inland and territorial waters. Even so there was nothing in his very general expressions which was inconsistent with the 3-mile limit from shore being the normal

rule to which the "different set of traditions" for bays was an exception.

209. The United Kingdom Government accordingly submits that none of the various arguments advanced in the Counter-Memorial shakes or even touches the position of the tide-mark rule (i.e. the rule that the coast is the base-line) as the primary rule for the delimitation of base-lines to which the rules for bays, islands, etc., are exceptions. The reason is that the position could not in the nature of things be otherwise. Maritime territory, as Norway insists, is an accessory to the coast and inevitably the physical shore line is the primary definition of the coast. The low-water mark rule is the legally accepted definition of the actual line of the coast.

The burden of proof

(Counter-Memorial, paras. 317-327)

Preliminary remarks

210. The Norwegian Government, in paragraphs 317 to 327 of the Counter-Memorial, contests the view expressed by the United Kingdom Government that, to the extent that the base-lines of the Royal Decree of 1935 depart from the principle that the coast is the base-line, the burden lies on Norway to justify the departures as falling within one of the exceptions specifically sanctioned by international law (see para. 67 of the Memorial). The Counter-Memorial correctly states (para. 318) that the question of burden of proof in no way turns on the fact that the proceedings were begun by the United Kingdom by application and that the position in this respect would have been the same if the proceedings had been submitted to the Court by the notification of a special agreement. The position of the parties in this respect is determined by the intrinsic nature of the dispute and not by the external form of the proceedings. It is well to recall that the dispute in the present case is whether a certain area of sea can be reserved to Norwegian fishermen or whether British or other fishermen can fish there ; i.e. whether the waters in the area in question are Norwegian waters or high seas. The Decree of 1935 asserts that they are Norwegian waters, and Norway is enforcing this decree against British fishermen.

Two main arguments summarized in paragraph 327 are advanced in the Counter-Memorial to show that the burden of proof lies in this case on the United Kingdom :

(1) Norway had issued a decree (the 1935 Decree) and the United Kingdom challenges the right of Norway under international law to enforce this decree against British fishermen. The decree is an act of sovereignty and the party which contests the validity of an act of sovereignty is the plaintiff and the

burden of proof rests on that party. Limitations on sovereignty are not to be presumed (para. 318).

(2) The nature of the rules of international law relating to State sovereignty over the sea confirms the conclusion that the burden of proof rests on the United Kingdom (paras. 320-326), because legally and historically these rules appear, so it is said, as restrictions on State sovereignty over the sea and not as the foundation of such sovereignty.

Before dealing with these arguments in turn, the Government of the United Kingdom will make some general observations on the question of burden of proof in this case.

211. The United Kingdom Government, as the party complaining of something Norway is doing, the enforcement of this decree against British fishermen (Norway is not complaining of action taken by the United Kingdom), naturally has the general burden of proof. But this only means that the United Kingdom Government is called upon to establish a *prima facie* case against the legality of the base-lines of the 1935 Decree such as to entitle the Court to hold them invalid in the absence of a satisfactory answer by Norway. It is a trite observation that the "burden of proof" in the sense of the risk of losing the case if nothing further is said to the Court may pass backwards and forwards from one side to the other with the progress of the case. The question of burden of proof arises strictly only on the proof of facts or of special exceptional rights and not in connection with the demonstration of the general rules of international law of which the Court has *ex officio* judicial knowledge. In connection with the demonstration of the applicable general rules of international law, it is perhaps more correct to speak of making a *prima facie* case rather than of discharging burden of proof; and the obligation to discharge the burden of proof of the facts and the necessity of making a *prima facie* case on the law are not burdens of quite the same character, though Norway does not distinguish between them.

212. The basic facts of the present case are largely facts of geography and the terms and effect of the Decree of 1935 which are not susceptible of dispute. The contention of the United Kingdom Government is that, on those facts which are undisputed, the "burden of proof" necessarily passes to Norway, because the United Kingdom has invoked as the main rule of international law governing the delimitation of base-lines, a rule which, in the submission of the United Kingdom, is well settled. This rule which the United Kingdom maintains is well settled is that the base-line is formed by the tide mark along the coast; diverging from this actual coast line only under the exceptions, and within the limits, established by international law. No demonstration is needed that the base-lines of the 1935 Decree do not in any part follow the tide mark along the

coast, for that is demonstrated on the charts submitted to the Court by the Norwegian Government. (Annex 2 of the Counter-Memorial.)

In addition, the United Kingdom has set out in Part II of its Memorial what it conceives to be the accepted rules of international law which govern the exceptions permitting departures of the base-line from the tide mark along the coast. The fact that the almost continuous departures of the base-lines of the 1935 Decree from the tide mark along the coast do not fall within any of these recognized exceptions is demonstrated in paragraphs 123 to 140 of the Memorial. Indeed, such demonstration is scarcely needed because again the fact appears from an examination of the charts submitted by the Norwegian Government. Thus the United Kingdom has proved the facts on which it relies and made a *prima facie* case in law.

It follows that, if the views of the United Kingdom Government concerning the applicable rules of law are *prima facie* correct—and they are strongly supported by the records of the 1930 Conference, by the opinions of writers and by international practice—the legal burden in this case lies upon Norway to justify on prescriptive and historic grounds base-lines which, on the face of them, bear no relation to the base-lines permitted by international law. It is, of course, open to Norway to show, if she can, that the rules of customary law justifying exceptions to the general primary rule that the base-line is the tide mark are wider than they are stated to be in the Memorial, or indeed, to disprove, if she can, that this is the primary rule. Otherwise, it is open to her to discharge the burden of justifying her very exceptional base-lines by proving an historic title to the waters that she claims.

213. In this connection it may be well to recall that no party is under a burden of proving propositions of law by evidence in the same way as he must prove a relevant fact. The Norwegian Government in some parts of the Counter-Memorial seems almost to represent that it is incumbent upon the United Kingdom to prove by evidence, in the same way as a fact, every legal proposition on which it relies. But here another rule comes into play, *iura novit curia*. As was said by the Permanent Court of International Justice in the Brazilian Loans case (Series A/21, p. 124):

> "The Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, etc."

Also, in *the case relating to the territorial jurisdiction of the International Commission of the River Oder* (Series A/23, at pp. 18-19), when the "Six Governments" (the United Kingdom, Czechoslovakia, Denmark, France, Germany and Sweden) complained that Poland did not raise the point that Poland had not ratified the Barcelona Convention until the oral proceedings, the Permanent Court of International Justice, dismissing this objection, said: "The fact that Poland has not ratified the Barcelona Convention not being contested, it is evident that *the matter is purely one of law such as the*

Court should examine ex officio.... The Court will, therefore, pass upon this point and will do so at the outset...." In short, the Court has both the authority and the duty to declare the applicable rules of international law. The duty to declare the applicable rules of international law arises when, and just because, the parties are at issue as to what these rules are. It is certainly no part of the procedure of an international court (or indeed it is thought of any court) that judgment is entered for the defendant party if the plaintiff party fails to demonstrate beyond all possible doubt that its view of the law is right. If that were so and there was any doubt as to the law, the judgment of the Court, in a matter where its view of the law is a precedent of world-wide importance, would depend on the accident whether, for instance, the United Kingdom was complaining of Norwegian interference with British fishermen or the Norwegian Government was complaining because the United Kingdom protected British fishermen from Norwegian attempts to enforce against them a decree which in the opinion of the United Kingdom was unjustified.

The United Kingdom Government, in making these observations, does not seek in any way to minimize its own task in bringing forward satisfactory authority for the propositions of law which it advances. It does so to make clear its dissent from the idea that in the International Court the establishment of international law is a matter of evidentiary proof by the individual party relying on the law and the Court's decision on the law depends on the accident which party happens to be the aggrieved party. In the "*Lotus*" *case* (Series A/10) the Court went out of its way to say at the end of its judgment :

> "The Court .... observes that, in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement" (p. 31).

214. The United Kingdom Government thus recognizes that, as claimant, it has a general burden of proof as to the facts which it alleges. It also recognizes that it has an obligation to assist the Court so far as it can in the ascertainment of the law and to support its propositions of law with any necessary authority. It rejects, however, the idea that it has any general burden of proof in regard to the applicable law. Something in the nature of a burden of proof in regard to the law may indeed arise from the status of a particular rule of law in relation to other rules. When the rule which is contended for is in opposition to a primary rule, as, for example, the alleged régime for archipelagos is in opposition to the primary rule of the low-water mark, then the practice of the Court suggests that

the primary rule holds good unless the existence of the exception has been satisfactorily established.

The presumption against restrictions on the sovereignty of a State (Counter-Memorial, paras. 318-319)

215. It is now convenient to consider the first of the two Norwegian arguments summarized in paragraph 210 above and in paragraph 327 of the Counter-Memorial and developed in paragraphs 318-319 of the Counter-Memorial. Norway bases this argument on the principle that restrictions on the independence of States are not to be presumed, citing the "*Lotus*" *case* as authority for the principle, and says that this principle applies when an act of sovereignty is in question, i.e. the 1935 Decree. This means, as explained in paragraph 213 above, that, under this argument, if there is any doubt as to the law, the decision of the Court will turn on what is almost an irrelevant consideration. Is the United Kingdom the aggrieved party or is Norway the aggrieved party? In fact, it is Norway who has issued her decree and enforced it (without justification in the United Kingdom's view) against British fishermen. Therefore, any doubt as to the law would—on Norway's hypothesis—operate in her favour. But supposing the United Kingdom had by an act of sovereignty on its part (an act of sovereignty includes, Norway says, a law, decree, judgment, or administrative measure) directed British fishery protection vessels to protect British fishing vessels in the disputed area (a perfectly legitimate action if the area in question is high seas) and Norway had had recourse to the Court because she complained of the British action—then any doubt as to the law would have operated in favour of the United Kingdom. Therefore, because the United Kingdom has preferred to come itself first to the Court instead of forcing Norway to do so—because in fact the United Kingdom has acted in the most friendly and least provocative way towards Norway—she is placed, if there is any doubt as to the law, in a disadvantageous position. Such a conclusion seems obviously wrong. Yet it is inevitable if the present Norwegian contention is right. In fact this contention is, it is submitted, entirely mistaken in law.

The statement by the majority of the Court in the "*Lotus*" *case* that "restrictions upon the independence of a State cannot be presumed" followed its declaration that "the rules of law binding upon States emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law". Whatever criticisms may be made of the terms of this famous declaration, it is clear that, as all rules of international law impose more or less restrictions on the independence of individual States in the interests of each other, the presumption against restrictions on independence can only operate *within the areas of State activity left in principle by international law to the discretion of the State.* Thus, if State A has taken action within the sphere of its

domestic jurisdiction under general international law either by means of restricting the activities of foreigners in its territory or by means of a judgment delivered by its courts in proceedings brought against a party (or a ship) which is present in its territory, and State B complains that the action violates a treaty or some exceptional rule of international law regarding the exercise of judicial jurisdiction, no doubt the maxim that restrictions on sovereignty are not presumed is applicable. But the present case relates to Norwegian action in relation to an area of sea and *the whole question at issue is whether that area is under Norwegian jurisdiction at all.* That the presumption in favour of acts of sovereignty and against restrictions on a State's independence cannot apply to this case is clear from the immediately following passage of the Court's judgment in the "*Lotus*" *case* itself.

The Court, which was dealing with the legality of the exercise of criminal jurisdiction by Turkey on Turkish territory against a French national in regard to a collision between a French vessel and a Turkish vessel on the high seas, said :

> "Now the first and foremost restriction imposed by international law upon a State is that—*failing the existence of a permissive rule to the contrary*—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial ; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." (A/10, pp. 18-19.)

The Court went on to hold that there was no such general restriction in regard to the exercise of jurisdiction by a State *within its own territory* but only the limited restrictions of specific prohibitive rules and then added :

> "In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction ; *within these limits, its title to exercise jurisdiction rests in its sovereignty.*" (A/10, p. 19.)

It was on this basis that the Court held that, to invalidate the exercise of jurisdiction by Turkey, a specific prohibitive rule must be established excluding a State's exercise of criminal jurisdiction against a foreigner in regard to incidents on the high seas. The correctness of its ultimate decision that France had failed to establish such a specific prohibitive rule has been much debated. But whether the decision was right or wrong, it is clear that, if there had been a relevant rule of international law imposing a general restriction on a State's discretion to exercise jurisdiction in regard to collisions on the high seas, it would have lain with Turkey to justify her act under a specific permissive rule of international law.

216. It is also to be observed that Turkey's act of sovereignty, the exercise of jurisdiction over a vessel lying alongside in a Turkish

port, indisputably took place within Turkish territory and was limited in its effects to Turkish territory. It is one thing to raise a presumption against restrictions on the exercise of its sovereignty by a State wholly within its territorial boundaries. It is a very different thing to raise such a presumption when the act of sovereignty is not performed within the undisputed territorial boundaries of the State concerned. The Court in the *"Lotus" case* expressly condemned the exercise of jurisdiction against a foreign vessel on the high seas in the following passage (Series A/10, p. 25) :

> "It is certainly true that—apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law."

Thus, the fundamental principle of international law comprised in the freedom of the high seas imposes a general restriction on the action of a State as against other States, with the result that an exercise of sovereignty inconsistent with that general restriction has to be justified under a specific permissive rule.

217. How, then, do the above considerations apply in the present case ? Norway apparently claims that the Royal Decree of 1935 was a purely domestic exercise of Norway's sovereignty within Norwegian territory and therefore within the area of discretion left to Norway by international law. But the whole question is whether the area to which the decree applies and in which it is enforced against British fishing vessels *is* within Norwegian sovereignty. It was promulgated for the express and sole purpose of defining the limits of Norway's claims to exclusive fisheries as against foreign fishermen and foreign States. Its effect was to impose restrictions on the independence of other States and to declare that in the areas of sea covered by the decree vessels would be treated as subject not to the exclusive authority of their flag State but to the overriding authority of Norway. In these circumstances the United Kingdom Government submits that it is impossible for Norway to try and support the decree by invoking a presumption against restrictions upon the independence of States.

Furthermore, so far as concerns the rules for the delimitation of territorial waters, which are the rules in question in the present dispute, the 1935 Decree operates in a sphere where there is, as the United Kingdom Government submits, a settled rule of international law that territorial waters are in principle to be measured from the

tide mark along the coast. This principal rule, defining the legal coast line of a State, to which its territorial sea is accessory, imposes a general restriction on the power of a State to determine its base-lines for the measurement of its territorial sea. Under the principles laid down in the *"Lotus" case*, a municipal decree infringing this general restriction, if challenged, has to be justified by reference to a permissive rule of international law authorizing the infringements.

217 A. Accordingly, the first of the two arguments by which Norway seeks to place on the United Kingdom a burden of establishing with absolute certainty the applicable rules of customary law fails. With the first Norwegian argument fails the whole Norwegian contention that a special burden lies upon the United Kingdom in regard to the law. For the second Norwegian argument, that legally and historically the applicable rules of international law appear as restrictions on State sovereignty over the sea and not as the foundation of such sovereignty, is advanced simply for the purpose of bringing into play the first argument based on the principle that restrictions on the sovereignty of States are not to be presumed. It has been shown that there is no room for the application of the latter principle in the present connection. Indeed, it is not easy to see how Norway can consistently argue that a burden lies on the United Kingdom to establish the applicable law, when all that she can say about the relation between the rights of a coastal State and the freedom of the seas, putting the matter as favourably as possible for herself, is :

> *"Ces deux principes sont juridiquement égaux.* C'est leur conciliation (et non la subordination de l'un à l'autre) qui donne la clef du droit international moderne de la mer."

In other words, according to Norway's own thesis, the rights of all States on the high seas are as much entitled to be protected against limitation as the rights of Norway in her adjacent waters.

The United Kingdom Government, for all the above reasons, submits that the principles laid down in the *"Lotus" case* and the intrinsic nature of the issues in the present case, so far from imposing any special burden on the United Kingdom in regard to the law, support its own contention that it is for Norway to demonstrate to the satisfaction of the Court the principles by which her most exceptional base-lines are to be justified.

A presumption in favour of the freedom of the seas (Counter-Memorial, paras. 320-326)

218. *A fortiori* does it lie with Norway to demonstrate the principles by which her most exceptional base-lines are to be justified if the United Kingdom's contention in paragraphs 65 and 66 of the Memorial holds good, namely, that the dominant principle of maritime law is the freedom of the seas. If it is right to speak of a

presumption in connection with the establishment of the law, there certainly seems to be every reason for the presumption lying in favour of freedom of the seas and of the rights of the community of States. The Norwegian Government, however, in paragraphs 320-324 of the Counter-Memorial, disputes this contention primarily by the argument that to raise a presumption in favour of the freedom of the seas as against the sovereignty of the coastal State is to disregard the historical evolution of the law of the sea. It is said that State claims to maritime territory ante-date the doctrine of the freedom of the seas and that the territorial sea belonging to States to-day represents what has survived from much larger claims. This historical argument has already been examined in paragraphs 107-116 above, where it was pointed out that the fact that a State's claims to maritime territory have enormously contracted in the past 250 years in face of the doctrine of the freedom of the seas is scarcely a convincing reason for supposing that the freedom of the seas and State rights to coastal waters are norms of equal strength. Moreover, it is historically a dubious proposition that the modern territorial sea is properly to be regarded as a mere survival of greater claims. Some of the principal roots of the modern concept, for example, the cannon-shot rule and the 3-mile limit, have no contact with the ancient claims. It seems rather that the growth of maritime commerce and naval power induced an entirely different attitude on the part of States in regard to maritime territory during the eighteenth century. The claims existing to-day appear to be the consequence of a completely new orientation in the attitude of States towards rights in adjacent seas, under the influence of these facts and of the appeal of the doctrine of the freedom of the seas. This seems to have been the case even with the Scandinavian States which felt able to maintain a claim to the distance of the range of vision only for a very brief period before settling upon the much smaller limit of one league.

219. The relevant point now, however, is not what may be the truth concerning the still somewhat obscure history of territorial waters but whether to-day the dominating principle in maritime law is the freedom of the seas. The upsurge of this principle in the eighteenth and nineteenth centuries until it became the predominant principle of the law of the sea was due precisely to the strong reaction of States, as international commerce developed, against claims to the exclusive use of areas of sea. The principle of the freedom of the seas was the foundation of the award in the *Behring Sea Arbitration* and its ascendancy in the latter part of the nineteenth century is stressed for example by Calvo. Having dealt with territorial waters, bays, straits, etc., he adds (*Le Droit international*, Vol. I, Section 384) :

> "Au fond, il faut bien le reconnaître, toutes les questions que nous avons discutées plus haut se rattachent directement ou

aboutissent forcément à un seul et même principe fondamental, celui de la liberté des mers."

220. To-day it is recognized that the freedom of the seas carries certain dangers owing to technical progress and that international co-operation in the regulation of the seas is necessary to overcome these dangers. But the principle of the predominance of the rights of the community of States over exclusive claims by single States has never been relaxed and remains the fundamental principle. In this connection the United Kingdom Government cited in its Memorial the following sentence from Gidel to support its contention that there is a presumption in favour of the freedom of the seas :

> "L'idée qui domine le droit de mer est l'idée de la liberté de l'utilisation licite et normale des espaces maritimes ; toute restriction inutile à cette liberté doit être évitée." (*Op. cit.*, Vol. III, p. 674.)

It is said in paragraph 285 of the Counter-Memorial that, by giving the above sentence without the rest of its context, the United Kingdom Government has misrepresented Gidel's meaning. It is asserted that Gidel was only emphasizing the need to avoid useless restrictions on the freedom of the seas and was not laying down a presumption in favour of the latter principle. What then was the context ? Gidel, it is true, was arguing for a different rule concerning islands from that accepted by Sub-Committee No. II. He was arguing for the stricter rule that an island should not carry territorial waters, if not capable of occupation and use. He was arguing that even a permanently dry rock possessed by a State should not, in those circumstances, entitle it to territorial waters in respect of the rock. And why did he advocate this strict rule against the coastal State ? He advocated it for no other reason than that he considered the dominating principle to be the freedom of the use of the seas.

221. But this was by no means the only occasion on which Gidel in his book objected to methods of delimiting coastal waters on the ground that they involved encroachments on the high seas. Another example is to be found in his criticism (cited paragraph 196 above) of the Norwegian-Swedish proposal for an extreme points base-line where he ended with the words :

> "Enfin — et c'est là une dernière critique, — pratiquement cette méthode du tracé polygonal ou *headland theory* augmente d'une manière indue les eaux intérieures, *ce qui a pour conséquence finale une extension corrélative de la mer territoriale et la réduction des espaces de haute mer.*"

A third example is to be found in a passage dealing with a suggestion for the extension of the base-line off ice-bound coasts (*op. cit.*, Vol. III, p. 530) where he said : "A quoi on peut objecter que toute extension du territoire de l'État vient réduire d'autant la mer libre...."

The fourth and most emphatic statement by Gidel affirming the primacy of the principle of the freedom of the seas is in the passage concerning the burden of proving an historic title which is set out in full in paragraph 143 of the Memorial. He there said (*op. cit.*, Vol. III, p. 632): "le principe de la liberté de la haute mer, qui demeure *la base essentielle de tout le droit international public maritime*, ne permet pas de faire peser le fardeau de la preuve sur les États au détriment desquels la haute mer sera réduite par l'attribution de certaines eaux en propre à l'État qui les réclame comme telles". It certainly seems therefore that in regard to the delimitation of coastal waters Gidel considered the principle of the freedom of the seas to be the fundamental norm which is only displaced where there is a *legally justifiable* claim to maritime territory on the part of a coastal State.

222. The fact that international law recognizes the right of a State to some maritime territory does not in the least detract from the predominant force of the principle of the freedom of the seas. On the contrary this fact is the very occasion for insisting on the predominance of the principle which guards the rights of the community of States against excessive claims to exclusive use of the sea by individual States. The United Kingdom Government submits that there is a general presumption in favour of the seas being free and that this presumption is displaced in favour of a coastal State only by showing that the particular areas of the seas fall within its sovereignty under generally accepted rules of international law, including the rule which allows historic claims.

Bays

(Counter-Memorial, paras. 328-394)

The problem of definition

(Counter-Memorial, paras. 331-335)

223. The Norwegian Government (after in paragraphs 328-330 summarizing the United Kingdom argument) criticizes the United Kingdom Government's thesis that bays constitute an exception to the rule of the low-water mark on the ground that there is an initial difficulty in defining the legal concept of a bay. In paragraphs 331 to 335 of the Counter-Memorial it maintains that there is no formula for defining a bay with sufficient backing to constitute the formula a rule of international law. In particular, it criticizes the view expressed by the United Kingdom in paragraph 94 of the Memorial that

> "There can be no real doubt, it is contended, concerning the general sense in which the word 'bay' is used in international law. It denotes a well-marked indentation whose penetration inland is in

such proportion to the width of its mouth as to constitute the indentation more than a mere curvature of the coast."

The chief ground of this criticism is that, by isolating the element of proportion between penetration into the land and width of mouth and by making it the decisive test, the United Kingdom Government gives to the definition a restrictive meaning which international practice and decisions of international tribunals are said not to justify.

224. Paragraph 332 of the Counter-Memorial cites extracts from a passage in the award of the tribunal in the *North Atlantic Fisheries Arbitration* to support the above criticism. The tribunal there said (Wilson, *Hague Arbitration Cases*, p. 186) :

> "The Tribunal is unable to understand the term 'bays' in the renunciatory clause in other than its geographical sense, by which a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally."

The next sentence, which is not included in the Counter-Memorial, goes on :

> "The negotiators of the Treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of 'bays', they most probably thought that everybody would know what was a bay."

So far, therefore, the tribunal seems rather to have shared the view of the United Kingdom Government expressed in the Memorial, that there is not much doubt about the general meaning of the word "bay".

225. It is also to be observed that in the former of these two sentences, which the Counter-Memorial speaks of as the tribunal's only definition of a bay, the critical words are "an indentation of the coast, *bearing a configuration of a particular character*", etc. It is true that, as the Counter-Memorial points out, the tribunal said in the sentences which followed :

> "In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented ; the special value which it has for the industry of the inhabitants of its shores ; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general."

But even here the first consideration stated is the element of proportion. Whether the other considerations mentioned really have much to do with the concept of a bay it is permissible to

doubt, and there is nothing to suggest that in their award the tribunal took as their test any element other than configuration. The other considerations mentioned by the tribunal are undoubtedly some of the reasons why bays (i.e. any bay) under certain conditions are admitted by international law to be within the national territory of a State. The base-line for territorial waters running across the mouth of the bay is an exception to the general rule that it follows the coast. This may well have been what was primarily in the mind of the tribunal, for in an earlier passage it had said, in rejecting the contention of the United States that the 3-mile limit should be strictly and systematically applied in bays (meaning that the base-line should in bays follow the ordinary rule) *(ibid.*, p. 182):

> "But the Tribunal is unable to agree with this contention
>
> *(a)* Because admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the 3-mile rule."

Here, again, there is a strong suggestion that the critical factor is the proportionate penetration into the land. The tribunal, it may be suspected, experienced the same difficulty as the 1930 Conference in giving geometrical precision to the concept of a bay while recognizing that the clue to the definition lay in the element of proportion.

226. The Counter-Memorial in paragraph 334 also cites a passage from the *Californian Case Ocean Industries, Inc.* v. *Green* et al. (Hudson, *Cases and Other Materials on International Law*, p. 447), claiming that the passage shows the Supreme Court of California to have relied on a lexicographer's definition without regard to the element of proportion. The claim is decidedly unconvincing since, as the cited passage shows, the Court *stated the proportions of the bay with some exactness as its only reason for saying that the bay satisfied the definition of a bay* [1].

So far, therefore, the tribunals, whose dicta are cited to support Norway's criticism of the formula suggested in the Memorial also seem rather to share the United Kingdom's view that the key to

[1] In fact the depth of the bay was about half the width at the opening.

the definition of a bay lies in the proportion between depth of penetration and width at the mouth.

227. The Norwegian Government has, however, another objection to the suggested formula. The formula is said to be altogether too vague a definition if bays are to be considered an "exception" in the juridical sense. In that case, so the Counter-Memorial contends, it would be necessary to find a geometrical formula expressing precisely the required proportion between the depth of penetration and width at the mouth. The United Kingdom Government is indeed said to have admitted the need for giving such precision to the formula, but this is entirely untrue in the sense which the Norwegian Government is trying to extract from the language used in the Memorial. The Norwegian Government is now seeking to maintain that without a geometrical formula to define with absolute precision the exception "bays", there can be no restrictive rule of international law limiting claims to bays. The United Kingdom Government dissents absolutely from this proposition. The word bay has long been used in international practice and has frequently been interpreted by judicial tribunals with a sufficient understanding of its general and legal meaning. It is also constantly referred to by jurists in its particular aspect as an exception to the rule of the low-water mark without any doubt as to the general scope of the exception. The need for some further precision, which is recognized by the United Kingdom and which was recognized by Sub-Committee No. II, does not concern the general nature of the "exception" nor the general scope of its application. It only concerns the need to mark out the boundary fences of the exception more exactly *so as to exclude the possibility of encroachments on the high seas through unscrupulous use of the exception.* It was only from this point of view that the question of a geometrical formula was discussed in 1930 by Sub-Committee No. II, as its report indicates in the sentence: "Most delegations agreed to a width of 10 miles, *provided a system were simultaneously adopted under which slight indentations would not be treated as bays.*" It is also from this point of view that Gidel examines the problem of defining a bay. (*Op. cit.*, Vol. III, pp. 583-593.)

228. The United Kingdom Government does not claim that its modest formula represents the last word that can be said on the definition of a bay or that it gives absolute precision to the meaning of a bay. It merely suggests that its formula contains the essence of what in law is meant by a bay. Nor does the United Kingdom Government contend that its formula has the specific status of a rule of international law. The rule accepted by jurists and established in international practice is that bays constitute an exception to the rule that the base-line follows the low-water mark all along the coast. The formula suggested by the United Kingdom is merely

a formula to assist the application in practice of this well-established rule of international law.

229. The United Kingdom Government, however, strongly resists, for the reasons already given, the idea propounded in the Counter-Memorial that without a geometrical formula the exception for bays is too vague to constitute a rule of international law at all. Gidel and Boggs, whose language is cited in paragraph 331 of the Counter-Memorial as evidence of the difficulty of distinguishing bays from other indentations, both start from the assumption that there is an established rule of international law governing bays. Gidel, indeed, not only regards bays as an exception to the low-water mark rule, but considers that a rule of international law, restricting the width of bays normally to be admitted within this exception, is "peremptorily proved" by the very existence of the category of historic bays as exceptions to the normal rule. (*Op. cit.*, Vol. III, pp. 536-537.) The rule of international law has not adopted any particular formula, verbal or geometrical.

230. The Norwegian Government in paragraph 335 of the Counter-Memorial entirely perverts the meaning of the last sentence of paragraph 94 of the Memorial. The United Kingdom Government made no kind of suggestion that Norway is bound in these proceedings by the geometrical formula proposed in 1930 by the United States delegation. The United Kingdom Government merely offered itself to accept the application of the formula should any particular indentation prove to be a border-line case. But the United Kingdom Government does strenuously contend that Norway is bound by the generally-accepted rule of customary law which treats bays as an exception to the low-water mark rule and prescribes the conditions under which bays may be included within a State's national waters.

It is permissible again to enquire what has become of the Norwegian Government's concept of law, and especially international law, as something which "s'abstient souvent de concrétiser les notions normatives dont il se sert" (para. 240 of the Counter-Memorial). The suppleness considered commendable by the Norwegian Government in the extremely vague phrase "waters accessory to *terra firma*" is apparently to be fatal to the validity of the —comparatively—much more precise rule for bays. The United Kingdom Government holds a very different view. Precision is in the nature of things desirable in the rules governing the extent of coastal waters for the avoidance of disputes. But, to say that lack of absolute precision in the application of a rule means no rule of international law at all, is to introduce anarchy and to go against the system of international law as it is found in international practice. Where governments in their practice, municipal tribunals in their decisions and the Permanent Court of Arbitration in the 1910 Arbitration have not shrunk from deciding what is meant by a bay, the United Kingdom Government submits that the International

Court of Justice need show no less readiness to appreciate the geographical facts and decide what is in law a Norwegian bay.

The width of bays

(Paras. 336-342 of the Counter-Memorial)

Norwegian argument that no rule of international law has been established, either before or after 1910, governing the width of bays

231. The Norwegian Government, in paragraphs 336 to 394 of the Counter-Memorial, contests the thesis of the United Kingdom Government that international law prescribes a 10-mile limit as the rule for determining the territoriality and therefore the base-line of bays apart from historic usage. Indeed it goes much further and denies that there is any general rule of customary law governing the width of bays which may be claimed as territorial. The Norwegian argument is divided into two historical periods, seeking to show (1) that international law recognized no general rule limiting the width of territorial bays up to 1910 when the *North Atlantic Fisheries Arbitration* Tribunal gave its award (paras. 343-353) and (2) that no such general rule has developed since 1910 (paras. 354-392). The United Kingdom Government contends that this argument both gives an incorrect appreciation of the available evidence and fails to take sufficient account of the gradual process of evolution which not infrequently accompanies the establishment of a rule of customary law.

Nineteenth-century fishery conventions and negotiations

232. It is common ground that there *was* not any general rule established in customary law laying down a specific limit for the territoriality of bays, with the result that any bay whose opening was at any rate more than double the width of territorial waters was open to challenge, as the United States Government endeavoured to do in the *North Atlantic Fisheries case*. The difference is that the United Kingdom Government insists that the evidence of practice shows clear traces of the evolution of a general rule defining the width of territorial bays and a distinct tendency towards the recognition of 10 miles as the proper limit, apart from historic bays, whereas the Norwegian Government declines to see any sign of the growth of a rule of customary law.

First, the Norwegian Government denies (paras. 339-341) that the various fishery conventions (of 1839, 1869, 1882) [1] adopting a 10-mile limit for bays, which are cited in paragraphs 71 to 74 of the Memorial, may legitimately be used as evidence of the growth of a customary rule. It stresses that the conventions only settled matters

[1] To this list may now be added another convention not cited in the United Kingdom Memorial, namely, that between Denmark and Germany of 1880 (Hertslet, *Commercial Treaties*, Vol. XV, p. 207).

between particular States in relation to particular coasts and that the parties did not regard themselves as complying with a rule of international law when adopting the 10-mile limit. The United Kingdom Government does not dispute that these conventions dealt with particular matters or that at their respective dates they were not regarded as giving effect to an already existing rule of customary law. Certainly, Great Britain herself during the Chamberlain-Bayard negotiations of 1886-1888 and again in argument in the 1910 Arbitration emphasized that the conventions were particular and did not express a rule of general international law. But the United Kingdom Government does not rely on the conventions as evidence of a rule of international law *already existing* when they were signed. It relies on them as evidence of a growing conviction among States that in face of the principle of the freedom of the seas extensive claims to appropriate the waters of bays were untenable. What is material about the Anglo-French Convention of 1839 is that Great Britain (whose interest it was to invoke much larger claims—perhaps even the ghostly King's Chambers—against the operations of French fishermen) accepted the 10-mile limit proposed by France. What is material about the 1882 North Sea Fisheries Convention is that Great Britain and five other States, when it had been decided to insert a limit in the convention, fixed almost automatically on the 10-mile limit again proposed by France. In this instance also the restriction upon the territoriality of bays was against the interest of Great Britain. What is material about the Chamberlain-Bayard negotiations of 1886-1888 is that Great Britain, despite the view that she took of the interpretation of the Anglo-United States Treaty of 1818, felt constrained to accept a 10-mile limit which was against her own fisheries interests. This convention also would have become law if the United States Congress had not thought even the 10-mile limit too large. It is the same with the other conventions referred to in the United Kingdom's Memorial and also with the German-Danish Convention of 1880, concluded before the North Sea Convention and therefore independently of any initiative in the matter from Great Britain and France. Whenever States had to address themselves to the question of fixing a limit to bays in a convention, the limit decided upon was 10 miles. And Great Britain, even when she had won a verdict in 1910 on the interpretation of the 1818 Treaty, accepted instead the application of the 10-mile limit as a general rule.

Treaty practice is more reliable evidence than unilateral acts of policy

233. It is granted that the use of particular treaties as evidence of customary law requires circumspection. But, when a pattern of conduct begins to appear among different States and in different parts of the world, is it any longer enough to talk of particular parties and particular coasts? Moreover, in a matter of this kind involving essentially the reconciliation of the interests of States

in their different capacities as claimants of coastal waters and as users of the high seas, treaty practice is intrinsically more reliable evidence than unilateral acts of policy. For in unilateral acts a State looks chiefly at one aspect of its rights, while in a treaty the reconciliation of the two opposite interests is at work.

United Kingdom interpretation of treaty practice supported by the work of learned societies and of Ræstad

234. That learned opinion has interpreted the evidence of treaty practice in the same way as the United Kingdom Government is clear from the attitude of learned societies as shown in the draft conventions cited in paragraph 80 of the Memorial [1]. The Norwegian Government elsewhere in the Counter-Memorial professes to believe that the drafts of these learned societies were dictated purely by considerations *de lege ferenda*. It is, however, certain that on this point their drafts were a reflection of existing practice. The flimsiness of the Norwegian argument on this head can be judged from the very different appreciation of the evidence by the Norwegian jurist Ræstad in the following passage written in 1913 (*La Mer territoriale*, p. 146) :

> "Quant à l'étendue des baies territoriales, la pratique, telle qu'elle est affirmée dans les conventions de pêche, a dégagé une tendance marquée vers la limitation des prétentions quelquefois exagérées à l'empire des baies. Mais la limitation arbitraire introduite par lesdites conventions — la ligne de dix milles — n'a pas réussi à anéantir la territorialité des baies appelées historiques."

Thus Ræstad regarded the treaty practice adopting the 10-mile limit as having introduced a severe limit on claims to territorial bays, saving only historic claims. Ræstad, whose native country's own claims might have inclined him to deny that the treaty practice constituted a change in customary law, recognized the change. It may be added that, like the United Kingdom Government, he regarded the validity of Norway's special claims as falling to be considered under the category of historic bays by way of exception to the ordinary rule limiting the width of territorial bays.

[1] Namely :

(i) Article 7 of the draft convention of the International Law Association (Report of the 34th Conference, 1926, p. 101).
(ii) Article 6 of the draft convention of the American Institute on the National Domain (Rio Conference, 1927, 23 A.J.I.L., Special Supplement, p. 370).
(iii) Article 4 of the draft of the League of Nations Committee of Experts in 1926 (23 A.J.I.L., Special Supplement, p. 366).
(iv) Article 2 of the draft of the Japanese International Law Association (1926, *ibid.*, p. 376).
(v) Article 3 of the draft of the Institute of International Law (Stockholm Conference, 1928, Annuaire, p. 756).
(vi) Article 5 of the Harvard Research draft (23 A.J.I.L., Special Supplement, pp. 243 and 265).

Inconsistency of British practice in the nineteenth century is not denied ; but there is nothing surprising about this inconsistency, nor is it of any assistance to Norway in the present case

235. Norway, however, lays special stress on the resistant attitude of Great Britain towards the limitation of territorial bays as evidence of the absence of any rule limiting the width of territorial bays. The inconsistency in Great Britain's practice, in adopting the 10-mile limit in European conventions, while maintaining larger claims against the United States, is not denied. At the same time, it is proper to recall that the British bays on the coasts of North America had had a very special diplomatic history and *that the question was dominated by the language of the Treaty of 1818*. It may also be said that some inconsistency on the part of a State during the process of reducing its territorial claims is scarcely a matter for surprise. In any event, the Norwegian Government's representation of Great Britain's practice is altogether too selective and superficial even in regard to the long dispute over the North Atlantic Coast fisheries.

The 10-mile rule in the period up to and including the 1910 Arbitration

(Paras. 343-353 of the Counter-Memorial)

The case of the Washington *(1853-1854)*

236. Reference is made in the Counter Memorial (paras. 343-349) to Great Britain's reliance on the headland theory in the earlier stages of the dispute with the United States, and in particular to opinions of the Law Officers of Nova Scotia and Great Britain in 1841 justifying that interpretation of the 1818 Treaty (paras. 344-345). The Counter-Memorial emphasizes that the headland theory in these opinions was not limited to the headlands of bays. It is unnecessary to dwell upon a position that was soon abandoned by Great Britain. It should, however, be stated that the United States regarded this claim as preposterous and pointed out that the opinion of the British Law Officers was founded on a misunderstanding as to the language of the Treaty of 1818. (See Moore, *Digest*, Vol. I, p. 785.) The headland theory appears to have been advanced by the British Commissioner before the Arbitration Tribunal in 1854 in justification of the action of the Colonial authorities in seizing the vessel, the *Washington* (referred to in the Counter-Memorial, para. 347), but was rejected by Umpire Bates, and thereafter the headland theory was limited entirely to headlands of bays. So far as concerns the 1910 Arbitration, it was said explicitly that (*Printed Argument*, p. 107) :

"Great Britain claims to draw the line from which the treaty limits are to be measured from the headlands of all those tracts of

water which were known as bays, harbours or creeks at the date of the treaty. *She does not claim to draw the line between every two points of British territory.*"

237. The Norwegian Government contends (para. 348) that the award of Umpire Bates in the case of the *Washington*, in which he rejected the headland theory and approved the 10-mile limit of the Anglo-French Fishery Convention of 1839, was of no legal significance. It repeats the British argument in the 1910 Arbitration that Umpire Bates was a banker, not a lawyer. But Umpire Bates had the confidence of both Governments in 1854 and not only has his award stood as an acceptable precedent in very many text-books and case-books on international law, but the 10-mile limit has been extended in State practice. The Norwegian Government then says that in any event the real ground of the award in the *Washington* was that both headlands in the Bay of Fundy did not belong to Great Britain, and it cites the article by Professor Basdevant in 1912 discussing the North Atlantic Fisheries Arbitration (*Revue générale de Droit international public*, Vol. XIX, pp. 421-582). As the form of this citation may give the impression—quite wrongly—that this was the view of the author of that article, it is necessary to explain the matter a little further. The passage cited in the Counter-Memorial was not an observation of Professor Basdevant, but was part of his summary of the British argument in the 1910 Arbitration. In fact, the British argument was not original, but quoted a dictum of Dana when arguing before the Halifax Commission in 1871 and Dana's statement is not convincing as the following analysis of the case shows :

The United States, by the 1818 Treaty, renounced the right to fish within 3 miles of the *coasts*, *bays*, creeks or harbours of His Britannic Majesty's Dominions in America. The British Commissioner in the *Washington* put his case on two different grounds *(a)* the word *coasts* meant a line joining headlands, and *(b)* Fundy was a British bay within the renunciatory clause. Umpire Bates disallowed the "coasts" argument in *(a)* by rejecting the headland doctrine. He then disallowed the argument in *(b)* that Fundy was a British bay for two reasons ; he considered Fundy, like the Bay of Biscay or Bengal, to be too big to be susceptible of sovereignty, and pointed out that one of the headlands was just in the United States. (See Moore, *International Arbitrations*, Vol. IV, p. 4344.) The suggestion, therefore, that his award is not a distinct precedent both for the rejection of the headland doctrine and for the limitation of the width of territorial bays is completely untenable.

Article by Professor Basdevant on the 1910 Arbitration

238. To remove any false impression that may have been created by the Counter-Memorial in regard to the opinion of Professor Basdevant, the attention of the Court is invited to

page 565 of the above-mentioned article. Having in the previous two pages criticized the majority award in the 1910 Arbitration for failing to discuss the case of the *Washington* and having pointed out that the 1910 award was governed by the interpretation of the language of the 1818 Treaty, Professor Basdevant continues (*Revue générale de Droit international public*, Vol. XIX, at p. 565) :

> "Ainsi le tribunal (de 1910) maintient son point de vue que, pour le litige pendant, le caractère territorial des baies est sans importance : il dit quelles baies sont visées dans la clause de renonciation et non quelles baies sont territoriales. Sa sentence, par suite — et cette remarque est capitale —, n'a aucune importance quant à la question de l'étendue de la mer territoriale : elle est tout à fait étrangère à la doctrine des caps, à la question des baies *et ne diminue aucunement l'autorité du précédent fourni par la sentence du 23 décembre 1854 (affaire du « Washington »)*: elle est une décision d'espèce, statuant en fait, non un précédent de jurisprudence ; au point de vue de la formation coutumière du droit son intérêt est nul."

The United Kingdom does not say that in the nineteenth century there was a rule limiting the width of bays, but that during that time such a rule was developing

239. The Norwegian Government next (para. 349) refers to the case of *Regina* v. *Cunningham* in 1859 concerning the Bristol Channel, an opinion of the Law Officers in 1864 concerning Jamaica (para. 350), the judgment of the Privy Council in 1877 (para. 351) concerning Conception Bay and the British argument before the *Alaskan Boundary* Tribunal in 1903 (para. 352) as evidence of the United Kingdom's persistent denial of any rule limiting the width of territorial bays. As the United Kingdom Government does not contend that in the nineteenth century there existed a rule of customary law prescribing a specific limit for territorial bays, it is unnecessary to discuss these pieces of evidence at length. The United Kingdom's contention is that during this century there was developing, under the influence of the doctrine of the freedom of the seas, the conviction that the limit within which territorial claims to bays must be accepted should be defined. Even these pieces of evidence cited by the Norwegian Government contain indications of limits to territorial claims to bays.

The first Bristol Channel case; Regina v. *Cunningham (1859)*

240. The case of *Regina* v. *Cunningham*, decided in 1859, was dealt with in paragraph 135 of the Memorial (see especially footnote, Vol. I, p. 91.), where it was pointed out that the English Court, so far from paying any attention to the headland line of the Old King's Chamber, directed its attention entirely to the common law rule claiming bays *inter fauces terræ*. This doctrine, as expounded by Lord Hale and Lord Coke, limited the claim to jurisdiction

in bays by the test of range of vision. The sentence from the Law Officers' opinion concerning Jamaica in 1864 relating to bays shows a very different outlook from the Law Officers' opinion of 1841 concerning the North-American fisheries which is cited in paragraph 345 of the Counter-Memorial. The claim in 1864 is limited to *maritime creeks, inlets* and *river mouths* within their headlands, although the width between the headlands may be more than 6 miles. Again, the passage from Lord Blackburn's judgment in the *Conception Bay case* (given in 1877), which is set out in paragraph 351 of the Counter-Memorial, contains palpable evidence of the Court's recognition that the dimensions of a bay are in general material to its territoriality. In the actual case, the Court found it unnecessary to decide what was the rule of international law concerning the dimensions of a territorial bay because it was decided on historic grounds. But it plainly contemplated the existence of *some* rule of international law limiting the width of territorial bays.

The Alaskan Boundary case (1903)

241. Similarly, the passage from the British argument in the *Alaskan Boundary case* (delivered in 1903), which is set out in paragraph 352 of the Counter-Memorial, although it denies the existence of a *precise* rule, shows unmistakably a conviction that there is some limit to the territoriality of bays and that exceptional circumstances are necessary to justify a larger claim. This becomes even clearer if the third paragraph of the conclusions in the British Counter-Case is added :

> *"If the size and configuration of an opening is such that the line may rightly be drawn from headland to headland,* the belt of territorial water is to be measured from the line outwards."

Great Britain's recognition in 1903 (the *Alaskan Boundary case*) that international law imposed some limit on the territoriality of bays is made even clearer still if a passage is read from the argument on which the conclusions cited by the Norwegian Government were based. This passage (*Counter-Case of Great Britain*, p. 24) reads :

> "In the first place it is undoubted law, which it is unnecessary to support by detailed argument, that a State has territorial sovereignty over a belt of sea, usually taken as 3 miles in width, adjoining its coasts. The waters of such belt are, however, subject to the right of innocent passage by commercial vessels of other nations.
>
> There is further a consensus of opinion among writers on international law that every State has territorial sovereignty over certain arms of the sea included within its territory by headlands or promontories. But there is not a universal agreement as to the limit of size and shape within which arms of the sea may be treated as territorial waters. It is generally considered that the crucial measurement is the width at the entrance of the inlet ; but the depth inland is not unimportant, because a claim that the waters of an inlet of some size are territorial is more readily admitted if

the length of its shore line is considerable in proportion to the breadth of the opening *intra fauces terræ*.

The reason why, in spite of the general doctrine of *mare liberum*, gulfs and bays up to a certain size are treated as territorial waters, is, of course, because the State which owns both headlands is in fact able to control the entrance."

Statement by Lord Fitzmaurice (1907)

242. Then, before dealing with the 1910 Arbitration itself, the Norwegian Government mentions a statement made in the House of Lords in 1907 by Lord Fitzmaurice as Under-Secretary for Foreign Affairs rejecting the headlands of bays doctrine and pronouncing in favour not of a 10-mile but a 6-mile limit. It says with truth that this statement, which issued from the Foreign Office, was thrown over by Sir Robert Finlay *arguendo* in the 1910 Arbitration. This vacillation in Great Britain's statements is no doubt evidence of inconsistency but it also contains proof of the effect of the impact on British official thought of the belief that territorial bays are limited as to their width. It may be added that the Foreign Secretary, Sir Edward Grey, in 1908 had also referred to the qualification of the 3-mile rule in the case of bays as limited to bays "10 miles wide" and again to bays "with a very narrow entrance". (*Hansard*, 4th Series, Vol. 191, col. 1771). Judge Drago, it appears, was less impressed by Sir Robert Finlay's disclaimer in Court than by Lord Fitzmaurice's parliamentary statement, for he referred to the latter as a "most public, solemn and unequivocal expression" of policy and disregarded the disclaimer altogether (Wilson, *Hague Arbitration Cases*, p. 203).

Conclusions to be drawn from the 1910 Arbitration

(Paras. 354-363 of the Counter-Memorial)

Norwegian complaint that in the Memorial the United Kingdom Government paid insufficient attention to the 1910 Arbitration

243. The Norwegian Government complains that the *North Atlantic Fisheries Arbitration* of 1910 deserves more attention than is given to it in the United Kingdom's Memorial. That may be so, even if both Professor Basdevant (*op. cit.*, pp. 555 and 563) and M. J. Louter (*Revue de Droit international et de Législation comparée* (1911), Vol. 13, p. 156) criticized the reasoning of the award with some severity and considered the award, owing to it being based on the special language of the [Treaty of] 1818, to have no value as a general precedent in regard to territorial bays. At any rate, the Norwegian Government relies on the decision of the tribunal and on passages from the British argument as evidence of the absence in 1910 of any general rule of customary law restricting claims to territorial bays. It will be more logical and give a

more correct perspective if the British argument is considered first and then the tribunal's award.

Essential features of the 1910 Arbitration

244. In appreciating the arguments in the case, the rulings of the majority of the tribunal and the dissenting opinion of Judge Drago on the question of territorial bays, it is important to remember two things. First, the whole case turned on the meaning of the word "bay" in a particular treaty concluded nearly a century before. Secondly, Counsel for the United States, presumably owing to the attitude of Congress, when it refused to ratify the Chamberlain-Bayard Treaty of 1888, maintained the thesis that, apart from historic bays, the 3-mile limit applies in bays. In other words the United States asked the tribunal exclusively to apply a 6-mile limit to territorial bays and declined to admit the possibility of any larger limit. Consequently, the question of the 10-mile limit being the actual or approximate limit in ordinary cases for territorial bays under customary law was never argued before the tribunal, although the British argument indicated that the 10-mile limit was to be regarded as a purely conventional rule.

The British argument in the 1910 Arbitration

245. The Norwegian Government in paragraph 362 of the Counter-Memorial quotes extracts from the British argument in 1910 and sets out the argument in full at Annex 64. Certainly, the British argument denies the existence in 1910 of a general rule of customary law prescribing a *specific* limit for territorial bays. But, as the passages extracted in paragraph 362 themselves show, the argument is directed essentially at denying the existence of a 6-mile limit in 1910 and especially in 1818. The argument contains many indications that Great Britain recognized a limit to be placed by international law on territorial bays, while denying that there was a general rule fixing a precise limit. Thus, the underlined words in the very first paragraph of the extract indicates the existence of a restriction :

> "His Majesty's Government submits that there is no principle or practice of the law of nations under which the right of a State to exercise territorial sovereignty over bays, creeks, or harbours on its coast is limited to those bodies of water only which are contained within headlands *not more than 6 miles apart. At the time when the Treaty of 1818 was entered into, the dominion of States over enclosed waters was claimed, and admitted, to a much greater extent than is the case at the present day,* but His Majesty's Government believes that in no single instance, either before or since that time, has any such limitation been accepted."

There is a similar indication in the following further passage from the extract :

"But different considerations apply in the case of *enclosed* waters from those which affect the open sea. The possession of headlands gives a greater power of control over waters contained within them than there can be over the open sea, and the safety of a State necessitates more extended dominion over the bays and gulfs enclosed by its territories than over open waters. Moreover, the interest of other nations in bays and gulfs is not so direct if, as is commonly the case, they lie off the ocean highways. For these reasons the 3-mile rule has never been applied to enclosed waters, *nor has any defined limit been generally accepted in regard to them.*"

But this indication is made even stronger by the two next sentences, which are to be found on page 267 of the Annexes to the Counter-Memorial, Volume II, but are omitted from the extracts :

"It is true that the understanding of nations has imposed some restrictions on the exercise of sovereignty over these waters, and that States do not now assert claims, such as were common in former times, over waters, which *from their size or configuration* cannot be effectively controlled, *or which from their situation cannot be fairly held to be the exclusive property of any one State.* But these restrictions must depend on the particular circumstances of each case ; they have never become formulated in any rule of general application."

246. In short, the British argument in these passages admits the general principle of restriction, but denies a general rule defining the restriction. The argument then proceeded to recite the well-known claims to larger bays such as Delaware, Chesapeake and Conception Bays and the fishery conventions which adopt the 10-mile limit as proof that the United States' thesis of a *6-mile* limit was unfounded. It summed up the effect of these conventions and of the other usage as follows (Annexes to the Counter-Memorial, Vol. II, p. 272) :

"These conventions fix by agreement a particular limit of 10 miles on the coasts to which they refer, but it is important to observe that such special conventions are inconsistent with the contention that any limitation as to the width of bays, *such as is now contended for*, forms part of general international law."

"His Majesty's Government submits that these facts establish beyond doubt that States do exercise exclusive jurisdiction over bodies of water *more than 6 marine miles in width*, and that the usage of nations is entirely inconsistent with the existence of any general limitation *of that kind* or, indeed, of any *precise* limitation at all."

It is true that the argument at this point treats the 10-mile limit as conventional, but it is important to remember that Great Britain had been prepared to accept 10 miles as the ordinary limit in the Chamberlain-Bayard negotiations and that the whole of the argument is here directed to rebutting the United States' view that the 3-mile limit also applies in bays *to give a 6-mile width for territorial*

bays. Having regard to the form of the issue in the case and to the previous history of the dispute Great Britain could scarcely be expected in its argument to volunteer its recognition of the 10-mile limit as a general rule of international law.

The same attitude is revealed in the summary of a very brief review of the opinions of writers (*ibid.*, p. 278) :

> "It is submitted, therefore, that the opinions of jurists establish that there is *not any definite limit*, whether 6 miles or more, beyond which enclosed waters such as bays may not be claimed as territorial waters by the State within whose shores they are enclosed ; and that *a fortiori* there was no such limit in 1818. It follows that the word 'bay' as used in the treaty was used in its ordinary sense and included all those tracts of water known at the time as bays."

247. The attitude of Great Britain in its argument cannot, it is submitted, be regarded as inconsistent with a position in which *(a)* customary international law already recognized a general principle that claims to territorial bays are to be restricted unless supported by historic usage and *(b)* a rule of customary international law defining the restrictions as a limitation to 10-mile bays was nearing the final stages of its formation. In any event, the British argument in this somewhat special case has also to be read in the light of Sir Edward Grey's statements in Parliament in 1908 that the qualification of the 3-mile limit in the case of bays is confined to bays "with a very narrow entrance" and to bays "10 miles wide". It has also to be read in the light of the fact that whenever Great Britain has been called upon to define a general limit for territorial bays, she has agreed to a 10-mile limit.

The 1910 Award

(Paras. 354-377, Counter-Memorial)

248. The Norwegian Government, in paragraph 356 of the Counter-Memorial, while conceding that some of the reasoning in the award has no relevance in the present case as relating only to the 1818 Treaty, claims that other parts of the reasoning apply to it with full force. It relies especially on a passage in the award in which the tribunal gave its reasons for rejecting the United States contention that the 3-mile limit should be "strictly and systematically applied to bays". The bearing of this passage on the definition of a bay has already been examined in paragraph 225 to which the Court is respectfully asked to refer again in the present connection. Having mentioned the grounds of national interest which cause a State to be concerned to control bays penetrating its coast, the tribunal said :

> "This interest varies, speaking generally, in proportion to the penetration inland of the bay ; but as no principle of international law recognizes any *specified* relation between the concavity of the

> bay and the requirements of control by the territorial sovereign, this tribunal is unable to qualify by the application of any *new* principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the 3-mile rule."

It is important, in appreciating the meaning of the above passage, to recall that the tribunal had begun by holding that the word "bays", having been used in the treaty without qualification, must be interpreted to include every bay which might reasonably have been considered a bay by the negotiators in 1818. It thereby put the burden on the United States to establish that any qualification of the popular meaning of bay either was in the minds of the framers of the treaty or ought to have been in their minds in 1818. Thus the passage simply meant that in the absence of any precise technical definition of a bay, the *prima facie* meaning of the word "bays" *as used in its general popular sense in the treaty* must prevail.

249. The same consideration applies in interpreting the next passage relied on by the Norwegian Government :

> "Nor can this tribunal take cognizance in this connection of other principles concerning the territorial sovereignty over bays such as 10-mile or 12-mile limits of exclusion *based on international acts subsequent to the Treaty of 1818* and relating to coasts of a different configuration and conditions of a different character."

Here the tribunal was in substance saying that the intention of the negotiators of 1818 could not be qualified by new principles of international practice derived from a development of State practice subsequent to 1818 ; in other words they relied on the intertemporal law. It might have added that neither party to the dispute had asked the Court to relate the 10-mile limit rule back to the date of the 1818 Convention, which was 21 years before any State had thought of it. The tribunal did also, it is true, add that these "international acts" adopting the 10-mile limit related to different coasts. How little importance the tribunal attached to this point may be judged from the fact that, in its recommendations to the parties complementary to the award it proposed the adoption of the 10-mile limit, subject to the exceptions previously agreed in the Chamberlain-Bayard negotiations. In the result the tribunal concluded that the word "bays" in the 1818 Treaty must be regarded as having been used in its purely geographical sense so that the United States had renounced its right of fishery in all the British bays covered by the treaty *irrespective of whether the bays were or were not in law British territorial bays.*

250. The Norwegian Government further relies (para. 360) on dicta in the dissenting opinion of Judge Drago, who declined to treat the word "bays" as having been used in the 1818 Treaty in a purely geographical sense. The Counter-Memorial recalls that Judge

Drago endorsed in emphatic terms the exception in favour of the territoriality of historic bays, which in his opinion

> "*form a class distinct and apart* and undoubtedly belong to the littoral country, whatever be their depth of penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances, such as geographical configuration, immemorial usage and, above all, the requirements of self-defence, justify such a pretension".

It then draws attention to what he said in regard to ordinary bays :

> "In what refers to the other bays, as might be termed the common, ordinary bays, indenting the coasts, over which no special claim or assertion of sovereignty has been made, there does not seem to be any other general principle to be applied than the one resulting from the custom and usage of each individual nation as shown by their treaties and their general and time-honoured practice."

Judge Drago, acting on the above views, found as a fact that Great Britain was by her practice committed to the 10-mile limit to such an extent that the 1818 Treaty ought to be interpreted by reference to this practice. Something might be said about this method of interpreting a treaty [1], but at any rate two things are quite clear. First, Judge Drago attached considerable importance to the conclusion of particular treaties as evidence of customary law, for he warmly endorsed the words of Bynkershoek, cited in paragraph 167 above, in which he expressed a preference for seeking a common law of nations "in a constant custom of concluding treaties in one sense or another". Secondly, Judge Drago saw nothing inherently inappropriate in applying to other coasts the 10-mile limit for bays, which had been formed as a general principle applicable to coasts specified in particular treaties. Indeed, he said expressly: "That a bay in Europe should be considered as different from a bay in America and subject to other principles of international law cannot be admitted on the face of it."

251. What is more difficult to see is the kind of national usage which Judge Drago regarded as applicable to "ordinary" bays. He made a very sharp distinction, as has been said, between "historic" and "ordinary" bays, but this distinction completely disappears if the territoriality of "ordinary" bays is to be determined by reference to national usage, meaning acts of internal law appropriating bays. On the other hand, his meaning becomes intelligible if what he had in mind, as is shown to be the case by his actual words—*was international usage of individual States like that of the States adopting the 10-mile limit for ordinary bays.* Judge Drago did not, it is true, think that there was yet a rule laying down a specific limit which could

[1] Judge Drago seems to have ignored the intertemporal law so clearly dealt with by Judge Huber in the *Island of Palmas case. (A. J.I.L.*, 1928, pp.867-912.)

be generally applied. But his dissenting opinion is very far from being inconsistent with the position that a general rule of customary law adopting the 10-mile limit was in the final stages of its development. Indeed, he concluded his account of British usage with the following significant passage (Wilson, *op. cit.*, p. 205) :

> "And it is for that reason that a usage so firmly and for so long a time established ought, in my opinion, to be applied to the construction of the treaty under consideration, much more so, when custom, one of the recognized sources of law, international as well as municipal, *is supported in this case by reason and by the acquiescence and the practice of many nations.*"

The Counter-Memorial forbears to mention that Judge Drago castigated as entirely impracticable the provision in the tribunal's award which said that the base-line should be "a straight line drawn across the body of water at the place where it ceases to have the configuration characteristic of a bay". (*Ibid.*, p. 205.) He gave the impossibility of applying this provision without a further treaty between the parties as one of the reasons for his dissent. But, as the Counter-Memorial notices, the tribunal itself was very conscious of the practical defects of its award. *Exceeding the powers conferred upon it in the Compromis*, the tribunal made a recommendation to the two States that they should agree to apply the award in accordance with detailed proposals drawn up by the tribunal. The tribunal in effect recommended that detailed, *precise* rules should be applied in substitution for the general, vague formula of its award. Several bays were dealt with particularly, but the tribunal advocated as the general rule that the 10-mile limit should be adopted as the general rule for all other bays. And these recommendations, including the 10-mile rule, were put into effect by agreement between the two States in the Treaty of Washington of 1912. (It was, however, decided to be unnecessary to give any consideration for the time being to the delimitation of the Newfoundland bays.)

252. The Norwegian Government underlines the fact that the Treaty of Washington of 1912 which followed the award and gave effect to its recommendations could not alter the nature of the tribunal's judicial award nor create obligations for Great Britain *vis-à-vis* States other than the United States. That is perfectly true but not very relevant to the argument advanced by the United Kingdom in its Memorial. The United Kingdom relies on the Treaty of Washington of 1912 simply as one of the many pieces of evidence showing the existence of a general conviction that the proper limit to put upon territorial claims to ordinary bays under modern international law is the 10-mile rule.

253. The Norwegian Government also underlines the distinction between the character of the award as a judicial precedent and the recommendations of the tribunal as mere policy proposals—propo-

sals "dictée par des considérations d'opportunité" to use Professor Basdevant's phrase (*op. cit.*, p. 559). That again is perfectly true, but the United Kingdom Government does not rely on the recommendations as a judicial precedent. It relies on the recommendation for a general limit of 10 miles simply as another of the pieces of evidence indicating the growing acceptance of the 10-mile limit as the appropriate general rule for bays. On the other hand, it is scarcely to be disputed that, whereas nearly everyone has accepted the tribunal's recommendations as a sensible and proper settlement of a long-standing controversy, hardly anyone has ever shown enthusiasm for the tribunal's award as a legal precedent. Most writers are content to point out that the award is not a precedent of general value, being concerned with the interpretation of a particular treaty. (See paras. 120-121 above.)

254. The Counter-Memorial, however, cites a dictum by A. H. Charteris in 1912 to the effect that the award's ruling in regard to bays must be accepted as a thoroughly considered opinion. (Para. 363 of the Counter-Memorial.) Charteris's dictum is expressed more as an assumption than a conviction after detailed analysis of the case, and others took a very different view at that date. Louter in his article in the *Revue de Droit international et de Législation comparée* (1911, Vol. XIII, 131, at pp. 153-157) expressed the greatest reserve about the tribunal's opinion concerning territorial bays. His view was that the 10-mile limit even at that date was an established rule of international law, and he does not seem to have been in the least shaken in that opinion by the proceedings of the 1910 Arbitration. In an earlier passage, at page 149, he had said :

> "Dans l'état actuel du droit des gens, toutes les baies dont l'entrée a une largeur qui ne surpasse pas 10 milles marins sont donc comprises dans la mer territoriale, tandis que les baies dont l'entrée est plus large font partie de la haute mer qui n'est soumise à aucune souveraineté, bien entendu sous réserve de l'existence de la mer littorale le long des côtes de la baie. La largeur de l'entrée est ordinairement mesurée par une ligne droite tracée en travers d'une côte à l'autre là où les côtes se rapprochent pour la première fois jusqu'à une distance de 10 milles marins au plus."

255. Professor Basdevant also criticized the reasoning of the award in a passage from his article, which has already been quoted (para. 238 above). But, in view of the use made in the Counter-Memorial of his expression "dictée par des considérations d'opportunité" to depreciate the significance of the recommendations in comparison with the award, it is necessary to refer to another passage from his article indicating a very different evaluation of the tribunal's recommendations in favour of a 10-mile limit from that now made by the Norwegian Government. Having given his reasons in the body of the article for thinking that the award was

of no importance at all in regard to the extent of territorial waters, he added the following comment by way of amplification of his views :

> "Cette décision, bien que ne prononçant pas en considération du caractère territorial des baies, est, cependant, intéressante à un point de vue général, si l'on cherche à déterminer le droit applicable aux baies d'après la méthode comparative mise en œuvre par M. Drago dans les motifs de son dissentiment. M. Drago, je le rappelle, dégage des traités et de la pratique la conception positive anglaise d'après laquelle ne seraient territoriales (en dehors des baies historiques) que les baies de 6 ou 10 milles d'ouverture. La sentence de 1910, qui statue sans tenir compte de ces limites et exclut les Américains de toutes les baies géographiques, ne détruit-elle pas cette construction ? Je ne le pense pas : 1° parce qu'elle déclare ne pas prendre en considération le caractère territorial des baies ; 2° parce qu'elle n'est que déclarative du droit établi en 1818 ; rendue en 1910 elle n'exprime cependant que la conception juridique de 1818 et n'affecte pas celle qui a pu s'établir après cette date ; 3° *parce que dans les recommandations, seule partie moderne de l'œuvre du tribunal, celui-ci adhère en général au système des 10 milles.*" (*Revue générale de Droit international public*, Vol. XIX, p. 565, note 2.)

The United Kingdom Government, in the light of all the above considerations, submits that the proceedings of the 1910 Arbitration do not support the Norwegian Government's contention that there was *at that date* no general rule of international law restricting claims to territorial bays. There are the clearest indications that the two disputing States and the members of the tribunal all recognized that some limit is imposed by modern international law on the width of bays which may be claimed as territorial—apart from historic bays. The difference was as to whether international law had yet formulated a general rule fixing a *precise* limit for territorial bays. If the tribunal did not feel sufficiently satisfied of the existence of a precise rule to contemplate applying it in the interpretation of a 92-year-old treaty, each one of the arbitrators showed his unmistakable predilection for the 10-mile limit as the general rule in modern practice. It is true that some of the bays were treated as exceptions to the 10-mile rule, but this is explained by the fact that these bays penetrated more deeply into the coast [1].

[1]

Bay	*Limit-line*	*Penetration*
Chaleurs Bay	16 miles	80+miles
Miramichi Bay	14½ miles	18 miles
Egmont Bay	17 miles	8½ miles
St. Ann's Bay	8¾ miles	15½ miles
Fortune Bay	11½ and 10½ miles	40 miles

Bay	*Base-line*	*Penetration*
Barrington Bay	6¾ and 7½ miles (Cape Sable Island in the middle)	10¾ miles
Chedabucto and St. Peters Bays	9½ and 8½ miles	closing the Gut of Canso.
Mira Bay	7½ miles	10 miles
Placentia Bay	8¾, 6 and 4 miles	31 miles

The two disputing States in argument concerned themselves primarily with the interpretation of the ancient treaty. So far as contestation was joined as to the limit imposed by the modern law on territorial bays, the whole issue between the two States was whether or not that limit took the strictest possible form of double the 3-mile maritime belt. Both States in the outcome accepted the 10-mile limit as the general rule for the ordinary bays in dispute.

The 10-mile rule for bays after the 1910 Arbitration

(Paras. 364-377 of the Counter-Memorial)

Wide acceptance of the 10-mile rule

256. It follows from what has just been said about the 1910 Arbitration that the Norwegian Government places the development of customary international law in regard to bays out of perspective when it seeks in paragraph 364 of the Counter-Memorial to isolate the proof of the existence of the 10-mile rule to the period after 1910. The development of the 10-mile limit has a long history in which the 1910 Arbitration was only one incident. The arbitration, taken as a whole, testifies to the growing strength of the 10-mile limit and to the fact that very little more was required to convert into general law a custom which, in Judge Drago's phrase, was "supported by the acquiescence and practice of many nations". The correctness of this interpretation of the evidence is very strongly endorsed in the criticisms of the arbitration by Louter and Professor Basdevant to which reference has been made. It is further confirmed by the attitude taken up by Ræstad in his book *La Mer territoriale*. The relevant passage, which has already been quoted (para. 234 above) [1], shows that Ræstad in 1913 regarded the 10-mile rule as having only stopped short at doing away with the historic bays.

257. The fact is that after 1910 Norway and Sweden have been almost alone in declining to recognize the existence of any general rule defining those bays which can be claimed as territorial bays apart from those which can be claimed on the basis of historic usage. Even Swedish official utterances, as will be shown, reveal a consciousness of a limit to the width of ordinary territorial bays not much in excess of 10 miles. What was left to be settled after 1910 was not the existence of a general rule limiting the width of territorial bays but whether the rule should be the logical—as some thought—limit of double the maritime belt or the 10-mile

[1] "Quant à l'étendue des baies territoriales, la pratique, telle qu'elle est affirmée dans les conventions de pêche, a dégagé une tendance marquée vers les limitations des prétentions quelquefois exagérées à l'empire des baies. Mais la limitation arbitraire introduite par lesdites conventions — la ligne de dix milles — n'a pas réussi à anéantir la territorialité des baies appelées historiques" (p. 146).

limit adopted as the reasonable and proper limit in international practice. The final emergence of the 10-mile limit as the basic general rule of customary law is believed by the United Kingdom Government to be demonstrated by the evidence submitted in paragraphs 78-88 of its Memorial, to which the Court is respectfully referred.

The Norwegian Government in paragraphs 365 to 392 seeks to refute the thesis that the rule of customary international law imposing a strict limitation on territorial bays in ordinary cases crystallized between 1910 and 1930 into the 10-mile rule. It both seeks to depreciate the value of the evidence adduced by the United Kingdom and alleges the existence of contrary indications after 1910. It will be convenient first to examine the alleged contrary indications and then to re-examine the value of the evidence previously adduced in the Memorial.

The "Lokken"

258. The English case of the *Lokken* is invoked in paragraph 373 of the Counter-Memorial as evidence that in 1917 Sir Samuel Evans in the Prize Court accepted a simple headland to headland line as fixing the base-line of a Norwegian bay between the Naze and the Lister light (which in point of fact gave a base-line of 13 miles). But the very exiguous summary of his judgment in Verzyl's book *Le Droit des Prises de la Grande Guerre*, pp. 1325-1326, which is cited in the Counter-Memorial, gives an entirely misleading account of his ruling in the case. The case turned essentially on the question whether the Court accepted the evidence of the British naval vessel or of the Norwegian merchant vessel as giving a more accurate fix of the point of capture. Sir Samuel Evans, having analyzed the evidence, concluded that, even if any waters in the area concerned could be said to be enclosed in a bay and if the base-line was assumed to be the maximum possible (i.e. across the headlands of the alleged bay), still the capture had taken place outside territorial waters. This is made clear by the full transcript of his judgment in the records of the High Court of Justice and especially by his personal explanation of the meaning of his words which is reported in a letter of 31st July, 1918, from an official in the Law Courts Branch of the Treasury Solicitor's Department to an official in the Prize Branch. The Admiralty had asked for this explanation in case the instructions to naval forces off the Norwegian coast should require amendment in the light of the views held by the President of the Prize Court. (Copies of the transcript and of the letter are attached as Annex 49 of this Reply.) As will be seen from the letter, Sir Samuel Evans emphatically denied that he had accepted the headland principle in a case where the headlands were 13 miles apart.

"La Chérie"

259. The Norwegian Government next refers in paragraph 374 of the Counter-Memorial to the case of *La Chérie*. This French vessel, bound from Halifax to Nassau, was arrested in 1925 when off the coast of Maine. The position of the arrest, as determined by the District Court of the Southern District of Maine [(1926) 9 Fed. (2nd) 640] and confirmed by the Circuit Court of Appeals of the First Circuit [(1926) 13 Fed. (2nd) 992] was "seven or eight miles southwesterly of Swan's Island". Thus the vessel, when arrested, was well within the 4-league contiguous zone established by Section 586 of the Tariff Act, 1922.

It is true that Masterson (*Jurisdiction in Marginal Seas*, at p. 323) says that the French Ambassador, being under the impression that the seizure had taken place some 15 or 20 miles from the shore, asked for the release of the vessel if that were the case. But when he was informed of the true position of the vessel, which, as stated above, was "7 or 8 miles southwesterly of Swan's Island" and, therefore, well within the contiguous zone jurisdiction established by Section 586 of the Tariff Act, 1922 [1], the matter was dropped.

In the view of the United Kingdom Government this case is therefore relevant only to the question of contiguous zones, and that no doubt is why Gidel refers to it in his chapter on that subject (Vol. III, p. 421, note 2) rather than in his chapter on bays. This view is confirmed by the fact that neither in the District Court nor in the Circuit Court of Appeals was it regarded as involving any question of international law. The *American Journal of International Law* does not include it amongst its digest of judical decisions involving questions of international law for 1926. Furthermore, the case was not cited by the United States Government in its reply to the *questionnaire* preparatory to the Hague Conference, and the attitude of that Government both before and at the 1930 Conference is entirely inconsistent with its recognizing a general limit for bays in excess of 10 miles.

The "Heinrich-Augustin"

260. The Norwegian Government thirdly refers to the well-known case of the *Heinrich-Augustin*, decided by the Swedish Supreme Court in 1927, and says that even the eminent Schücking could not persuade the Swedish Court to adopt the 10-mile rule for Laholm Bay. This bay, which is very slightly more than 12 miles

[1] Nor did this section itself purport to enlarge the jurisdiction of the United States in any way. It corresponds, with only slight amendment, to Section 13 of the Act of 1790, Section 27 of the Act of 1799 and Section 2867 of the Revised Statutes (1878). It relates in fact to the long-established contiguous zone jurisdiction claimed by the United States, of which the British equivalent was the Hovering Acts, repealed in 1876.

in width, had been the subject of a treaty with Denmark in 1899, in which Denmark conceded the whole bay to be an exclusive Swedish fishery, and had been dealt with by Swedish legislation since that date. Certainly, the arguments presented to the Swedish Courts on behalf of the Swedish Government disputed the applicability of the 10-mile limit as a universal rule, although the Court itself decided the case on the historic grounds. On the other hand, the Swedish Government's arguments put some weight on the fact that, applying Judge Moore's explanation of the 10-mile limit as being twice the 3-mile belt plus 4 miles, the basic limit for Swedish bays would be 12 miles. This point was again taken in Sweden's reply to the *questionnaire* before the 1930 Conference, which also indicates that Sweden regards a limit of about 12 miles as the acceptable general limit with exceptions only for certain bays. Having stated that Sweden's method was to draw the base-line across the opening of bays, the reply emphasized that this method was only to be applied up to certain limits. The relevant paragraph reads as follows (*Bases of Discussion*, p. 44) :

> "It does not, however, follow that the Swedish Government holds that the method of calculation which we are here providing should apply to all bays, whatever their width may be. In its reply of 18th November, 1926, to the *questionnaire* of the League of Nations Committee for the Codification of International Law (reference to which has already been made), the Swedish Government expressed itself to the effect that a basic line of 10 miles in the case of bays would not be sufficient so far as Sweden was concerned, and that the reasons which had led to the adoption of a line of that length in certain fishery conventions would, in the case of Sweden, involve the adoption of a line of at least 12 miles. In certain cases, however, even that line would have to be somewhat extended. Thus the Bay of Laholm, which was dealt with by a decision of the Supreme Court on 14th November, 1927, to which reference has already been made, is slightly wider than 12 nautical miles. Furthermore, similar areas between the islands of an archipelago should be treated in the same manner as bays."

The second Bristol Channel case; the "Fagernes" (1927)

261. The fourth and last judicial precedent invoked in the Counter-Memorial is another English case, the *Fagernes*, concerned with the Bristol Channel, which was mentioned in paragraph 78 of the Memorial. The Norwegian Government claims that this 1927 decision did not—*on the plane of international law*—upset the precedent of *Regina* v. *Cunningham* nor that of the 1910 Arbitration. Enough has already been said about the 1910 Arbitration to show that its value as a precedent in international law on the subject of bays has always been very slight. As to *Regina* v. *Cunningham* decided in 1859, it is necessary to point out that the incident in that year took place at a point where the Bristol Channel is only 10 miles wide whereas at the point of the 1927 incident the

Bristol Channel is 20 miles wide. But the Norwegian Government does not explain why a decision reached by a municipal court in the light of information supplied by the British Government on a question where the rule of international law was the subject of divergent views, is of no significance as a precedent on the international plane. The Government is in a better position than the Court to declare the State's attitude in regard to matters affecting its relations with other States which was the main reason why the Court of Appeal invited the Government to intervene in the case. The Attorney-General was perfectly frank about the unsettled state of customary law. He admitted that he could not go further than to say that, at any rate where the width is over 12 miles, there must be evidence of the establishment of dominion by effective exercise of sovereignty. He meant, of course, that 12 miles was the largest limit claimed by anyone as the general rule for bays. It was common ground that there was no evidence of appropriation of the area in question by long usage and the Government disclaimed jurisdiction over that part of the Bristol Channel.

262. The Counter-Memorial cites in particular a dictum of Mr. Justice Hill to the effect that there was no more agreement among international lawyers in 1927 than in 1877 (the year of the *Conception Bay case*) in regard to the width of territorial bays. As this observation followed an extremely economical examination by the judge of the opinions of modern writers and appears to have been simply based on the difference between the 12-mile limit proposed by the Institute in 1894 and the 10-mile limit found in the fishery conventions, it does not carry the matter very far. Nearer to the mark was Mr. Justice Hill's recognition that there was "a tendency in recent years to regard 10 miles as the maximum width" adding, however, that there was no authority for fixing that maximum except the conventions. Mr. Justice Hill, as a judge in a municipal court, looked for direct authority to apply a fixed limit and, speaking before the later draft conventions of learned societies on the preparatory work and records of the 1930 Conference were available, he did not find the precise authority which he sought.

263. The three judges in the Court of Appeal also suffered from the same feeling of disability as Mr. Justice Hill in approaching a question of customary law with a controversial history. Inevitably the position of a municipal court in these circumstances is very different from that of the International Court of Justice. The disability of a municipal court to pronounce upon a general rule of customary law which has been the subject of divergent opinions was freely admitted by the Privy Council in the earlier case of *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1914 A.C. 153). In this case the Judicial Committee of the Privy Council was asked, *inter alia*, whether it was competent for

the legislature of British Columbia to authorize the Government of that province to grant by way of lease, licence or otherwise the exclusive right, or any right, to fish below low-water mark in or in any or what part or parts of the open sea within 1 marine league of the coast of the province. It was argued that the province had a "proprietary title" in the shore around its coast up to 1 marine league. The Court then referring to the "marine league" or 3-mile limit held that there was no such title for the reason expressed as follows :

> "Its meaning is still in controversy [1]. The questions raised thereby affect not only the Empire generally but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a conference, it is not desirable that any municipal tribunal should pronounce on it."

Consequently, it is scarcely surprising that the English judges in the *Fagernes case* should have laid stress on the unsettled nature of the general rule of international law.

264. The Counter-Memorial then recalls that Lord Justice Bankes said that, owing to the declaration of the Attorney-General disclaiming jurisdiction, the case before the Court of Appeal was materially altered. It also recalls that Lord Justice Atkin said that, apart from the Attorney-General's declaration, he was inclined to share the view of Mr. Justice Hill that under the decision in *Regina* v. *Cunningham* British jurisdiction also existed at the point where the *Fagernes* incident took place. The Counter-Memorial does not, however, notice the fact (although it was pointed out in the Memorial, paragraph 78) that both Lord Justice Bankes and the third judge, Lord Justice Lawrence, indicated their disagreement with the view that a decision in 1859 governing the Channel where it was 10 miles wide also governed the Channel in 1927 at a point where it was 20 miles wide. The opinion of Lord Justice Bankes is particularly significant since, unlike his colleagues, he did not regard himself as bound to accept the Crown's disclaimer of jurisdiction. He gave as one of his reasons for in fact accepting the Crown's declaration in the case "the general trend of the more recent opinion on the question of limiting the width of the *fauces terræ* to which the rule of territorial jurisdiction should apply" (1927 Probate Division, at p. 323). Even Lord Justice Atkin only referred to the 10-mile rule as "not yet accepted" and subject to "admitted exceptions".

[1] The question was what was the nature of the State's right within the marine league. There is no doubt to-day on this point and no disagreement between the United Kingdom and Norway. This was certainly one of the points on which everyone agreed at the Hague Conference—namely, the State has complete sovereignty subject to the duty to allow the right of innocent passage.

The cases cited by Norway are consistent with the 10-mile rule

265. The United Kingdom Government accordingly submits that the four cases cited in the Counter-Memorial are consistent with the gradual emergence of a rule of customary law restricting the territoriality of bays in ordinary cases by a 10-mile limit. It also emphasizes that it is inappropriate to expect to find in the decision of a municipal tribunal the crystallization of a rule of customary law with a history like that of the 10-mile limit.

The practice of States

(Counter-Memorial, paras. 378-388)

266. The Norwegian Government, however, also invokes the fact that a number of claims are made by coastal States to bays in excess of 10 miles and without apparent regard to any mathematical formula. Thus, paragraphs 379 to 388 of the Counter-Memorial list special claims to particular bays by Canada, Australia, the United States, France, the Soviet Union, Sweden, El Salvador, Honduras and Argentina. The suggestion made by the Norwegian Government is that these claims are so numerous as to exclude the existence of a general rule applying a 10-mile or similar limit. But this is not the case at all.

In the first place no one—certainly not the United Kingdom Government—maintains that the general rule of the 10-mile limit does not have exceptions. As was said in paragraph 75 of the Memorial, the tendency during the nineteenth century to restrict territorial claims to bays as a general rule was accompanied by the development of the concept of historic bays as exceptions to the general rule. The resulting position is precisely the same as the position in regard to the maritime belt described in paragraphs 117-121 above. Under the influence of the doctrine of the freedom of the seas territorial claims to bays became subject to a restricted rule representing the greatest common measure of agreement as to the generally acceptable limit of such claims. This rule, the United Kingdom Government contends, has crystallized in the 10-mile rule so that there is now a presumption of universal acquiescence in claims to territorial bays made in conformity with this rule. If a larger claim is made, the presumption of universal acquiescence does not hold good and the validity of the claim, in accordance with one of the most fundamental norms of international law, depends on the acquiescence of the State against which it is invoked. Such acquiescence can be established either by particular evidence of the actual assent of the State concerned or by the general implication from historic usage. In short, there is no inherent inconsistency between the adoption of the 10-mile limit as a general rule and the admission of certain claims to larger territorial bays. On the other hand, the recognition of the now-established class of historic bays

categorically implies the existence of a general rule imposing a particular limit upon claims to ordinary bays.

267. In the second place, the number of the bays listed in the Counter-Memorial as subject to exceptional claims is by no means large in comparison with the very extensive coast lines possessed by the States mentioned as making the claims. The very fact that specific claims are made to a mere handful of particular bays confirms the existence of a general limiting rule to which these claims are recognized to be exceptions. It is, for example, no accident that the special claims to larger bays which the Norwegian Government has extracted from Gidel, *Le Droit international public de la Mer*, Volume III, pages 653-663, are there examined by the author in his chapter "Les eaux historiques". In these circumstances, it is as unnecessary as it would be invidious for the United Kingdom Government here to examine the validity of the various special claims to territorial bays one by one [1]. In some cases, the claims have long received general recognition as historic titles ; in other cases, the general or individual acquiescence of States in the exceptional claims may still be a matter of proof. For the present purpose, it is enough that the claims are exceptional and confirm the existence of a general limit imposed by customary law on territorial claims to bays.

Opinions of writers

(Paras. 389-392 of the Counter-Memorial)

268. Lastly, the Norwegian Government seeks to find indications contrary to the thesis, that there is a general rule limiting territorial claims to bays, in the opinions of writers. Neglecting the writers who, like Gidel, draw a clear distinction between ordinary and exceptional bays, the Counter-Memorial presents chosen passages from three writers. The first from Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927), is altogether too carefully chosen. It is true that on page 355 Jessup said :

> "Unlike territorial waters in general, it is not believed to be possible to lay down a general rule by which one may determine *in all cases* whether a particular gulf or bay or other body of water which forms an indentation of the coast is to be considered in whole or in part a portion of the territory of the State."

But it is perfectly clear from what he added later that he was referring to a rule *which would cover all bays—ordinary or extraordinary*. On page 358 he said that there can be no doubt about the soundness of the twice-3-mile limit as a minimum and then goes on

[1] It is equally unnecessary to examine here the correctness of the very special argument raised by Mr. R. Gushue on the status of the Newfoundland bays under the award of the 1910 Tribunal and the Washington Treaty of 1912 in an article cited in paragraph 379 of the Counter-Memorial.

to notice that the 10-mile limit had received considerable support. Next, having explained the difference between the headland to headland along the coast theory and the more limited headland of bays theory, he cites on page 362 the formula proposed by the Committee of Experts in their unrevised report of 1926. This formula in substance gave a 12-mile limit with exceptions for historic usage. Jessup's comment was (p. 362) :

> "This headland theory in its restricted form has much to commend it, but obviously its unlimited application would be a mere reversion to ancient times when, for example, Great Britain claimed jurisdiction over the 'King's Chambers', which were formed by squaring off the British Isles. Such a solution would be entirely out of accord with modern tendencies and cannot be said to have achieved any very general support."

269. In other words, Jessup condemned the version of the headland theory subsequently adopted in the Norwegian Decree of 1935. But he approved the proposal for a restricted 12-mile rule and, after he had written, this proposal was revised by the committee which substituted a 10-mile limit in order to accord with international practice. He continued on the same page :

> "Turning to the second point raised above—namely, prescriptive rights—one is forced to the rather unsatisfactory conclusion that for large bays each case should be determined on its own merits and that the status of any particular bay more than 6 miles wide rests upon the success with which the littoral State has succeeded in pressing its claims to entire jurisdiction over that body of water."

Next, Jessup embarked on a discussion of the 1910 Arbitration and, taking a more favourable view than some writers of its importance in connection with the law of bays, gave as one of his reasons for attributing value to it the fact that the tribunal *unanimously recognized a tendency towards the adoption of the 10-mile rule*. Jessup suggested on the same page that, owing to the uncertainty of the law, the best thing to do was to examine each individual case of a bay which had given rise to controversy. But, before he embarked on this examination, he gave his own conclusions from a study of these cases (p. 382) :

> "It is believed that it will appear from a study of this material that no established rule of international law exists as to bays except to the effect that bays not more than 6 miles wide are deemed territorial waters as well as those to which a nation has established a prescriptive claim. Such a prescriptive claim may be established over bays of great extent ; the legality of the claim is to be measured, not by the size of the area affected, but by the definiteness and duration of the assertion and the acquiescence of foreign Powers. The evidence of international practice and usage does not indicate that a claim to a large bay is illegal."

Thus nothing could be more misleading as to Jessup's views than the single citation in the Counter-Memorial. Jessup's views were

fully consistent with the position stated in paragraph 265 above, for he recognized a limit generally applicable to bays with larger claims admissible on the basis of express or implied acquiescence. The difference is that the greatest common measure of presumed acquiescence which Jessup, writing three years before the 1930 Conference, felt able to endorse was twice the 3-mile limit.

270. The second citation is of a passage from Oppenheim in which the treatment of the subject of bays is somewhat brief and fragmentary. So far as any clear opinion is expressed, it is that 6-mile bays are definitely territorial and that the maximum conceivable width depends on potential control by shore batteries. It is then said to be controversial what is the position of a bay with a width between the minimum distance of 6 miles and the maximum distance of control by coastal batteries. Whatever value may be thought to attach in 1950 to a passage still based on the obsolete idea of the cannon-shot, it is very evident that Oppenheim did not contemplate the admissibility of the arbitrary headland to headland method adopted in the 1935 Decree.

271. The third citation is of a passage from a brief descriptive lecture on bays at the Hague Academy delivered three years before the 1930 Conference. Professor Wilson said that from the beginning of the nineteenth century the tendency has been to impose a limit on the width of territorial bays and that 6-mile bays are agreed to be susceptible of jurisdiction. He then reviewed the practice, giving instances of the adoption of the 10-mile limit but also referring to the recognition of larger historic bays and to the difficulty of definition. Then he summed up as in the passage cited in paragraph 392 of the Counter-Memorial and it is evident that, like Jessup, he merely meant that there was no uniform rule for *all* bays.

272. The United Kingdom Government thus submits that none of the alleged "contrary indications after 1910" really touch the central points of the arguments advanced in the Memorial to establish the existence of a rule of customary law limiting the width of territorial bays to 10 miles. The central points of this argument are : (1) that under the influence of the principle of the freedom of the seas there developed from the beginning of the nineteenth century a clear principle of customary law requiring territorial claims to bays to be restricted in ordinary cases to enclosed bays of moderate width ; (2) that State practice tended more and more to fix upon a 10-mile limit as the reasonable and appropriate width in ordinary cases ; (3) that there also existed however a current of thought that the logical width is twice the maritime belt giving a width of 6 miles ; (4) the same current of thought, in the minds of those who proposed *de lege ferenda* to increase the maritime belt to 6 miles, led to one or two suggestions for a 12-mile rule for bays ; (5) the territoriality of bays came to be generally recognized—and no one

insists on this point more than Norway—to be a principle distinct from the maritime belt ; (6) in consequence, after some ventilation of the different views, the opinion hardened at the 1930 Conference that the acceptable form of the *existing rule* restricting claims to ordinary bays is the 10-mile rule of State practice. The "contrary indications after 1910" invoked by Norway only serve to testify to the general accuracy of the United Kingdom's arguments on these several points.

Revaluation of the evidence establishing the final emergence of a rule of customary law restricting the width of territorial bays to 10 miles in ordinary cases

273. The Norwegian Government, in paragraphs 367 to 372 of the Counter-Memorial, seeks to impeach the evidence relied upon in the United Kingdom's Memorial as establishing the crystallization of the 10-mile limit. The Counter-Memorial says that the United Kingdom's evidence in support of its thesis is *reduced* to the draft conventions of certain learned societies plus the work of the 1930 Conference. But, when it is a question of the final resolving of doubts upon a point of customary law, what better evidence can there be than the concentrated opinion of many jurists and the concentrated opinion of many States ? The United Kingdom Government emphasizes that the existence of *some* rule of customary law restricting the territoriality of bays is established by the overwhelming evidence of State practice and doctrine, including the alleged "contrary indications" invoked by Norway. Indeed, Gidel, as has previously been mentioned, declares that the mere recognition of the category of historic bays peremptorily proves the existence of a restrictive rule of customary law applicable to other bays. Here, it is a question simply of ascertaining the crystallization of the general opinion as to the precise content of the restrictive rule, and the best possible evidence of that is undoubtedly the evidence on which the United Kingdom relies [1].

274. The Norwegian Government again launches its by now familiar attack on the value of the work of the learned societies and of the 1930 Conference as evidence of existing law, complaining particularly that the work is a mixture of *lex lata* and *lex ferenda*. This argument has already been dealt with at length in paragraphs 173 to 179 above, to which the Court is respectfully asked to refer. The objection that the adoption of the 10-mile rule by learned societies and by Sub-Committee No. II results from a mixing of *lex ferenda* with *lex lata* is singularly unconvincing when the expressed reason for accepting the 10-mile limit was that this is the limit which has the support of international practice. In particular the Committee of Experts deliberately revised its draft basis of

[1] If there is no rule all bays are open to challenge ; if there is a rule it is either a 10-mile rule or a rule of double the width of territorial waters.

discussion by substituting 10 miles for 12 miles on the ground that the former had the support of State practice.

275. The Counter-Memorial (para. 368) points out that one learned society, the American Institute, left the actual figure in its rule as a blank, and that another, the International Law Association, seems to have contemplated that all bays would be subject to the primary rule that the base-line of territorial waters follows the coast. Since the usual figure given by the learned societies is 10 miles, and since the work of the 1930 Conference also adopted this figure, the point is immaterial. These little discrepancies are fully consistent with the position that the 10-mile rule was in process of crystallization.

The Counter-Memorial also observes that Sub-Committee No. II was not entirely unanimous, and that its adoption of the 10-mile limit was expressed conditionally. Norway was, no doubt, a dissentient, but most delegations accepted a 10-mile limit subject to a condition which would guard against the abuse of the rule in support of claims to waters not really bays.

276. Norway complains that the United Kingdom's Memorial did not notice the divergent view of Portugal at the 1930 Conference, who proposed a rule which would have given a 36-mile limit. If ever there was a proposal made *de lege ferenda* and without hope of realization it was that proposal of Portugal. The Counter-Memorial in any case overlooks the fact that in her practice Portugal had endorsed the 10-mile limit and that—most strikingly—in a fisheries treaty, not with one of the signatories of the North Sea Convention, but with Spain [1].

The attachment of the above-mentioned condition to their approval of the 10-mile limit can scarcely be said to indicate the disagreement of the majority with the thesis now maintained before the Court by the United Kingdom. The majority endorsed the 10-mile limit as being the limit found in State practice, but did so only on condition that *so large a limit* was not made the vehicle of improper encroachments on areas of high seas which *do not really comprise enclosed waters*.

Is the 10-mile rule dependent on the 2-mile rule ?

(Counter-Memorial, para. 393)

277. One last aspersion is cast upon the 10-mile rule in paragraph 393 of the Counter-Memorial. It is said to be linked to the régime of the 3-mile limit and to have lost its foundation with the defeat of the 3-mile limit at the 1930 Conference. The first comment to be made upon this argument is that the 3-mile limit, *as the only*

[1] See a convention between Spain and Portugal in 1885 (*British and Foreign State Papers*, Vol. 77, p. 1182).

limit carrying a presumption of universal acquiescence in the claim, suffered no defeat at all in 1930. The rule of the 3-mile limit, as has been said in paragraphs 117 to 121 above, retained its fundamental importance after 1930 as the limit beyond which the validity of the claim depends on proof of express or implied acquiescence. It is, therefore, idle to talk as if the 3-mile limit had vanished from international practice and to argue on that basis that the 10-mile limit lost its *raison d'être* in 1930.

278. In any event, the United Kingdom Government maintains its view that the 10-mile limit must be regarded as an essentially independent rule for bays. Admittedly, the 10-mile limit equally with the 3-mile limit has resulted from the impact of the doctrine of the freedom of the seas on rights to maritime territory. It may also be conceded that most States, *though not all,* which have specifically adopted the 10-mile limit for bays in treaties or proclamations, are adherents to the 3-mile limit for territorial waters. But the 10-mile limit seems to have established itself in international practice empirically as the reasonable and practical limit for bays rather than by any process of deduction from the 3-mile limit. Judge Moore's rationalization of the 10-mile limit caught the attention of Judge Drago and of some other jurists, but there is no trace of his reasoning in the negotiations for the Anglo-French Treaty of 1839, the Anglo-German Agreement of 1867 or the North Sea Convention of 1882. Indeed, most of those who have worked from the basis of the 3-mile limit to a general rule for bays have been advocates of the twice-3-mile limit. Certainly in 1930 the 10-mile limit was adopted simply as the reasonable and practical limit for territorial claims to bays already adopted by many States.

The "reasonable discernment theory"

(Counter-Memorial, para. 394)

279. In these circumstances, it is really a somewhat academic question whether and to what extent the range of vision has been an element in the choice of the limit. Nobody to-day suggests that the true rule is the extreme range of vision. Otherwise, no doubt, we should hear someone arguing that the limit must be increased with the range of telescopes just as it was once argued that the increased range of artillery increased the limit fixed by reference to the cannon-shot rule. Sir Cecil Hurst and Gidel go no further than to approve the 10-mile limit as a good working rule meeting the range of vision test. The fact that greater ranges of vision are possible is beside the point. The true position of the 10-mile limit to-day is that it has developed as an independent rule, fixing the ordinary limit of a territorial claim to a bay within which the acquiescence of other States is conclusively presumed by international law.

The 10-mile rule as a rule of customary law

280. It remains to consider the Norwegian Government's contention that the practice in favour of the 10-mile limit does not show sufficient continuity to qualify as a rule of customary law. The inconsistency of the United Kingdom's own practice is, indeed, invoked in the Counter-Memorial as evidence of the lack of continuity. There are, however, at least two answers to this argument. First, there is ample continuity in the practice showing the existence of a rule of customary law restricting the width of territorial bays. The inconsistency has been manifested only in fixing the precise limit which would be generally acceptable to States as not involving too large a derogation from the freedom of the seas. The United Kingdom Government submits that some inconsistencies or differences in past practice concerned merely with giving precision to a recognized rule of customary law cannot be a bar to the general validity of the customary rule and that it is a legitimate exercise of the judicial function to declare the precise version of the rule generally accepted in international practice. In this connection, it may be apposite to recall the frequently cited observation of Judge Altamira in the *"Lotus" case* (Series A/10, pp. 106-107) :

> "But even if the question were raised of the necessity for a definitely specific custom and of the stage of development reached by the custom which might be considered necessary in the present connection, I would point out that the conditions particular to the general process of the development of a customary rule must be borne in mind. Often in this process there are moments in time in which the rule, implicitly discernible, has not as yet taken shape in the eyes of the world, *but is so forcibly suggested by precedents* that it would be rendering good service to the cause of justice and law to assist its appearance in a form in which it will have all the force rightly belonging to rules of positive law appertaining to that category."

281. Secondly, as has been said in paragraphs 157 to 166 above, there is nothing in Article 38 (1) *(b)* of the Statute of the Court to make either the duration or the continuity of a custom essential to its legal force. All that the Statute requires is that at the time when a custom is invoked as law, it should constitute "evidence of a general practice accepted as law". The true relevance of the continuity of a custom is its logical value as proof of the general acceptance of the custom as law. But, in the submission of the United Kingdom Government, the Court under its Statute is entitled and bound in each case to decide the status of a custom invoked as law on a broad review of all the evidence. And no evidence can be so persuasive and conclusive as evidence of the general recognition of the practice as law in the period just before the time when the Court is called upon to take its decision. The United Kingdom Government in the present case reaffirms its contention that the

evidence contained in the work of learned societies immediately before 1930 and in the work of the 1930 Conference establishes that the rule of customary law restricting the width of territorial bays, which had been shaped and formulated in a century of State practice, has crystallized as the rule of the 10-mile limit for ordinary bays.

282. The United Kingdom Government, in any event, does not admit that the alleged inconsistencies and divergencies in the practice of States invoked in the Counter-Memorial by Norway are such as to constitute a bar to the recognition of the practice as law. Here the rule of law, which is invoked, concerns the conflicting interests of States as claimants of coastal waters and users of the high seas. It is not surprising that the final solution was arrived at with hesitation and differences of detail, but the basic rule restricting territorial claims to ordinary bays has grown steadily and inevitably to the final solution of the 10-mile limit. A rule of customary law may be formed more or less quickly and with more or less difficulty, according to the nature of its subject-matter. Here the rule has grown slowly over the period of a century. But ultimately the moment comes, as it has in the case of the 10-mile limit for bays, when the true rule shows clear as an acceptable and generally accepted rule of international law.

282 A. In any case Norway certainly cannot establish that the United Kingdom is obliged—except in individual cases where an historic title is proved—to recognize as national waters bays whose opening is wider than 10 miles.

Summary of international law relating to bays

283. Accordingly the United Kingdom Government, for all the above reasons and for the reasons stated in paragraphs 70 to 95 of its Memorial, submits that

(1) The modern rules of international law governing the territoriality of bays in the case of ordinary bays is the 10-mile rule as it was formulated by Sub-Committee No. II at the 1930 Conference (see para. 81 of the Memorial).

(2) Under modern international law the validity of a claim based on the exercise of jurisdiction, to a bay as territorial, beyond the 10-mile limit allowed by the general rule, has to be tested by reference to the acquiescence of the State against which it is invoked. In the absence of express acquiescence by that State, the claim can only be made good by proof of an historic usage from which the acquiescence of other States is to be implied.

(3) Modern international law categorically forbids the assertion of a base-line formed by the joining of headlands along the

coast except in the case of bays and within the limits allowed under rules (1) and (2).

Islands, rocks and banks

(Counter-Memorial, paras. 395-510)

Preliminary observations

(Paras. 395-403 of the Counter-Memorial)

Norwegian argument that the United Kingdom in the Memorial paid insufficient attention to early authorities regarding the effect of islands on the base-line of the territorial sea

284. The United Kingdom Government, in paragraphs 96 to 100 of its Memorial, indicated very briefly its reasons for thinking that until comparatively recently detailed consideration had not been given to the effect of islands upon the base-line of the territorial sea. The Norwegian Government, in paragraphs 395 to 403 of the Counter-Memorial, criticizes this view and claims that more attention was formerly given to the problem of islands in connection with the base-line both by writers and by States in their practice than is suggested by the United Kingdom Government. The pleading in these paragraphs somewhat misrepresents the meaning of the authorities cited by taking passages out of their proper context. It is therefore necessary to take up the attention of the Court in restoring these passages to their proper context.

Azuni

285. The United Kingdom Government referred to passages in Azuni, Ortolan and Calvo, merely as three typical nineteenth-century writers, to show that, while writers recognized islands to have some effect in closing bays, they otherwise regarded them simply as having their own territorial waters or as raising the problem of straits. The Counter-Memorial (para. 398), however, insists that the following passage cited in the Memorial (para. 96) and written by Azuni in 1805 shows a recognition of the principle of the "outer coast line" round islands :

> "17. Il est déjà reçu parmi les nations policées, que dans les lieux où la terre, en se courbant, forme une baie ou un golfe, on doit supposer une ligne tirée d'une pointe à l'autre de cette terre ferme, *ou des petites îles qui se prolongeraient au delà des promontoires de cette baie* .... (et qu'on regarde ce golfe ou cette baie comme mer territoriale, quand même le milieu serait dans quelques endroits à plus de trois milles de distance de chaque rive)". (*Le Droit maritime de l'Europe*, p. 254.)

By omitting the bracketed words and by printing in italics the previous words the Counter-Memorial seeks to give the impression that Azuni was advancing a principle much larger than that of the

closure of a bay by islands, which was the interpretation given by the United Kingdom. The latter interpretation is thought to be much more reasonable and fair than the strained "outer-coast-line" interpretation of the Counter-Memorial. It is, however, somewhat profitless to speculate as to the precise meaning of these words written 145 years ago when it is realized that this single reference was absolutely all that Azuni had to say about islands in the whole of his book. About rocks and banks submerged at high tide he said nothing at all.

Ortolan

286. The passage from Ortolan (*Diplomatie de la Mer* (1864), p. 145) mentioned in the Memorial (para. 96) was:

> "On doit ranger sur la même ligne que les rades et les ports les golfes et les baies et tous les enfoncements connus sous d'autres *dénominations*, lorsque ces enfoncements formés par les terres d'un même État ne dépassent en largeur la double portée du canon, ou lorsque l'entrée peut en être gouvernée par l'artillerie, ou qu'elle est défendue naturellement par des îles, par des bancs ou par des rochers."

The Norwegian Government first comments (para. 399) upon this passage that, contrary to the United Kingdom Government's contention, Ortolan did not confine his rule to "baies *sensu stricto*", but extended it to all indentations "connus sous d'autres dénominations". Why this is contrary to the contention of the United Kingdom Government in the Memorial is not made clear. In fact the United Kingdom Government concedes that straits leading to inland waters are to be treated as analogous to bays and merely said that writers like Ortolan assumed the effect of islands on territorial waters to be covered by the law relating to bays and straits. In any event, the natural meaning of Ortolan's words is that "tous les enfoncements connus sous d'autres *dénominations*" are to be read *ejusdem generis* with "les rades et les ports, les golfes et les baies". Indeed, the word "dénominations" suggests that all that Ortolan had in mind was such inlets as "estuaries", "creeks", "fjords", etc., which international law undoubtedly places in precisely the same category as bays.

287. The Norwegian Government, however, makes the further comment that in the passage set out above Ortolan takes account of the position of islands, banks or rocks in relation to bays, not by reference to whether they form channels leading to the open sea or to inland waters but by reference to whether they contribute to the defence of the bay. Ortolan is thus said not to look at the matter from the point of view of the navigator but of the interests, particularly the defence interests, of the coastal State. It is perfectly true that Ortolan placed a good deal of emphasis on defence as the philosophical justification of a State's right to maritime territory.

But essentially his statement of the legal extent of that right is the Bynkershoek doctrine of domination from shore by cannon-shot. Thus in the above passage Ortolan limits the width of bays in ordinary cases by reference to double cannon-shot. Another passage, however, a little earlier on, does show that he emphatically did take into account the interests of international navigation. In this earlier passage Ortolan gives the reasons justifying a State's right of possession over ports and roadsteads. In the passage quoted from page 145 he assimilates gulfs, bays and similar indentations to ports. The earlier passage reads :

> "En ce qui concerne les ports et les rades, d'une part, on ne peut pas dire qu'ils ne soient pas susceptibles d'être possédés. La nation maîtresse des côtes qui les forment les a incontestablement en son pouvoir ; il lui est possible de prendre des mesures pour en écarter toute action étrangère ; elle est à même d'y exercer de fait, et d'une manière permanente, cette puissance physique qui constitue la possession. Rien dans la nature des choses ne s'y oppose. L'obstacle matériel au droit de propriété n'existe donc pas.
>
> L'obstacle moral n'existe pas non plus. *En effet, la propriété d'un peuple sur les ports et rades de son territoire n'empêche pas les autres nations de naviguer librement et de communiquer entre elles. Le peuple qui userait de ce droit de propriété, même pour interdire l'abord de ses rades et de ses ports, se mettrait personnellement en dehors de ces communications, mais il ne détruirait pas celles des autres. Il n'y a de réserve à faire, sous ce rapport, que pour certaines nécessités impérieuses de la navigation générale*" (*l. c.*, p. 140).

The Norwegian Government in paragraph 399 of the Counter-Memorial cites yet another passage from Ortolan (p. 158) which is said to show (1) that Ortolan did not endorse the low-tide mark but the line of navigable water and (2) that the limits of the territorial sea are determined not only by the possibilities but also by the needs of defence. As to the first point it is to be observed that in an earlier page (p. 153) Ortolan says that the edge of the sea along the coast is the natural limit of a State's territory and that the imaginary line of the artificial frontier of a State may be traced at a given distance from the coast *following its contours*. The concept of the line of navigable waters as the limit of the coast never, of course, received recognition in international practice. As to the second point, Ortolan, as has been said, emphasizes the need of defence *but applies the principle of dominion from shore*. Little seems to be gained by further discussion of the views of Ortolan since the United Kingdom Government fails to see that Norway has revealed any detailed consideration by this author of the problems raised by islands in regard to the base-line.

Calvo

288. The passage from Calvo (Vol. I, Section 367) mentioned in the Memorial (para. 96) reads as follows :

"Les golfes et les baies défendus soit naturellement par des îles, des bancs de sable ou des roches, soit par le feu croisé de canons placés à leurs deux ouvertures, se rattachent à la souveraineté territoriale contiguë...."

The Norwegian Government, however, in paragraph 400 of the Counter-Memorial refers to a passage in an earlier section (para. 342) where Calvo is said to have been expounding the effect of an island on the tracing of the base-line. This suggestion is extraordinary. Section 342 occurs in a long chapter not dealing with maritime but land territory and at the end of it all Calvo inserts Section 342 entitled "Limites du territoire" which proceeds as follows :

"Chaque État a le droit de souveraineté jusqu'à sa frontière et le devoir de ne pas empiéter sur le territoire voisin. Il importe donc aux États limitrophes de déterminer clairement les limites qui les séparent.

On distingue les limites internationales ou frontières d'un territoire ou d'un État en limites *naturelles* et en limites *artificielles*.

Ces dernières consistent, en général, dans des lignes purement conventionnelles, qu'on indique par des signes extérieurs placés à certaines distances, et qui sont ordinairement sur terre des bornes, des poteaux, des barrières, des fossés, des monceaux de terre, des murs, des édifices, des routes, des arbres ou des rochers marqués ; *sur mer, des phares, des bouées flottantes arrêtées par des ancres, etc.* Ces frontières reposent, tantôt sur une possession non contestée depuis longtemps, tantôt sur des traités formels.

Les limites naturelles sont, sur la mer, les lacs, les fleuves ou les rivières, les montagnes, les terrains incultes ou inoccupés."

Then after discussing the dividing line between *limitrophe States* in the case of river, lake and mountain boundaries, he concludes :

"Nous avons déjà traité la question des frontières maritimes, c'est-à-dire de la mer formant la limite d'un État. Nous nous bornerons ici à dire, en résumé, que sur mer on peut tracer *des frontières imaginaires d'après les degrés de longitude et de latitude, ou mesurer les distances, soit par des lieues maritimes, à partir d'une certaine île ou d'une certaine côte, soit par des portées de canon.*

La délimitation des frontières des États repose sur les mêmes bases et sur les mêmes titres que la propriété du territoire national ; souvent aussi elle est déterminée par des traités spéciaux, auxquels sont généralement annexées des cartes géographiques frontières."

If the words in italics (i.e. those quoted in the Counter-Memorial) are read in their context, it will be seen that they have nothing to do with the present case and do not support the argument in the Counter-Memorial.

Lord Stowell's judgment in the case of the Anna *(1805)*

289. Next, in paragraph 401 of the Counter-Memorial, the Norwegian Government criticizes the brief account given in the Memorial (para. 98) of Lord Stowell's well-known judgment in the *Anna*

(5 Christopher Robinson, 1805, p. 373). It maintains that this great judge did not merely hold that the small mud elevations at the mouth of the Mississippi were entitled to territorial waters as isolated units of territory. He is said to have laid down that the *line of United States territory* must be traced to begin from these islands, thus treating the intervening sea as inland waters. Whatever interpretation others may afterwards have put on his language, it is perfectly clear from a reading of the whole case, instead of the single passage cited in the Counter-Memorial, that Lord Stowell directed his attention exclusively at the question whether these mud elevations could properly be regarded as territory of the United States.

Counsel for the capturing privateer had sought to support the capture by arguing (1) that the mud elevations were not of sufficient consistency to be considered territory at all and (2) even if they were territory, they were uninhabited and not territory of the United States. Lord Stowell treated these elevations (which were permanently above water) as islands and replied to the second argument in the following famous passage (p. 385 *(b)*) :

> "The capture was made, it seems, at the mouth of the River Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is *'terræ dominium finitur, ubi finitur armorum vis'*, and since the introduction of fire-arms, that distance has usually been recognized to be about three miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, which form a kind of portico to the main land. *It is contended that these are not to be considered as* any part of the *territory of America, that they are a sort of 'no man's land', not of consistency enough to support the purposes of life, uninhabited,* and resorted to, only, for shooting and taking birds' nests. It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on made land by the former Spanish possesssors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands ; and that they are the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, et vicino prædio attulerit, palam tuum remanet* [1], even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the main land and as comprised within the bounds of territory. If they do not belong to the United States of America, any other Power might occupy them ; they might be embanked and fortified. What a thorn would this be in the side of America ! It is physically possible at least that they might be so occupied by

[1] Inst. L2., Tit. 1. § 21.

> European nations, and then the command of the river would be no longer in *America*, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show *that these islands are not to be considered as part of the territory of America*. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.
>
> I am of opinion that the right of territory is to be reckoned from those islands."

The issue discussed in the above passage was simply whether, despite the lack of any evidence in the case as to the existence of United States sovereignty over the mud elevations, they must in their particular circumstances be presumed to be United States territory. The phrases "kind of portico to the mainland" and "natural appendages of the coast which they border" as well as the arguments about alluvium and possible occupation by a foreign Power are all addressed exclusively to this issue.

It seems that some of the misconception in the Counter-Memorial as to the meaning of Lord Stowell's language arises from a misunderstanding of his words "protection of territory" which in a later paragraph of the Norwegian pleading (para. 425) are treated as referring to the protection afforded by the mud islands to the mainland of the United States. This is not the case at all. Lord Stowell employed the words "protection of territory" as a term of art in prize law to denote the protection from capture enjoyed by a merchant ship in neutral waters. In short he referred to the protection given by the neutral shore to the merchant ship and not to protection of the shore by the islands. A similar use of the word "protection" is to be found in the arguments of counsel in the case. Thus counsel for the captor, dealing with the argument that the capture had taken place in neutral waters, said (p. 375) :

> "This argument proceeds on a supposition that the time of capture is to be dated from the time of pursuit, and that the immunity of territory is not violated by the capture of a vessel which has been chased into territory, in the same manner as when the vessel is *avowedly lying in a state of protection in the first instance*, and does not merely fly to it as a place of refuge, from the operations of the enemy."

It is therefore clear that, as stated in the Memorial, Lord Stowell was dealing simply with the question whether the islands belonged to the United States so as to constitute a base-point *for neutral protection of merchant ships in the adjoining 3-mile belt.*

The session of the Institute of International Law in 1894

290. In paragraph 403 the Counter-Memorial deals with the discussion of rocks and sandbanks at the 1894 session of the Institute of International Law (13 *Annuaire*, p. 293). The United Kingdom Government said in paragraph 100 of the Memorial that the Institute

decided to exclude any article on rocks and sandbanks apparently because it was feared that to make allowance for rocks and sandbanks would lead to undue extension of territorial waters. The rejected article read as follows :

> "Des bancs de sable et des rocs découvrant à marée basse sont assimilés au territoire."

M. de Bar, as the Counter-Memorial states, proposed the suppression of this article on the ground that, taken literally, it opened up the possibility of a series of sandbanks leading to infinite extensions of territorial waters. The Norwegian Government now contends that the objection was only to sandbanks, not to rocks. If this was so, it is curious that M. de Montluc should have immediately mentioned another proposal for dealing with rocks, and that no one thought of suggesting that the article should stand in the draft, only the reference to sandbanks being deleted. And what are we to think of the following observations of M. de Martens and M. Desjardins at the next meeting of the committee (13 *Annuaire*, p. 298) with respect to the rejection of the article on the previous day :

> "M. de Martens désire qu'il soit bien entendu, à propos de l'article 4 qui a été rejeté, que les rochers, les îlots qui émergent toujours de la mer seront assimilés au territoire.
>
> M. Desjardins se demande si telle a bien été la pensée de l'assemblée, si elle a entendu par exemple faire partir une nouvelle zone de 6 milles d'un rocher situé lui-même à 5 milles de la côte."

It is thus clear that the United Kingdom's assertion in paragraph 100 of the Memorial was an understatement, not an exaggeration, of the Institute's objection in 1894 to allowing rocks and banks to be taken into account in measuring territorial waters.

Arguments of the United Kingdom Government in the Memorial re-affirmed

291. The Norwegian Government in paragraph 403 of the Counter-Memorial concludes its preliminary observations concerning the effect of islands on the base-line, by renewing its criticism (also put forward in para. 396) of the view expressed in paragraph 100 of the Memorial that the tendency to distinguish between individual islands and groups of islands is comparatively recent. The United Kingdom Government does not however deny that States in their practice have sometimes had to address themselves to the question of territorial waters in regard to groups of islands, though it will contest in later paragraphs the allegations made in paragraph 396 with regard to the United Kingdom. It merely emphasized that the juridical régime of the waters in and around archipelagos has only recently been the subject of detailed examination. There are some echos of Lord Stowell's decision in the *Anna* in nineteenth-century writers. Otherwise Hall seems to be alone in raising the

question of lagoons enclosed by coral islands and banks and he deals with them as entirely exceptional and as a form of salt-water lake (para. 346 below). The United Kingdom Government therefore re-affirms that the conditions under which, and the limits within which, areas of sea may be converted into inland waters through the grouping and positioning of islands only attracted general attention on the eve of the 1930 Conference.

A.—Individual islands, rocks and banks

(Counter-Memorial, paras. 404-421)

Norwegian criticism of United Kingdom definition of an island

292. The Norwegian Government, in paragraphs 404 to 419 of the Counter-Memorial, criticizes the views expressed in paragraphs 101 to 108 of the Memorial as to the extent to which individual islands, rocks and banks lying off a coast may be taken into account in delimiting the territorial waters appertaining to that coast. It is common ground that an elevation of the sea bed off the Norwegian coast, which belongs to Norway and rises permanently above water, ranks as a Norwegian island possessing territorial waters in its own right. It is also common ground that an elevation of the sea bed not permanently above water, which is situated within 4 miles of the low-water mark of permanently dry Norwegian territory, is entitled to be taken into account as a base-point for the delimitation of Norwegian territorial waters. The chief point of difference is as to the status of an elevation not permanently above water (a low-tide elevation) all of which lies more than 4 miles from the nearest permanently dry territory.

The problem of low-tide elevations

The United Kingdom repeats its view that the problem has only attracted attention within comparatively recent times

293. The United Kingdom Government, relying primarily on Basis of Discussion No. 14 and on the rules adopted in 1930 by Sub-Committee No. II, asserts that a low-tide elevation may only be taken into account if it lies within the maritime belt of permanently dry territory measured from the latter's low-water mark. If an elevation which is covered at high tide lies at a greater distance from any dry land, it neither ranks as an island nor can influence the delimitation of the maritime belt of any permanently dry territory. The Norwegian Government criticizes the United Kingdom for invoking no other authority in support of its propositions in the Memorial than the work of the 1930 Conference—apart from a reference to the North Sea Fisheries Convention of 1882. But the precise effect of islands, rocks and banks on the delimitation of

territorial waters, as has been explained, is a matter which has only recently attracted general attention and study in connection with the 1930 Conference. It is, therefore, scarcely surprising that there is a paucity of material in the works of jurists before 1930. Even so, as will appear below, there is not inconsiderable evidence supporting the principles adopted by Sub-Committee No. II.

294. In fact the United Kingdom did adduce in paragraph 100 of the Memorial evidence of the disinclination of the Institute of International Law in 1894 to allow rocks and banks, whether dry only at low tide or permanently dry, to be taken into account at all in the delimitation of territorial waters. As the Norwegian Government questioned the meaning put in the Memorial upon the proceedings of the Institute in 1894, the United Kingdom Government has further examined those proceedings in paragraph 290 of this Reply and has shown beyond any doubt the general opposition of members of the Institute to the extension of territorial waters by means of rocks and banks off the coast. The Institute's cautious approach in 1894 to the question of extending territorial waters by the use of off-shore rocks and banks is in line both with the views of the British Law Officers in 1875 and with Norwegian legal opinion in the nineteenth century.

Law Officers' opinion concerning Great Barrier Reef (1875)

295. The Law Officers of Great Britain, when asked in 1875 to give their views concerning the jurisdiction of the Courts of Queensland with particular reference to the territories of the Great Barrier Reef, gave an opinion, the full text of which is printed at Annex 44. They laid down four propositions which are extremely close to the principles endorsed by Sub-Committee No. II :

(1) Queensland has no legislative authority over the seas beyond the distance of 3 marine miles from low-water mark on the mainland and islands respectively.
(4) Land not submerged at ordinary high tides however small in extent is an island.
(5) *Reefs attached to an island* and dry at low water are part of the island.
(6) *Reefs detached from any island and dry at low-water mark only are not islands.*

This opinion is the more significant in that it was given after considering the Law Officers' opinion concerning the Bermuda Reefs (cited in para. 467 of the Counter-Memorial) which seems to have adopted a slightly more liberal attitude towards the appropriation of reefs exposed only at low tide. The phrase "reefs attached" to an island is akin to the phrase "dependent islands and banks" in the 1882 Convention and clearly limits the use of low-tide elevations for extending the territorial sea to those which are properly "adjuncts" or "appendages" of the dry land.

Norwegian legal opinion in the nineteenth century

296. Norwegian legal opinion in the nineteenth century also shows doubts about the propriety of using low-tide elevations in delimiting the territorial sea. It has been pointed out in Part I of this Reply that neither the 1869 Decree for Søndmøre nor the 1889 Decree for Romsdal and Nordmøre took account of rocks submerged at high tide in delimiting the base-line for those areas. The language used in the "Exposé des Motifs" of the Minister of the Interior when proposing these decrees strongly suggests that the Minister did not consider the use of submerging rocks for base-points as legitimate. Thus in the Exposé des Motifs for the 1869 Decree (Annexes to the C.-Memorial, Vol. II, pp. 60-61) the Minister said that the zone of exclusive fisheries coincides with the zone of the territorial sea, which in turn is determined partly by cannon range and partly by the distance of one geographical league and then continued :

> "Comme point de départ du calcul, ce n'est pas la terre ferme seule qui doit pouvoir être utilisée, mais aussi les îles et rochers situés au large de la côte, pourvu qu'ils ne soient pas recouverts par la mer ; cette conception a d'ailleurs déjà été adoptée dans la lettre patente mentionnée ci-dessus (i.e. 1812 Rescript).
>
> On verra par la carte ci-jointe, dressée par le service hydrographique, que l'étendue de mer dont il est ici question recouvre deux déclivités partant de la côte, ou deux bancs continus situés de chaque côté de la dépression du Bredsunddypet qui, avec la partie de mer s'étendant des deux côtés, forme le commencement du golfe ou fjord s'enfonçant dans la terre dans la direction de l'est sous le nom de Bredsund, et plus loin de Storfjord.
>
> Outre un certain nombre de hauts-fonds et roches sous-marines, ces deux déclivités *ou bancs comptent plusieurs îlots ou rochers, qui sont toujours visibles au-dessus de la mer ;* la plus grande ligne continue formée par ces rochers est celle qui porte le nom de Faldgaren, sur le banc nord, dans le voisinage du phare d'Ernka ; les autres rochers situés le plus au large (Svinöy, Takleboene, Hestboene, Langskjær, Skibbyggeren et Storholmen) sont indiqués en rouge sur la carte."

The italicized phrases in the above passage indicate that the Minister considered himself only entitled to make use of *permanently visible* islets and rocks. The Minister, in his Exposé des Motifs for the 1889 Decree did not find it necessary to repeat this language, but he equally disregarded submerging rocks. The Geodesic Institute, to which the Minister referred for advice, adopted the same attitude and used similar language. (See Rapport 1912, p. 28.) It is also not without significance that in the course of the discussions concerning this decree the Prefect of Romsdal expressed the view that it was only possible to take into account the outermost *inhabited* or *inhabitable* territory and not mere rocks and islets situated in the open seas. Although this view was not accepted by the Geodesic Institute, it shows how far Norwegian official opinion was at this

period from considering the use of low-tide rocks to be legitimate in delimiting the base-line.

297. The above interpretation of Norwegian practice in the nineteenth century is strongly confirmed by the four Norwegian jurists, Aschehoug, Arctander, Aubert and Morgenstierne, whose opinions are cited on page 45 of the 1912 Rapport. Aubert, for example, said in the *Revue générale de Droit international public* of 1894 (p. 434) :

> "Mais nos lois n'ont pas décidé s'il fallait tenir compte aussi des rochers qui ne se trouvent à découvert qu'à marée basse[1]; leurs termes à cet égard sont équivoques. En pratique on n'a, que je sache, jamais compté que les rochers qui sont toujours au-dessus de la mer ; les îlots et rochers, fixés comme points de départ dans les règlements mentionnés ci-dessous, appartiennent du moins tous à cette catégorie."

And Morgenstierne, in his book, *Manuel du Droit constitutionnel norvégien*, said as late as 1909 that under the terms of the 1812 Rescript it is not possible to take into account rocks only visible at low tide. Despite the previous practice and legal opinion, the committee which drew up the 1912 Rapport decided by reasoning the weakness of which is acknowledged in the Rapport, to recommend that submerging rocks should be taken into account.

298. The phrase "which are not continuously run over by the sea" was first substituted in Norwegian legislation for the phrase "which are not run over by the sea" in a letter of 1908 from the Ministry of Foreign Affairs to the Ministry of National Defence (see Annex 34 A of the Counter-Memorial). In spite of the fact that the phrase "continuously run over" occurs in an unpublished Swedish decree of 1779, the effective starting point of this phrase, which was also introduced into the neutrality declaration of the Scandinavian States in 1938, the Aaland Islands Convention of 1920 and the Swedish-Finnish Liquor Convention of 1933 as noted in paragraph 409 of the Counter-Memorial, was almost certainly a Swedish fisheries decree of 1871. It seems reasonable to suppose that the adoption of this phrase claiming to take into account rocks not continuously submerged was a result of the emergence of the rule of the low-water mark in the nineteenth century. But the low-water mark rule was formulated to define the seaward limit of permanently dry *terra firma*. It is one thing to take into account low-tide rocks and banks as adjuncts of the low-water coast line of permanently dry territory. It is quite a different thing, when they lie by themselves in the open sea, to treat them as islands possessing their own territorial waters. Although the above-mentioned conventions

[1] A cette étude est ajouté en note : Seulement le traité avec le Mexique de 1886 compte expressément de la basse marée.

and decrees do not give expression to this distinction, the relevant clauses were essentially directed to off-shore islands and rocks.

The Hague Conference (1930)

299. Similarly, a number of the replies to the *questionnaire* applied the low-water mark test to islands without making the distinction between territory properly to be regarded as part of the main coast and territory standing apart on its own. But the moment that the distinction was brought to the attention of States at the 1930 Conference, its relevance was endorsed and Sub-Committee No. II recorded, without qualification, its approval of the *low-water mark test* for elevations ranking as adjuncts of a main coast, but of the *high-water mark test* for elevations standing apart on their own in the open sea. The actual terms in which they expressed the distinction will be found in paragraph 103 of the United Kingdom's Memorial.

Sub-Committee No. II, as stated in paragraph 105 of the Memorial, expressly referred to the analogy of the North Sea Fisheries Convention of 1882 which used the phrase "the low-water mark along the whole extent of the coasts of their respective countries as well as of the *dependent* islands and banks". Sub-Committee No. II plainly considered that its formula, which only allows low-tide rocks and banks lying within the width of the territorial sea to be taken into account, was a more precise rendering of the concept of "dependency" in the 1882 Convention. The same phrase "dependent"—in the French text "qui en dépendent"—appears in the French Neutrality Decree of 1912 with reference to banks uncovering at low tide. (See para. 409 *(a)* of the Counter-Memorial.) Here, it was clearly intended to express the idea of banks which are adjuncts of the main coast. Admittedly, the decree also appears to make a claim in respect of submerged shoals which are buoyed. The United States Federal Courts have, however, denied the validity of such a claim. In one case they have decided that a submerged shoal cannot be considered an island of the United States (*Soult* v. *L'Africaine* (1804) 22 Federal Cases, Circuit and District Courts, 1789-1880, Case No. 13179 : [Bee 204]) and in another case that a submerged reef off the coast of Florida on which a beacon had been constructed could not be considered territory of the United States (*United States* v. *Henning* (1925) 7 Fed. (2nd) 488).

300. The other branch of Sub-Committee No. II's rule for islands, rocks and banks, namely, that an elevation can only have territorial waters of its own if it is permanently above water, was entirely in line with the views expressed by Fauchille, one of few jurists to give detailed consideration to the problem of islands. Making specific reference to the Norwegian claim, he said (Book I, Part II (1925), p. 202) :

"Mais doit-on compter seulement à partir des îles qui restent à sec à marée haute ou à partir de celles qui ne découvrent qu'à marée basse ? La question n'a jamais reçu en Norvège une solution certaine : le décret du 22 février 1812 y a été interprété comme devant s'entendre tantôt de la marée basse (v. lettres du ministère des Affaires étrangères des 24 mars et 26 mai 1908), tantôt de la marée haute (v. déclaration du ministère de l'Intérieur en 1894). *Il nous paraît qu'on ne saurait traiter comme un véritable continent devant avoir une mer territoriale qu'une île qui n'est jamais recouverte par les eaux.* — Mais, à propos des îles, une autre question se pose encore. Que faut-il entendre exactement par des « îles » ? De simples rochers, des récifs, des bancs de sable doivent-ils leur être assimilés pour le calcul de la mer territoriale ? Les textes norvégiens parlent tout à la fois des rochers, des écueils et des îles. L'Institut de Droit international a expressément écarté les bancs de sable. Il nous semble qu'il faut tenir compte seulement des rochers, écueils et bancs de sable, habités ou non, où l'État peut d'une manière fixe établir des ouvrages."

It will thus be seen that Fauchille would have preferred an even stricter rule than that adopted by Sub-Committee No. II. Like Gidel, he would not even allow every elevation permanently above water to count as an island but only such as are capable of continuing use.

301. The Norwegian Government, in paragraph 411 of the Counter-Memorial, contends that the rules for islands, rocks and banks contained in Sub-Committee No. II's report have no juridical value in the present case on the ground that they were adopted as a compromise. In this connection it refers to the United Kingdom's own statement in paragraph 108 of the Memorial that the rules in the report are a reasonable compromise between the opposing views. The argument, in effect, is that the rules, being a compromise, must have been formulated *de lege ferenda* and are of no value as evidence of the existing law. Such an argument might have some force if this was a point on which there were clearer indications of what precisely was the rule of international law before 1930. The customary law of maritime territory, as Norway insists, is essentially a compromise between the right of all States to the free use of the seas and the right of individual coastal States to certain maritime territory. The fact that the rules adopted by Sub-Committee No. II were a compromise does not therefore in itself prejudice their claim to be applied in the present case. The question of islands, rocks and banks was for the first time considered in detail by a number of States at the 1930 Conference. The rules then adopted by Sub-Committee No. II may have been a compromise but they are far more in line with the views of the Institute in 1894 and of the few jurists, like Fauchille and Gidel, who have studied the question in detail, than is the claim of the Norwegian Government. The law of maritime territory is not simply a matter of claim by an individual State but requires the

acquiescence of other States. On a point where practice is limited and lacks precision what better evidence is there of the applicable law than a compromise adopted in an important committee of a codification conference and afterwards welcomed as a sensible reconciliation of the divergences ?

302. In paragraph 415 of the Counter-Memorial, the United Kingdom Government is chided for thinking only of mariners and not of the coastal State when it justified the rules formulated by Sub-Committee No. II as meeting the requirement that base-points should be permanently visible to mariners. The complaint made by the United Kingdom Government is that the Norwegian Government declines to recognize at all that others may have rights in the seas off the Norwegian coasts. The element of compromise in the law of the sea is not to be allowed to affect Norway. It is, however, perfectly reasonable for foreign mariners to expect permanently visible land marks to be the main basis for the delimitation of territorial waters. A submerging rock is not, of course, more visible itself when close to land than when out to sea. But the fact that it lies close to a permanently visible land-mark removes the objection which exists from the mariners' point of view to according territorial waters to a submerging rock far out to sea. As has been mentioned in paragraph 18 above, Norwegian fishermen have always attached great importance to permanent "fixes" from land in identifying their fishing grounds ; and did not the Minister of Interior in 1869 emphasize that he was only taking into account "les îlots ou rochers, qui sont *toujours visibles*" ? The significance of the element of visibility for mariners is emphasized by the fact that the charts normally used by ships at sea show permanently visible elevations, but owing to the frequent absence of detailed information often do not specify whether or not reefs show at low tide.

303. The objection to allowing territorial waters to a rock far from shore which submerges at high tide does not arise only from the point of view of visibility. Gidel, in a passage which has previously been cited, has said (*op. cit.*, Vol III, p. 674) :

> "L'idée qui domine le droit de la mer est l'idée de la liberté de l'utilisation licite et normale des espaces maritimes ; toute restriction inutile à cette liberté doit être évitée. Le territoire maritime est sans doute une dépendance nécessaire du territoire terrestre ; mais il faut que ce territoire terrestre soit ou effectivement utilisé ou susceptible de l'être."

This observation was made with reference to elevations of the sea bed which are permanently above water. How much more does it apply to elevations disappearing at every rise of the tide ? Norway's concept of maritime territory is said to be of waters accessory to the coast of a State the extent of which is determined by its legitimate interests. The application of this concept to a minute rock submerged at high tide and lying several miles from any permanently

dry land is submitted by the United Kingdom Government to be altogether too artificial and excessively restrictive of the freedom of the seas.

304. The Norwegian Government also criticizes, in paragraphs 417 to 419 of the Counter-Memorial, the statement of the United Kingdom in paragraph 106 of the Memorial that the words defining an island in Sub-Committee No. II's report are to be understood to denote an elevation exposing an appreciable surface of land above the sea so as to be permanently visible in normal weather conditions. The Norwegian Government maintains that Sub-Committee No. II intended any elevation, however small, to count as an island. It is unnecessary to pursue the point, as the United Kingdom accepts as falling within the rule laid down by the sub-committee any elevation which can be shown really to emerge permanently above high water. It merely considers that an elevation cannot be shown to emerge permanently without exposing some appreciable surface above the sea.

B.—Groups of islands

(Counter-Memorial, paras. 422-470)

Distinction between coastal and ocean groups

(Counter-Memorial, paras. 422-425)

305. The Norwegian Government, in paragraphs 422 to 425 of the Counter-Memorial, distinguishes between groups of islands lying off a mainland coast and groups lying in mid-ocean. It also distinguishes between the different types of coastal groups, some shaped like a chaplet, others circular or polygonal in form. It contends that no single formula can cover all these different types and pours ridicule on the United Kingdom for applying the same juridical régime to an ocean group like the Fiji Islands as to the Norwegian "skjærgaard". The United Kingdom is said to take no account of the geographical differences which are so varied as to make it particularly necessary to beware of abstract formulæ. This line of argument is, of course, merely an application to the case of archipelagos of the familiar Norwegian doctrine that the geographical facts of the world are so hopelessly complex that it is quite impossible for the law to formulate any general restrictions on the acquisition of maritime territory by coastal States. According to this pessimistic doctrine the coastal State must be left to encroach as it likes on the high seas.

306. The Norwegian criticism of the United Kingdom's thesis contained in paragraphs 113 to 121 of its Memorial is much less than fair. Broadly speaking, the United Kingdom maintains that islands in general have their own territorial waters and that channels between two islands or between an island and the mainland are

subject to the régime for straits except that where islands are so placed that they substantially enclose areas of sea within a State's territory, and where their intervening channels lead toward inland waters, the United Kingdom Government fully concedes that the channels must be treated as bays. The case of coastal groups of islands is, of course, precisely the case which may more often attract the application of the rule for bays. The United Kingdom's thesis is flexible enough to take account of geographical differences, including the differences between chaplets and other coastal groups. Moreover, it is not a new principle. It is merely the application to coastal groups of islands of the fundamental distinction in maritime law between waters enclosed within territory and waters which, being open to the high seas, are international waters.

307. What, then, is the Norwegian Government's concept of the régime of coastal archipelagos ? It lies in the more or less close solidarity of the islands with the mainland. Sometimes the solidarity is said to be such that the elevations rising from the sea will be part of the mainland and will be both physically and socially inseparable from it. The question of social separability or inseparability from the mainland apparently depends on whether the intervening waters serve as an agent of union or disunion. The Norwegian "skjærgaard" is represented in paragraph 425 of the Counter-Memorial as the conspicuous example of an archipelago inseparably linked, physically and socially, to the mainland.

Those who are familiar with the writings of jurists, with the work of the learned societies, with the practice of States and with the work of the 1930 Conference may feel that there are strong elements of novelty in the Norwegian exposition of this branch of maritime law. At any rate, it is not possible to lay the Norwegian doctrine, as does the Counter-Memorial, at the door of Lord Stowell whose judgment in the *Anna* is here invoked by the Norwegian Government. Lord Stowell, as has been explained in paragraph 289 above, concerned himself only with the question of the United States' title to the islands. And in his judgment, on which Norway now so strongly relies, the words "protection of territory" referred not to the protection of the mainland by the islands but to the protection afforded to the captured merchant ship by the 3-mile neutrality limit of an island belonging to the United States.

It is also to be observed that again the one factor, the one social element, of which the Norwegian Government declines to take any notice at all is the freedom of the seas. The sole criterion is to be the interest of the coastal State in the islands and in the intervening waters. Yet, even according to the Norwegian Government's own theory, the freedom of the seas is one of the two fundamental norms of maritime law. The present case, as is said in paragraphs 424-425 of the Counter-Memorial, concerns groups of islands lying off a mainland coast. But the settlement of the boundaries of the maritime territory of islands belonging to a coastal archipelago is just

as much a matter of compromise between the interests of the coastal State in adjacent waters and the interests of other States in the high seas as it is in other cases of maritime territory. The boundaries are thus necessarily determined not by the choice of the coastal State but by principles of international law. The applicable principles of international law, in the submission of the United Kingdom Government, are those set out in paragraph 122 of the Memorial.

Does international law recognize an exceptional régime for coastal groups of islands ?

(Counter-Memorial, paras. 426-441)

Question of the burden of proof (Counter-Memorial, paras. 424 and 426-429)

308. The Norwegian Government, in paragraph 424 of the Counter-Memorial, formulates the issue before the Court in regard to coastal groups of islands as follows :

> "Il s'agit de savoir quelles limites le droit international impose au domaine maritime de l'État, lorsque se trouve devant les côtes de ce dernier un complexe d'îles, d'îlots et de rochers présentant les caractères du « skjærgaard » norvégien."

It then proceeds in paragraphs 426-429 to argue that the burden is on the United Kingdom to establish that customary international law forbids a State to treat its coastal archipelago as a unity and as a prolongation of its continental territory.

The United Kingdom Government cannot agree with the Norwegian Government's formulation of the issue in regard to coastal groups of islands. Under international law the maritime territory of a State is determined fundamentally by reference to the tide mark on its individual pieces of territory and, where areas of seas are claimed by reason of particular configurations to be enclosed waters, it is for the claimant State to establish a permissive rule of international law authorizing the enclosure of the waters. The United Kingdom Government does not, as is wrongly asserted in paragraph 428 of the Counter-Memorial, contend that there is a principal rule for single islands to which any rule for archipelagos would have to be established as an exception. The principal rule is the much more fundamental one that the maritime territory of a State is to be measured from the tide mark along the shores of each piece of its territory. Then, where a given area of sea is claimed to be enclosed within the national territory of a State, a permissive rule has to be shown warranting the enclosure of the waters and the departure of the base-line from the tide-line. The force of the principal rule is greater rather than less when the enclosure of the waters is said to be due to the configuration not of a solid, continuous band of mainland territory but of disunited pieces of island territory

separated by considerable intervals of sea. The general questions of the primacy of the tide-mark rule and of the burden of proof in regard to its exceptions have already been discussed and the Court is invited in the present connection to refer to paragraphs 180-222 above.

309. The Government of the United Kingdom does not wish to place undue emphasis on the question of burden of proof in the matter of demonstration of rules of international law as opposed to the question of burden of proof on matters of fact or on questions of a prescriptive or historic title or of any alleged rule limited in application to a particular coast. In the matter of the demonstration of the rules of international law, it is, as explained above in paragraphs 211-214, indeed doubtful whether there is a burden of proof in the strict sense. So far, however, as it is proper to speak of the burden of proof lying on one side or the other as regards the demonstration of the existence in international law of any special rules about archipelagos or groups of islands, the burden would rest on Norway because these special rules would be exceptions from a wider general rule that the base-line follows the tide mark. On the assumption that special rules exist concerning territorial waters around archipelagos and groups of islands, the question remains to what cases do these rules apply and what the effect of the rules is. Norway's contentions based on State practice and the writers with regard to the existence of such rules are discussed in paragraphs 310-364 below. When, however, all this has been examined, it will be seen that there is certainly no general rule regarding archipelagos or groups of islands under which the base-lines of the Norwegian Decree of 1935 can be justified. To justify this it has to be shown that some rule authorizes a littoral State to draw off her coasts base-lines between islands and rocks of extravagant length and to claim as national waters all waters inside the base including waters lying between the island fringe and the mainland whatever the interval between the two. The burden of proof is certainly on Norway to show some rule of international law justifying what Norway has done in her Decree of 1935 because her justification, if any, will be found on the last analysis to be that the Norwegian coast is *sui generis* and therefore a particular rule applies to it because it is such an unusual coast. Whether Norway puts this on the basis of prescription (historic title) or whether she puts it as a particular rule applying to what she claims to be a very special coast line, the burden of proof is certainly on her to prove the existence of this title or rule. There is, of course, in addition first Norway's wider contention that the presumption is against restrictions upon individual State sovereignty and therefore the rights of the coastal State are always to take precedence over the general rights of the international community over the open sea, and, secondly, Norway's other general contention that there is virtually no binding international law on the matter at all. These wide contentions have been

dealt with already in paragraphs 117-147 and 210-222 above. Before proceeding, however, to the examination of Norway's arguments based on State practice and the views of writers with regard to archipelagos and groups of islands, the Government of the United Kingdom wishes to make the general comment that Norway's whole examination of this practice proceeds on the wrong basis. Norway examines this practice and the opinions of writers on the footing that it is necessary to see if international law explicitly *forbids* claims such as those Norway makes in her Decree of 1935, whereas in the submission of the United Kingdom the real enquiry is whether, under international law, the *United Kingdom is obliged to recognize* the claims which Norway has made in her decree based on the existence of the chain of islands and islets off the Norwegian coast, or, in other words, whether international law *permits* a littoral State to enclose waters by drawing base-lines such as Norway has drawn. The decision in the *Lotus* case (Series A, No. 10) seems to show (as has been explained in paragraphs 215-216 above) that where a State invokes a rule permitting it to do something which in general is not permissible—the burden is on that State to prove the permissive rule.

Coastal groups of islands

(Counter-Memorial, paras. 430 to 470)

Remarks as to the order of treatment

310. In the Norwegian Counter-Memorial the opinions of writers and the work of the 1930 Conference are examined first in paragraphs 430 to 444 and again 454-455 and then the evidence regarding State practice in paragraphs 445 to 453 and 456 to 470. It is, however, thought to be more logical to deal with State practice first and to consider the opinions of jurists and the work of the Codification Conference afterwards. In this Reply, therefore, the material will be taken in this order and the observations of the United Kingdom on what is said in paragraphs 430 to 444 of the Counter-Memorial with regard to the writers and the Codification Conference will be found below in paragraphs 346-364.

The evidence of State practice: question of the outer coast line

(Counter-Memorial, paras. 445-470)

Preliminary observations

311. The evidence of State practice invoked by Norway is contained in paragraphs 445 to 470 and is said to show that international law does not forbid a State to assert an "exterior coast line" of the kind now asserted by the Norwegian Government in the 1935 Decree. One feature of this exterior coast line claim is that all waters

between the islands which form the exterior coast line and the mainland are claimed as national waters, irrespective of the distance which lies between the islands and the mainland.

312. The misapprehension of the Norwegian Government concerning the decision of Lord Stowell in the *Anna*, a case referred to again in paragraph 445 of the Counter-Memorial, has already been explained (para. 289 above). He described the mud islands of the Mississippi as "a kind of portico to the mainland" and as "natural appendages of the coast" solely with reference to the question whether, although there was no evidence of acts of sovereignty by the United States, the islands ought to be treated as United States' territory. He was not concerned with the status of the intervening waters. In examining the evidence of State practice adduced by Norway in support of her outer coast line theory, it is important to bear in mind this distinction between claims to the islands themselves and claims to the intervening waters because a number of the alleged precedents for outer coast lines in fact deal with nothing but claims to islands as land territory.

313. Thus, the British legislation in regard to the Queensland Barrier Reef cited in paragraph 464, in regard to the Cook Islands cited in paragraph 465 and in regard to the Fiji Islands cited in paragraph 466 simply asserts claims to all the islands and islets inhabited and uninhabited of ill-defined groups scattered over wide areas. The definition of the extent of British claims to the *land* territory of such scattered Pacific island formations by claiming all islands within given latitudes and longitudes is perfectly natural and intelligible in view of the difficulty of otherwise describing and denominating each group with sufficient precision to avoid the risk of subsequent disputes. The form of these territorial definitions has led some writers to misunderstand the position concerning the waters falling within the lines of definition as the citations with reference to the Queensland Barrier Reef show. But the opinion sometimes expressed that the effect of the British legislation is to appropriate the intervening sea between the mainland and the reef as inland waters is incorrect. The claim in each of the three cases is to the islands lying within the lines of definition together with such territorial waters as they attract by the application of the 3-mile limit under the normal rules of international law set out in the United Kingdom's Memorial. (In the case of the Barrier Reef, there is also a claim to certain sedentary fisheries which may have contributed to the misconception of the British claim in 1923 by United States consular officials in London.) More detailed comment on the Norwegian contention in regard to these three precedents is given in the three following paragraphs.

314. *Queensland.*—The article by Cumbrae-Stewart concerning the Queensland Barrier Reef deals with the gradual extension of

British sovereignty over the distant *islands* of the Reef and says not one word about a claim to the intervening waters. That the object of the British legislation in the nineteenth century was simply the appropriation of islands and rocks lying beyond the maritime belt of the mainland of Queensland is clear from the following extract of an opinion of the Law Officers on the territory of Queensland dated 26th May, 1863 :

> "It is hardly necessary to add that although the definition of the colony under the Letters Patent (of 8th September, 1855) extends eastwards to the 154th meridian of east longitude, it would be requisite in order to give a title to Great Britain as against a claim by any other country to any island within those limits, lying more than 3 miles from any territory in the actual occupation of Great Britain (and not included within any bays or indentations of the British coasts), that such island should be actually taken possession of, or in some manner occupied by this country."

In other words, the Law Officers in 1863 recognized that islands which lie outside both the inland and territorial waters of a mainland are not in law "its natural appendages" and require specific appropriation. That the British legislation was not regarded as creating any title to the intervening waters—apart from normal territorial waters—was made equally clear in the later opinion of the Law Officers in 1875 concerning the jurisdiction of the Queensland courts which has already been cited in paragraph 295 above (see also Annex 44 of this Reply). The first proposition of the Law Officers, it will be recalled, was :

> "Queensland has no legislative authority over the seas beyond the distance of 3 marine miles from low-water mark *on the mainland and islands respectively.*"

315. *The Cook Islands.*—The proclamation of British sovereignty over the Cook Islands in 1901 is unequivocally a claim simply to the territories lying within the lines of definition, and the Norwegian misapprehension as to the meaning of the proclamation was corrected in 1925 by the British Chargé d'Affaires at Oslo. The letter from the New Zealand Government Senior Trade Commissioner in Australia of 24th June, 1949, and the note of the High Commissioner for New Zealand in Australia of 3rd January, 1950 [1], both addressed to the Norwegian Minister at Canberra do not depart from this position at all. The letter refers to regulations affecting persons fishing from bases in the islands which the coastal State is fully entitled to control as it likes. The note explicitly limits the legislation to territorial waters. (For the text of the letter and the note, see Annex 73 of the Counter-Memorial, Nos. 1 and 2.)

[1] The date of this note is wrongly given as 30th January, 1950, in paragraph 465 of the Counter-Memorial.

The Governments of Australia and New Zealand concur in the text of paragraphs 313-315 above

315 A. The Governments of Australia and New Zealand have been informed of the texts of paragraphs 313-315 above and have authorized the Government of the United Kingdom to state that they concur in these paragraphs so far as territories under their respective jurisdictions are concerned.

316. *The Fiji Islands.*—The proclamation of British sovereignty over the Fiji Islands in 1874 is in its terms unequivocally limited to the islands plus the waters appurtenant to them under international law. This is perfectly clear from the two passages underlined in paragraph 466 of the Counter-Memorial. The first passage reads "*and of and over all ports, harbours, havens, roadsteads, rivers, estuaries, and other waters, and all reefs and foreshores within or adjacent thereto*". The phrase "other waters", must be read *ejusdem generis* with ports, harbours, etc., and covers for example bays and territorial waters. The word *within* cannot mean within the lines of definition ; it is used with reference to the ports, harbours, havens, roadsteads and other waters which are necessarily described as within, or adjacent to, the islands. Thus the clause plainly limits the claim to the waters which are appurtenant to the *individual islands* and such is the scope of the British claim. The second underlined passage in effect repeats the definition in the previous passage. The object of the Royal Charter of the following year, also referred to in paragraph 466 of the Counter-Memorial, was simply to create a Crown Colony and a Colonial Government for the territories previously brought within British sovereignty by the proclamation. The reference to the territorial boundaries is in much more general terms than in the proclamation and has to be read in the light of the precise definition in the instrument by which sovereignty had recently been assumed. The phrase "and waters" thus covers the waters appurtenant to the several islands and no more.

British Honduras

317. In paragraph 463 of the Counter-Memorial the Norwegian Government refers to a letter alleged to have been written in 1936 by the Under-Secretary of State for the Colonies. Actually, this letter was written in 1836, not 1936 ; and its number was 391, not 39, as stated in the Counter-Memorial. Further, this letter was merely written to a Mr. S. Coxe in reply to an enquiry made on behalf of the Eastern Coast of Central America Company. (A copy of this letter in full is given in Annex 45.) Numerous islets, many unnamed, lie off the coast of British Honduras and it would be impracticable to define the extent of British territorial claims to these islets except by reference to a general line within which all islets

are claimed. Together with the islands go the territorial waters appendant to them under international law. It is recognized that the terms of the explanation given by the Under-Secretary of State for the Colonies in the Parliamentary Paper of 1836 are so expressed as to be open to misconception as regards the water claimed. In any case, it can be stated authoritatively that such an extensive claim to all waters between the coast and the meridian referred to is certainly not made to-day. On 20th December, 1932, the Governor of British Honduras wrote to the Secretary of State enquiring whether a certain area of water, falling within the area mentioned in the letter of 1836, was within the limits of the territorial waters of the colony. From that letter and the map enclosed therewith it appears that British Honduras did not then claim all the waters within the limits mentioned in the Counter-Memorial as being territorial waters. This is confirmed by the Secretary of State's reply to the Governor on 3rd June, 1933. (Copies of this correspondence are given in Annex 46.)

A still more significant instance of the latest British claim with regard to British Honduras is the Alteration of Boundaries Order in Council 1950. This Order in Council (see Annex 47) annexes the continental shelf adjacent to British Honduras. It expressly excludes claims to the waters above the continental shelf. Since the edge of the continental shelf, which is the 100-fathom line, falls well within the limits alleged to have been claimed as territorial by the letter of 1836, the Order in Council is clear proof that no claim is made to these waters.

Norwegian misunderstanding of the argument of Commissioner Upham in the case of the Washington *(1853-1854)*

318. A misapprehension, which is of a somewhat different kind, though it springs from the same failure to distinguish between title to off-shore islands and title to the intervening waters, has led the Norwegian Government, in paragraph 445, to place an extraordinary interpretation on the argument of the United States Commissioner Upham in the case of the *Washington* (1853 : discussed above in para. 237). The United States Commissioner is represented as having argued that the word "coasts" in certain eighteenth-century treaties had to be interpreted as including the coastal islands in the sense of extending the base-line round the islands and of making the islands an "outer coast line". But his argument was directed simply to the question whether the word "coasts", as, for example, the "coasts of Nova Scotia", were apt to cover the coasts of the off-shore islands *as well as* of the mainland. The whole American position on the 1818 Treaty was founded on the thesis that the United States only renounced fishing rights *within the 3-mile limit on all the coasts* of every piece of territory covered by the treaty *whether within bays or not.* The last thing that Commissioner Upham wished to contend was that Great

Britain was entitled to waters within an outer coast line. He was contending for the opposite of what is suggested in the Counter-Memorial. *He was insisting that islands carry their own territorial belt of 3 miles in their capacity as separate pieces of territory, and nothing more.*

The North Sea Fisheries Convention (1882)

319. Another precedent invoked on a somewhat similar misinterpretation to provide support for the "outer coast line" theory in Article 2 of the North Sea Fisheries Convention which is invoked in paragraph 451 of the Counter-Memorial. The full text of this article reads :

> "Les pêcheurs nationaux jouiront du droit exclusif de pêche dans le rayon de 3 milles à partir de la laisse de basse mer, le long de toute l'étendue des côtes de leurs pays respectifs, *ainsi que* des îles et des bancs qui en dépendent."

The Norwegian Government insists that this is an example of an "outer coast line" theory despite the fact that the use of the words "ainsi que des" clearly shows that the article treats the islands and banks as units of territory separate from the mainland coasts *and with coasts of their own.* Whatever be the true meaning of the phrase "qui en dépendent", Article 2 of the North Sea Fisheries Convention cannot be accepted as lending support to the present Norwegian theory of an outer island coast line, enclosing inland waters.

Fisheries Agreement between Great Britain and Germany (1874)

320. The next alleged precedent for an "outer coast line" cited in paragraph 452 of the Counter-Memorial also rests on a complete misconstruction of the meaning of words. In pursuance of a fisheries agreement with the German Empire the British Board of Trade issued the following notice :

> "I. The exclusive fishery limits of the German Empire are designated by the Imperial Government, as follows : That tract of the sea which extends to a distance of 3 sea miles from the extremest limit which the ebb leaves dry *of* the German North Sea coast *of* the German islands or flats *lying before it*, as well as those bays and incurvations of the coast which are 10 sea miles or less in breadth, reckoned from the extremest points of the land and the flats, must be considered as under the territorial sovereignty of the German Empire."

The Norwegian Government insists that the above notice recognizes the outer coast line theory whereas in fact it treats the islands and flats as being units of territory distinct from the mainland coast. The notice quite clearly contemplates a 3-mile belt from the tide mark of the mainland coast and, secondly, of the islands lying off the coast and then, thirdly, off the mouth of 10-mile bays. The

misapprehension in the Counter-Memorial as to the meaning of the notice may perhaps be due to a too economical use of punctuation in 1874. When the notice was reissued in 1880 the matter was made even clearer by the addition of a comma between the words "North Sea coast" and the words "of the German islands" and the phrase was then made to read:

> "which extends to a distance of 3 sea miles from the extremest limit which the ebb leaves dry of the German North Sea coast, of the German islands or flats lying before it, as well as....".

These notices are perfectly normal illustrations of the application of the tide-mark rule but have nothing in common with the modern Norwegian conception of an outer coast line.

The North Atlantic Fisheries Arbitration (1910)

321. In paragraph 447 of the Counter-Memorial, the recommendation of the 1910 Arbitration Tribunal for the tracing of the limits of particular bays are invoked as evidence of the application of the outer coast line theory. The point made by the Norwegian Government is that islands off the promontories of the mainland were allowed by the tribunal to count as the headlands of the bays concerned. It is perfectly true that in some cases base-lines are taken from an island off a promontory. It is however also true that in other cases islands which lie across the opening of the bay are used as base-points. Indeed, this is the case with the four islands which lie off the southern shore of the Bay of Chaleurs, the example particularly stressed by the Norwegian Government. The truth is that all the various islands mentioned in the recommendations were allowed to count as base-points in the tribunal's recommendations only because that *they were thought to form part of the territorial configurations enclosing the waters of the particular bays.* It is a complete misapprehension to infer that the tribunal in its recommendations was either consciously or unconsciously giving effect to anything like the Norwegian Government's concept of an "outer coast line". If the recommendations are looked at as a whole with a chart of all the treaty coasts, it will be seen that they leave an even larger number of coastal islands isolated from the mainland coast and entitled only to their own 3-mile limit. This is because, apart from the bays specially listed, the low-water mark rule along the coast plus the 10-mile rule for bays was to determine the area of exclusive British fisheries. There was not the slightest suggestion in the tribunal's award nor in the recommendations that waters inside a fringe of islands fell under any special rule. The very fact that in the case of St. Mary's Bay it was thought necessary to specify that Long Island and Bryer Island should be taken to constitute the coast of the bay (i.e. the closing line of the bay) shows that the tribunal entertained no general theory of an outer coast line.

The Counter-Memorial does not trouble to explain why, on the outer coast line theory, Prince Edward Island was not treated by the tribunal as an outer coast enclosing the Northumberland Strait which in several places is only 10 miles in width and indeed at its narrowest is only 7 miles wide. The reason was that this island, far though it stretches laterally along the coast, does not enclose the intervening waters. In other words, the tribunal's recommendations are entirely consistent with the United Kingdom's contention in paragraphs 112 and 122 of the Memorial that off-shore islands may influence the tracing of the base-line of the mainland coast to the extent that they tend to enclose the waters of a bay (or of a strait leading to inland waters which is analogous to a bay).

As the Counter-Memorial has drawn attention to the southern headland of Chaleurs Bay on Miscou Island, it may also be observed, in passing, that the headland allowed on the north shore was Maquereau Point, not Cape d'Espoir. This is a very different method of drawing a base-line across a bay from that adopted in the 1935 Decree.

Arbitration between Brazil and United States (1870)

322. Another precedent invoked by the Norwegian Government in paragraph 448 of the Counter-Memorial, the arbitration in 1870 between Brazil and the United States in regard to the loss of the vessel the *Canada*, is also simply a case of off-shore islands lying across the mouth of a bay, the estuary of the Rio del Norte.

Summary of these precedents

323. The above precedents cited as support for the legality of the base-lines of the 1935 Decree do not, therefore, really touch the question of the admission in customary law of an "outer coast line" doctrine such as Norway has to rely upon in order to justify her long base-lines drawn on King's Chamber principles on the outside of the island fringe [1] or even (though on the particular facts of the Norwegian case the point is not in issue) for the reservation of all waters between the islands and the mainland as *internal waters*. They relate either to the title of unoccupied islands and rocks or to the enclosure of bays and estuaries by islands situated at the entrance. They do not relate to the question of archipelagos. It remains to consider the precedents invoked by the Norwegian Government which—superficially at any rate—appear to have a somewhat greater bearing on the possible existence in international law of a special régime for archipelagos.

The Cuban cays

324. Historically, the precedents to be considered first are those between 1862 and 1869 relating to coral islands and reefs off the

[1] Of course, even if such a doctrine were established, it still would not cover the long Norwegian base-lines which the United Kingdom is objecting to in this case.

coasts of Florida, Cuba, the Bermudas, the Bahamas and Jamaica (paras. 461-462 and 467-469 of the Counter-Memorial). Disputes concerning the Cuban cays arose between Great Britain and Spain as early as 1837 owing to Spain's objection to the practice of the inhabitants of neighbouring British possessions resorting to the uninhabited cays and conducting fishing operations from them. The British Government took the opinion of its Law Officers and a desultory diplomatic correspondence with Spain ensued, in which Great Britain contested Spain's title to the uninhabited cays and to any territorial sea in connection with them. Subsequently, Great Britain's neutrality in the American Civil War led to an examination of Great Britain's own title to the uninhabited cays off the Bermudas, the Bahamas and Jamaica for the purpose of determining the extent of her neutrality jurisdiction. The Law Officers then, in 1862, 1863 and 1864, reconsidered the position in regard to title to uninhabited off-shore islands and pointed out that Lord Stowell's decision in the *Anna* had been overlooked in previous opinions on this question. The upshot was that Great Britain decided to claim the sovereignty of uninhabited cays in the vicinity of the British possessions and that her objection to the Spanish title to the Cuban cays was allowed to drop. (The relevant documents are set out in Smith, *Great Britain and the Law of Nations*, Vol. II, pp. 221-241.)

325. The diplomatic correspondence between Great Britain and Spain concerning the Cuban cays dealt with two main questions: (1) the Spanish claim to a 6-mile maritime belt which Great Britain persistently opposed, and (2) the Spanish title to the uninhabited Cuban cays. It is true that momentarily Great Britain showed a disposition to doubt whether any uninhabited islands even if owned by Spain, could possess a maritime belt. Otherwise, apart from the 6-mile limit, the main question under consideration between the two Governments was simply that of the title to the uninhabited islands which, if established, would carry a belt of territorial sea without further consequence. Indeed Spain does not appear to have claimed a special status for the intervening waters since in the diplomatic correspondence with the United States at the same period Spain sought to justify her need for a 6-mile belt *from the mainland* by reference to the presence of islets and rocks off the mainland coast. (Moore, *Digest*, Vol. I, p. 711.) On the British side the Queen's Advocate (Sir John Harding) took the view in 1859 that islands recognized to be Spanish possessions were entitled to a 3-mile belt (Smith, *op. cit.*, p. 231):

> "Generally and in conclusion I can only say *(a)* that the 3-mile limit should be maintained and *(b)* that the permanently inhabited cays and islands must be considered as Spanish territory, and the rule applied to them."

The Bermudas

326. In 1862 the first of the British claims came under the consideration of the Law Officers when the local authorities asked for a ruling concerning the territorial waters of the Bermudas (referred to in para. 467 of the Counter-Memorial). The Bermudas, as can be seen from the chart at Annex 48, are the highest part of a coral formation which consists of a broad oval-shaped reef completely enclosing some deeper lagoons and entered by a single navigable channel not a quarter of a mile wide. The islands lie at the south-eastern curve of the oval and to-day the only other part of the reef which rises permanently clear of the water is the North Rock which lies at the opposite, northern curve, and on which there is a light-house. The remainder of the reef either just breaks the surface of the sea or stands at varying depths not far below the surface. These physical features are clearly enough seen on the 1946 chart submitted to the Court. The old chart used by the Law Officers in 1862, however, showed the reefs much more heavily marked and much more prominent and it is clear from their language in the passages given below that they believed the normal condition of most of the coral ledge to be above water. The maximum difference between low and high tide at spring tide in this area is in fact 4.2 feet. It is necessary to have these facts in mind in appreciating the opinions.

327. The Law Officers, before they had been referred to the correspondence relating to Cuba, took the following view (Smith, *op. cit.*, p. 232) :

> "We were of opinion that the authority (the *dominium eminens*) of Her Majesty does extend to three marine miles from the northern reefs. We think that these reefs must be considered as belonging to the territorial jurisdiction incident to the possession of Bermuda, so far at least as that, between them and the island, Her Majesty has a right to prevent the exercise of hostilities, and that if we are right in considering them as part of Bermuda, it would follow that Her Majesty's jurisdiction must extend to three marine miles from that point."

After being referred to the Cuban correspondence they elaborated their opinion as follows (*ibid.*, p. 233) :

> "*That* we are still of opinion that the territorial jurisdiction of Bermuda must be estimated at the distance of a marine league from the North Rock *or the outer ledge of the coral reef, or at all events from the rock on the outer edge of that part of the coral reef, which is not covered by the sea at low water.*
>
> It appears that the islands of Bermuda consist of a collection or group of about 365 ledges of coral formation, emerging above the water. The whole group lies upon a coral bank, of which the ledge flats are a continuation.

The North Rock, which is 14 feet above water, forms part of these flats, and lies at the mouth of what is marked on the ordnance map as the Western Channel—though, only on one occasion, as we are informed by Capt. Barrett (who has been employed by the Government to survey the islands) was it ever passed through by men of war.

This rock would admit of a fort being constructed upon it, and it might be necessary in a future war to place one there for the protection of the island.

The 'ledger flats' generally, though sometimes covered at high water, are, in fact, as it were, a natural ledge or girdle of defence to the Bermudas, of which they are, or have been, a continuation.

Great Britain appears always to have attached great importance to the maintenance of a complete jurisdiction over the whole reef, as well as that part of it, designated as the Bermudas.

Surveys of the whole group were made in 1793-1797.

The original is kept at the Admiralty, and one copy was sent to Bermuda: both have been always kept secret, and no copies of them allowed to be made.

These Bermuda reefs bear a close analogy, not only to the Bahamas, but (so far as the application of the law affects them) to the Florida reefs, and to the uninhabited island, distant 5 or 6 miles from the mouth of the Mississippi.

The former, the Americans have, we believe, always claimed as a continuation of the mainland. As to the latter we have the advantage of an express decision of Lord Stowell, the principle and even the language of which appear very applicable to the case of the North Rock and 'ledger flats' of Bermuda."

Then, having cited the relevant passage from Lord Stowell's judgment, the Law Officers turned their attention to the Cuban correspondence and concluded (*ibid.*, p. 236):

"It appears clear, however, that the report of the late Queen's Advocate, Sir John Harding (11th November, 1859), does not sanction the principle that the cays, if Spanish, did not carry with them the usual territorial jurisdiction over adjacent waters; he rather returns to the original opinion of Sir John Dodson, as to the uncertainty of the Spanish title to the cays themselves. Indeed, he expressly says, 'If the Spanish title should be clearly established in one or more particular cases, *then I consider that the 3-mile limit applies to such cases, just as it would to the coast of Cuba*'."

328. It is clear that in the above passages the chief point in the minds of the Law Officers was again the question whether the sovereignty possessed by His Majesty over the inhabited territory could properly be said to extend to uninhabited rocks and reefs. Whether rightly or wrongly from the point of view of the then existing law, the Law Officers, believing that the coral ledges were normally above water, gave it as their opinion that the reefs were British possessions carrying their own 3-mile maritime belt. In addition, they considered that Great Britain had the right to prevent the exercise of hostilities inside the reefs. Once the main conclusion

was reached that the continuous band of coral reefs were British territory, the assertion of jurisdiction within them was scarcely surprising since the interior lagoons were then wholly enclosed except for one very narrow channel deep enough for sea-going vessels and two or three very shallow channels leading into the lagoons and usable only by very small craft.

328 A. Having regard to the actual condition of the Bermuda reefs as it is known to-day, the opinion of the Law Officers in 1862 concerning the territorial waters of Bermuda goes beyond the principles concerning the delimitation of territorial waters in respect of rocks and reefs which were generally accepted at the 1930 Codification Conference. However, both from the earlier days of the colony and after 1862, the colonial authorities in Bermuda, by legislation and by administrative exercise of jurisdiction, have continuously and publicly asserted their authority both over the enclosed waters within the reefs and to a distance of three miles from the outer ledges. This legislation and exercise of jurisdiction have been applied internationally in fisheries, navigation, wrecks and related matters and has met with no objection on the part of any State. Therefore, the title of the Bermuda Government to sovereignty over the above-mentioned waters in the view of the United Kingdom Government finds its justification in an historic usage which has received the assent of other States.

The Bahama banks

329. The opinion of the Law Officers in the very next year (1863) concerning British jurisdiction over the Bahama banks, referred to in paragraph 468 of the Counter-Memorial, shows plainly that they did not entertain the idea that every reef exposed at low tide is open to appropriation and capable of possessing territorial waters. Having protested that even with the aid of the charts supplied to them, they had not sufficient "practical knowledge of the locality", they expressed themselves as follows (*ibid.*, p. 237) :

> "In answering these questions, moreover, we assume 1st, that the Great Banks, referred to, have not been heretofore claimed, or in any sense occupied as British territory ; 2ndly, that (if in any part capable of being occupied and inhabited, which we do not suppose to be the case) they are uninhabited in fact.
>
> *Upon these assumptions we are of opinion that, as a general rule, British jurisdiction would not extend beyond the distance of three miles from an inhabited island or cay.* This general proposition, however, must be subjected to exceptions. For instance, any part of the Great Banks which may be *closed within inhabited cays, though beyond the distance of three miles from each cay, might be considered within British jurisdiction.* Any part of the Great Banks capable of sustaining a fort, which, if built, would command the entrance, or threaten the security of an inhabited cay, might also be considered to be within British jurisdiction. In fact, having regard to the

> peculiar formation and position of these cays, we incline to adopt the expressions of Sir Frederick Rogers in his letter to Mr. Hammond, that 'the conditions of contiguity and dependence must be considered separately in each case or group of cases'."

In this opinion the Law Officers did not, therefore, consider it possible to claim an uninhabited part of the Great Banks as being within British jurisdiction unless it was either enclosed by inhabited cays or was solid enough to sustain a fort which might command the entrance to or threaten an inhabited cay.

329 A. To-day the delimitation of territorial waters in respect of the Bahama banks is governed by the principles of international law concerning islands, rocks and reefs which were generally accepted as law at the 1930 Codification Conference. In addition, the Bahamas authorities claim exclusive jurisdiction over certain sedentary fisheries on the sea bed in the waters off the Bahamas islands and banks.

Jamaica

330. The following year (1864), Spain being engaged in suppressing a revolt at San Domingo, the Spanish Consul asked the Governor of Jamaica for information concerning the territorial waters of that island (para. 469 of the Counter-Memorial). As the 3-mile limit had been a matter of controversy with Spain for some years past, it was not unnatural that the opinion of the Law Officers should be largely devoted to emphasizing the British point of view on that issue. Having said that the 3-mile limit was "a received usage and understanding of all the Powers of Europe and America", the Law Officers did, however, add (*ibid.*, p. 239) :

> "That besides this general limit Her Majesty's Government also claim, as part of Her Dominion, the whole waters of maritime creeks, inlets, and the mouths of rivers, included between headlands part of Her Territory, although such headlands, or some parts of the coasts included within them may be more than six miles apart from each other. That in places where the possession of particular rocks, reefs or banks, *naturally connected with the mainland of any part of Her Majesty's territory, is necessary for the safe occupation and defence of such mainland, Her Majesty's Government also claim the waters enclosed between the mainland and those rocks, reefs, or banks; whatever may be the distance between them and the nearest headland.*"

The Norwegian Government represents that the Law Officers characterized the above "claims" as being in accordance with the received usage and understanding of all the Powers of Europe and America. As a mere matter of language this is the reverse of the truth. The Law Officers' language distinguishes between the 3-mile limit as a received usage and the remainder as British "claims". Nevertheless, the Norwegian Government is still entitled to take

what support it can find in these claims and it is necessary to say a word about them.

331. The first claim mentioned by the Law Officers is essentially a claim to bays between their headlands whether or not the width exceeds six miles. The history of claims to bays has already been dealt with at length in paragraphs 231 to 242, and it will be recalled that in 1863 the doctrine of the freedom of the seas had not yet resulted in any clear definition of the claim that could be made to bays and to similar enclosed waters of the sea. The second claim is said by the Norwegian Government to amount to an appropriation of all waters situated between a coastal archipelago and the mainland, when the islands are necessary for the defence of the mainland, whatever may be the distance between the islands, rocks and reefs and the nearest headland. But this is altogether too liberal an interpretation of the language. In the first place, the Law Officers only envisaged a claim to waters *enclosed* between the mainland and the rocks, reefs and banks, and their opinion is certainly no precedent for a claim to waters not genuinely enclosed by the coastal islands. In the second place the language has to be read in the light of the previous opinion concerning the Bahama banks which is less widely expressed.

That the Law Officers did not take a large view of the legitimacy of claims to waters with an archipelago is plain from the terms of their opinion in 1869 when they advised the recognition of the Spanish claim to the cays off the north coast of Cuba (*ibid.*, p. 240; para. 461 of the Counter-Memorial):

> "*That* the cays on the north coast of Cuba, as laid down in the chart of 1858, appear to us to come within the principle laid down by Lord Stowell in the case of the *Anna* (5 Ch: Robinson, p. 385) and that the Spanish right of jurisdiction extends to a distance of a marine league *seawards from those cays, and over all the banks which may be enclosed within those cays and the mainland of Cuba.—We would wish to reserve our opinion in regard to any other cays, as each group of cases may be required to be separately considered.*"

The northern cays of Cuba are close to the coast and almost continuous and the intervening water is extremely shallow. The Law Officers declined to express an opinion on the different circumstances of the cays on the south coast. Six years later, when they were called upon to advise concerning British jurisdiction over the Barrier Reef off Queensland, the Law Officers, as has been seen above (para. 295), held that jurisdiction is limited to "3 marine miles from low-water mark on the mainland and islands *respectively*" and that only "reefs *attached* to an island and dry at low tide" may be taken to be part of an island".

331 A. It may be added that to-day the delimitation of territorial waters in respect of the Jamaican islands and reefs is governed by

the principles of international law which were accepted as law at the 1930 Codification Conference.

The United States and the Cuban cays

332. In 1862 the United States had also become engaged in a dispute with Spain concerning the latter's claim to a 6-mile maritime belt round the island of Cuba (also referred to in para. 461 of the Counter-Memorial). Spain, as previously mentioned, argued that the presence of islets and rocks off the mainland justified her pretension to a 6-mile belt off the mainland. To this argument Secretary Steward replied (Moore, *Digest*, Vol. I, p. 711) :

> "The undersigned has examined what are supposed to be accurate charts of the coast of Cuba, and if he is not misled by some error of the chart, or of the process of examination, he has ascertained that nearly half of the coast of Cuba is practically free from reefs, rocks, and keys, and that the seas adjacent to that part of the island which includes the great harbours of Cabanos, Havana, Matanzas, and Santiago are very deep, while in fact the greatest depth of the passage between Cuba and Florida is found within 5 miles of the coast of Cuba, off the harbour of Havana.
>
> The undersigned has further ascertained, as he thinks, that the line of keys which confront other portions of the Cuban coast resemble, in dimensions, constitution and vicinity to the mainland, the keys which lie off the southern Florida coast of the United States. The undersigned assumes that this line of keys is properly to be regarded as the exterior coast line, and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea front of those keys."

The principal point conceded by Secretary Steward was that the uninhabited cays constituted Spanish territory so as to carry a maritime belt of their own. He also seems to have conceded that the water enclosed within a line of cays might be treated as inland waters though he did not go into details as to the cays which he had in mind in this connection. No doubt, the particular tendency of the configurations of the Cuban cays to enclose the waters of the lagoons within the reefs influenced him in expressing this view. The language used by Secretary Fish in 1869, seven years later, was, however, a little different (*ibid.*, p. 713) :

> "The maritime jurisdiction of Spain may be acknowledged to extend not only to a marine league beyond the coast of Cuba itself but also to the same distance from the coast line of the *several islets or keys* with which Cuba itself is surrounded. Any acts of Spanish authority within that line cannot be called into question, provided they shall not be at variance with law or treaties."

Certainly, the above passages concerning the Cuban cays indicate that the United States then recognized, as the United Kingdom Government in its Memorial recognizes, the possibility of islands by their particular configuration actually enclosing areas of sea. But

that is a very different thing from recognizing a right to establish a purely notional enclosure of areas of seas by joining on the outside of the fringe arbitrarily selected extreme points regardless of whether the areas are in fact enclosed by the physical formations.

The Florida keys

333. This conclusion is not in any way affected by the fact that the United States, in recognizing Spain's title to maritime jurisdiction in respect of the Cuban cays, drew a parallel with the Florida keys. These island keys stretch in a curving line in a south-westerly direction from the southern point of Florida. They rest on a coral ledge which encloses between it and the mainland the extremely shallow waters of Florida Bay much of which is only 2 or 3 feet deep. The islands and islets of this reef so far form a continuous shore line that to-day the railway extends from the mainland to Key West. It is not therefore surprising that the keys have been claimed as possessions of the United States entitled to their own maritime belt.

The definition of the boundaries of the State of Florida in the Constitution of Florida (cited in para. 462 of the Counter-Memorial) is of no significance in international law. For it is clear beyond doubt that the position adopted by the Federal Government in matters of international law (in this case, the 3-mile limit) is binding on the legislatures and courts of all the States of the Union. In the recent case of *United States* v. *Texas* (5th June, 1950 ; 70 S.Ct. 918) decided by the Supreme Court of the United States, it was held that : "In external affairs the United States became the sole and exclusive spokesman for the nation." And in *United States* v. *California* [(1947) 332 U.S. 19] the Supreme Court said : "But whatever any nation does in the open sea, which detracts from its usefulness to nations, is a question for consideration among nations as such, and not their separate governmental units." (As far back as 1886, in *Merchants Mutual Insurance Company* v. *Allen* (121 U.S. 67), the Supreme Court of the United States had held that the Gulf of Mexico was part of the Atlantic Ocean.) What then is the significance of the boundaries defined by the Florida Constitution ? The answer lies in the fact that, with regard to international matters (e.g. the limit of territorial waters) the renunciation of sovereignty by the States was complete so that the position of the Federal Government is paramount ; but that, with regard to non-international matters, since the relinquishment of sovereignty by the States was only partial and took place only in so far as it was necessary to transfer to the Union the right to handle foreign relations, the States retained their right to legislate. Thus in *Skiriotes* v. *State of Florida* (331 U.S. 69), in 1941, it was held by the Supreme Court of the United States that a Florida law prohibiting the use of certain equipment in sponge fishing within nine miles of the coast (the offence took place six miles from the coast) was validly applied since the defendant was a

citizen and resident of Florida. As he was not a national of any foreign State, "no question of international law, or of the extent of the authority of the United States in its international relations" was involved (at p. 72). And at page 73 the Court said :

> "The argument based on the limits of the territorial waters, as these are described by this Court in *Cunard Steamship Company* v. *Mellon* (262 U.S. 100, 122)—i.e. the 3-mile limit—and in diplomatic correspondence and statements of the Political Department of our Government, is thus *beside the point.*"

On the other hand, in *Middleton* v. *United States* (1929 ; 32 Fed. (2nd) 239) it was held by the Circuit Court of Appeals, Fifth Circuit, that, since the case concerned the bringing of *aliens* into the United States in violation of a *federal* statute, the 3-mile rule rather than the 9-mile rule of the Florida Constitution must be applied.

The facts of this case were that Middleton had arranged to take certain aliens by motor-boat from Cuba and to land them secretly in the United States. The boat grounded within half a mile of the Florida keys, then proceeded through the north-west channel close to Key West, passed by the bell-buoy which is within 3 miles of an uninhabited island and finally caught fire when 5 miles further to the north-east within Florida Bay. Middleton appealed from a conviction of having landed aliens in the United States and in dismissing his appeal, the Circuit Court of Appeals, Fifth Circuit, said :

> "It is beyond dispute that he brought the aliens into the territorial waters of the United States when he came within half a mile of the keys, and also when he passed by the bell-buoy of the north-west channel within 3 miles of an island. It does not make any difference that these islands were uninhabited ; it is sufficient that they were islands of the United States."

All the points through which the motor-boat passed were within the boundaries of the Florida Constitution, but the Federal Court regarded the limits of United States jurisdiction as dependent on an application of the 3-mile limit from the individual islands.

It is clear, therefore, that the Constitution of Florida is of no assistance to the Norwegian Government in connection with the present case.

Irrelevance of these precedents to the main issue of this case, which is the long base-lines drawn by the 1935 Decree along the outer edge of the fringe

334. Interesting although all these historical precedents are, the United Kingdom Government doubts if they are relevant to the issue before the Court, which is whether the base-lines drawn by the Norwegian Royal Decree of 1935 on the outer edge of the fringe are valid according to the international law in force to-day. On the actual facts of the Norwegian case, the United Kingdom does not dispute that the waters between the fringe and the mainland are

enclosed and are Norwegian waters. There may or may not be differences in some cases as to whether certain areas are or are not enclosed. The United Kingdom Government naturally opposes any supposed doctrine under which all waters on the mainland side of an island fringe are under the sovereignty of the coastal State irrespective of the extent of the interval and of the extent to which in fact these waters are in fact enclosed. The main issue is the character of Norway's claims on the *outside* of the fringe and on this issue it does not appear that these precedents afford any support whatever to Norway's case.

The more modern claims relied upon by the Norwegian Government to establish its contentions as to base-lines round coastal archipelagos will be dealt with in the immediately ensuing paragraphs of this Reply.

Modern precedents concerned with coastal archipelagos

335. The modern precedents with coastal archipelagos which are cited in the Counter-Memorial are the following: namely *(a)* the *Alaskan Boundary Arbitration* of 1903 (para. 446), *(b)* a New Caledonia Fisheries Decree of 1911 (para. 449), *(c)* Danish, Norwegian, Swedish and Finnish Decrees of 1912 and 1938 (para. 450), *(d)* the Treaty of Dorpat of 1920 (para. 457), *(e)* the Helsingfors Liquor Convention of 1925 (para. 458), *(f)* an Iranian Law of 1934 (para. 458 A), *(g)* an Equador decree of 1938 (para. 459) and *(h)* a Saudi-Arabian decree of 1949 (para. 460).

The Alaskan Boundary Arbitration (1903)

336. The question of an outer coast line was not in issue in the *Alaskan Boundary Arbitration* (Counter-Memorial, para. 446) because it was accepted by both parties that the word "coast" in the Anglo-Russian Treaty of 1825 referred to the mainland coast. Nevertheless the argument of the United States in developing a proposition on the meaning of the treaty, touched upon the question of an outer coast line where the coast is fringed by the Alexander Archipelago. Having cited a passage from Hall's *International Law* on the Cuban Archipelago de los Canarios (see para. 346 below) and Lord Stowell's judgment in the *Anna*, the argument proceeded with the following two sentences which are given in the Counter-Memorial (para. 446):

> "It thus appears that from *the outer coast line* of a maritime State, as defined in physical geography, is invariably measured under international law, the limit of that zone of territorial water generally known as the marine league. The boundary of Alaska—that is, the exterior boundary from which the marine league is measured—runs along the outer edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands."

The citation in the Counter-Memorial, however, stops too soon, for the remainder of the paragraph reads:

"When 'measured in a straight line from headland to headland' at their entrance, Chatham Strait, Cross Sound, Sumner Strait and Clarence Strait, by which this exterior coast line is pierced, measure less than ten miles. That fact, according to the authorities quoted in the British Counter-Case, pages 24-28, places them within the category of territorial waters. All of the interior waters touching upon the *lisière*, such as Behm Canal, Taku Inlet and Lynn Canal are, in the language of Hall, '*lakes enclosed within the territory*', and as such are territorial waters, regardless of their width at their entrances when measured from headland to headland."

The additional sentences make it plain that the United States did not contemplate the possibility of an unrestricted outer coast line wherever archipelagos occur but limited the outer coast line concept to cases where the interior waters are genuinely enclosed by the configurations of the island groups. They also appear only to have claimed a line passing along the shores of each individual outer island and across the promontories of the actual inlets into the interior waters—a very different method of delimitation from that adopted by Norway in the 1935 Decree. Admittedly, the United States argument maintained that, the interior waters being mere lakes, the width of the inlets was immaterial. But it emphasized that the inlets in fact conformed to the 10-mile limit and in the 1910 Arbitration the United States took up a radically different position in regard to the width of entrances to enclosed waters, then urging a 6-mile limit. At the 1930 Conference the United States favoured the 10-mile limit both for bays and for straits leading to interior waters.

French Decree for New Caledonia (1911)

337. Article 2 of the French Decree for New Caledonia (Counter-Memorial, para. 449) reads :

"La limite des eaux territoriales est fixée par une ligne imaginaire courant à trois milles marins au large des *grands* récifs extérieurs et, là où ces récifs manquent, à trois milles marins au large de la laisse de basse mer."

The import of this decree is essentially that France claims the great outer reefs as French territory with the consequence that they are to be taken into account in the delimitation of territorial waters. It appears that the base-line follows faithfully the line of the rocks. There is no suggestion of base-lines drawn from one extreme point on the line of rocks to another extreme point (which is what Norway does in the Royal Decree of 1935).

Danish, Norwegian, Swedish and Finnish decrees

338. The relevant formula of the Danish, Norwegian, Swedish and Finnish decrees, which are cited in para. 450 of the Counter-Memorial, is—with unessential variations in the later decrees—the following (see Annexes 65-67 of the Counter-Memorial) :

"Les eaux intérieures comprennent, outre les ports, entrées des ports, rades et baies, *les eaux territoriales situées entre et en deçà des îles, îlots et récifs qui ne sont pas continuellement submergés.*"

Certainly, this formula contains a claim to treat as inland waters the sea both inside and in between off-shore islands, rocks and reefs. To that extent the decrees may be said to contemplate a special régime for fringes of islands and the Norwegian Government, so it seems, wishes the Court to understand that Denmark, Sweden and Finland in their practice adopt principles no different from those on which she seeks to justify the base-lines of the Royal Decree of 1935. But that is not the case at all.

The phrase "les eaux territoriales situées entre et en deçà des îles, îlots et récifs"

(a) affords no support at all for the drawing of long base-lines on the outside of the fringe, which is the main issue in the present case ; and

(b) leaves entirely vague the conditions under which the respective States regard the sea as being "inside or in between the islands, islets and reefs" for the purpose of the delimitation of their inland waters.

In other words, so far as *(b)* is concerned, the phrase does not define the conditions under which coastal islands will be treated by these States as having a unity with the mainland or with each other. But the views of Denmark, Sweden and Finland on these matters are to some extent known and it is clear that they do not regard their decrees as involving unlimited claims to areas of sea lying between islands and the mainland or between separate islands.

339. Denmark, in her reply to the *questionnaire*, recited the above formula as constituting the definition of inland waters in Article 3 of its Regulations for the admission of foreign warships. She then added that the distance between the coast and the islands is not taken into account so long as it is less than double the width of the territorial zone—a view similar to that expressed by the Norwegian jurist Aubert at the Institute of International Law in 1894 (see para. 53 above). She further considered that straits leading to inland waters should be treated as bays and that therefore the 10-mile limit would apply. (*Bases of Discussion*, p. 123.)

Sweden, in her reply to the *questionnaire*, indicated that inland waters were only claimed where the islands were situated *alongside the coast*, although, in the case of an archipelago, the outermost islands might be taken as the base-line even if some considerable distance from the mainland shore. (*Bases of Discussion*, p. 189.) Sweden, like Denmark, expressed the view that channels between the islands of an archipelago or between the islands and the

mainland should be treated as bays in regard to which it seemed to think that the normal limit would be about 12 miles. (*Bases of Discussion*, p. 190; for the Swedish view concerning bays see para. 260 above.)

Finland, in her reply to the *questionnaire*, endorsed the concept of a special régime for archipelagos in the form adopted in Article 5 of the Institute of International Law's draft in 1927, that is, where the distance between islands on the circumference does not exceed twice the width of the territorial sea. She supported Sweden's attitude, however, in regard to coastal archipelagos.

The United Kingdom Government is not to be understood as subscribing to the views expressed by these three States in 1930 concerning coastal islands, and indeed their views show some divergence. It merely emphasizes that the practice of these States does not support the theory of the Norwegian Government under which notional base-lines are joined between extreme points on the outer islands regardless of whether the configurations enclose the sea and regardless of the width of the intervals between the units of territory taken as base-points and regardless of the intervals between the island fringe and the mainland.

Treaty of Dorpat (1920)

340. Article 3 of the Treaty of Dorpat 1920 between the U.S.S.R. and Finland, which is cited as a precedent in paragraph 457 of the Counter-Memorial, does not carry the Norwegian argument any further or even so far as the decrees of Denmark, Finland and Sweden discussed in paragraph 56 above. The article reads:

> "Les eaux territoriales des Puissances contractantes, dans le golfe de Finlande, auront la largeur de quatre milles marins à partir de la côte, *et dans l'archipel à partir du dernier îlot ou rocher dépassant le niveau de la mer.*"

This article merely prescribes that where there is an archipelago the 4-mile limit is to be measured not from the mainland but from the outermost inlet or rock above water. There is no reference to the sea areas between the islands or to the circumstances in which an island may be said to belong to an archipelago. Least of all is there any indication that notional lines of whatever length may be drawn between extreme rocks at widely separted intervals.

Helsingfors Liquor Convention (1925)

341. Article 9 of the Helsingfors Liquor Convention of 1925 (para. 458 of the Counter-Memorial) between Germany, Denmark, Estonia, Finland, Latvia, Lithuania, Norway, Poland, Danzig, Sweden and the U.S.S.R. is even less helpful to the Norwegian argument. The parties agreed to a special customs zone of 12 miles extending from the coast or the outer limit of archipelagos. There was no indication as to what was meant by an archipelago or as

to how the exterior limit was to be determined. Moreover, the States concerned expressly reserved their attitude in regard to the delimitation of territorial waters under general international law. The attitudes of some of the contracting States concerning coastal islands has already been mentioned. It may be added that of the other States at the 1930 Conference Germany objected altogether to the *introduction* of a special rule for the archipelagos, while Latvia thought that the unity of islands could only be recognized subject to the limit of twice the width of the territorial sea. (*Bases of Discussion*, pp. 111 and 171.)

Iranian Law of 1934

342. Similarly, Article 3 of the Iranian Law of 1934, which is cited in paragraph 458 A of the Counter-Memorial, merely claims the right to treat the islands of an archipelago as a unit without specifying what constitutes an archipelago or in what circumstances, if at all, notional lines may be drawn between the outer islands of a group. We know, however, from Article 2 of the same law that, where areas of sea are claimed by Iran to be enclosed within the *solid* continuous arms of a bay, she restricts her claims by applying the 10-mile limit (Annex 68 of the Counter-Memorial).

The Ecuador Decree of 1938

343. The Ecuador Decree of 1938, which is cited in paragraph 459 of the Counter-Memorial, leaves extremely vague precisely how the territorial sea of the mid-ocean archipelago of Colon is considered to be delimited. In any event, the United Kingdom Government declines to accept as a pertinent precedent a decree which in its claim to territorial waters so greatly exceeds the limits of what the large majority of States regarded as acceptable at the 1930 Conference and of what in fact they accept in their practice.

The Saudi-Arabian Decree of 1949

344. The last precedent, invoked in paragraph 460 of the Counter-Memorial, is Article 6 of the Saudi-Arabian Decree of 1949. Clauses *(f)* and *(g)* of the article dealing with the groups of islands seem to have been inspired by a reading of the discussions at the 1930 Conference and by a determination to claim the largest area of territorial waters which could conceivably be attributed to principles ventilated in those discussions. The decree has attracted the protest of the United States Government as well as of the United Kingdom (see paragraph 123 above). It may, however, be observed that even in this decree the joining of baselines between points more than 12 miles apart was expressly excluded. Indeed, 12 miles is in fact double the width of the belt of territorial waters which Saudi Arabia claims.

Summary of precedents invoked by Norway

345. The precedents invoked in the Norwegian Counter-Memorial are therefore considered to be inadequate to establish a special régime for coastal archipelagos under customary law. The majority of the precedents relate either to the enclosure of bays by islands or to the enclosure of waters by island and rock formations in a manner analogous to the enclosure of bays. The principle of these claims is the enclosure of the waters by the particular geographical configurations whether of the mainland shore coasts or of the off-shore islands. Further, even if—which the United Kingdom Government denies—these precedents did constitute a special régime for coastal archipelagos under international law, they would still not provide authority for the drawing of exceptionally long base-lines along the outside of the fringe, such as those drawn by Norway in the Royal Decree of 1935. As to this, the United Kingdom repeats what it has already said in paragraphs 52 and 56 above. It is the question of very long base-lines which goes to the root of this litigation.

Writers and the Hague Codification Conference

(Counter-Memorial, paras. 430-444 and 454-455)

Writers

346. The Norwegian Government, however, invokes (paras. 442-444 and 454-455 of the Counter-Memorial) also the opinions expressed in five textbooks. Two of these books, those by Gidel and by Higgins and Colombos (paras. 454 and 455) were published after the 1930 Conference and it will be convenient to defer consideration of them until after the Norwegian Government's comments on the work of the conference have been examined. The other three books cited in the Counter-Memorial (paras. 442-444) are those of the distinguished nineteenth-century writers, Hall, Wheaton and Halleck.

The only one of these writers who even touches the question of coastal archipelagos is Hall, who says (*International Law* (8th ed.), p. 149):

> "Apart from questions connected with the extent of territorial waters, which will be dealt with later, certain physical peculiarities of coasts in various parts of the world, where land impinges on the sea in an unusual manner, require to be noticed as affecting the territorial boundary. Off the coast of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific, are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior

> bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water. To take a specific case, on the south coast of Cuba the Archipelago de los Canarios stretches from 60 to 80 miles from the mainland to La Isla de Piños, its length from the Jardines Bank to Cape Frances is over 100 miles. It is enclosed partly by some islands, mainly by banks, which are always awash, but upon which, as the tides are very slight, the depth of water is at no time sufficient to permit of navigation. Spaces along these banks, many miles in length, are unbroken by a single inlet ; the water is uninterrupted, but access to the interior gulf or sea is impossible. At the western end there is a strait, 20 miles or so in width, but not more than 6 miles of channel intervene between two banks, which rise to within 7 or 8 feet from the surface, and which do not consequently admit of the passage of sea-going vessels. In cases of this sort the question whether the interior waters are, or are not, lakes enclosed within the territory, must always depend upon the depth upon the banks, and the width of the entrances. Each must be judged upon its own merits. But in the instance cited, there can be little doubt that the whole Archipelago de los Canarios is a mere salt-water lake, and that the boundary of the land of Cuba runs along the exterior edge of the banks."

The above passage occurs not in the sections dealing with maritime territory but in Section 38 concerning land frontiers and it is plain that what Hall had in mind was continuous coral barriers enclosing lagoons. He treats these cases as exceptional and emphasizes the continuity of the shallow reefs, the enclosure of the waters by the reefs and the narrowness of the inlets into the interior. So far was Hall from thinking of any general rule for archipelagos that he insisted on each individual case being judged upon its own merits. Moreover, in his opinion, the question whether the interior waters are to be considered enclosed lakes "must always depend upon *the depth upon the banks and the width of the entrances*".

The view of Hall, writing in 1880, that reefs only just below the level of the sea may count as territory, is scarcely reconcilable with modern principles concerning the delimitation of territorial waters. But his emphasis on the enclosure of the waters and the narrowness of the inlets is entirely in accord with modern ideas. It may be added that in the particular case to which he refers, the Archipelago de los Canarios, the maximum width of any of the intervals between the *above-water islands and cays* on the enclosing coral bank is about 10¼ miles.

347. The passages from Wheaton and Halleck, cited in paragraphs 443 and 444 of the Counter-Memorial, are identical in substance—if the second half of the sentence in Wheaton is added. It will therefore suffice to recall the words used by Wheaton (*Elements of International Law*, 1936 ed., p. 215) :

> "The term 'coasts' includes the natural appendages of the territory which rise out of the water, although these islands are not of sufficient

> firmness to be inhabited or fortified; but it does not properly comprehend all the shoals which form sunken continuations of the land perpetually covered with water."

These words are, of course, an echo of the judgment of Lord Stowell in the *Anna*, who merely laid down that the uninhabited islands at the mouth of the Mississippi, formed from the mud brought down by the river, were nevertheless islands of the United States, possessing territorial waters. Lord Stowell's judgment, as has been explained (para. 289 above), related essentially to the question of a coastal State's title to islands constituting a "natural appendage" to the coast. The remainder of the paragraphs in both Wheaton and Halleck, where the above passage occurs, shows clearly that both these writers were correctly interpreting Lord Stowell's judgment as directed to the question of the United States sovereignty over the mud islands. Indeed both these writers seemed to regard Lord Stowell's reference to the islands having been formed by alluvium as a material element in his decision to treat them as "natural appendages" of the mainland coast and therefore belonging to the coastal State.

348. It is thus impossible to accept the contention in paragraph 443 of the Counter-Memorial that the above-cited passage, found in Wheaton and Halleck, exactly expresses the idea behind the Norwegian practice of treating the outer islands, islets and rocks of the "Skjærgaard" as forming part of the coast. At most the passage may be said to lend support to what appears to be the true principle of the Norwegian Rescript of 1812, namely, that the islands and rocks off the Norwegian coast, although uninhabited, are to be treated as Norwegian territory possessing territorial waters. In fact, it is doubtful how far Wheaton and Halleck would have regarded all the islands and rocks off Norway as "natural appendages" of the mainland, but the point is immaterial as the United Kingdom Government does not contest Norway's sovereignty over any uninhabited island or rock susceptible in law of being claimed as territory. What is material for the present purpose is that the passage found in Wheaton and Halleck contains no indication at all of a right to treat as the "coast" of a State notional lines drawn at will between widely separated rocks nor of any special rule applying to groups of islands.

349. The Government of the United Kingdom therefore submits that neither the precedents of State practice nor the opinions of writers which are cited in the Counter-Memorial establish the existence in international law before 1930 of a rule giving a special régime to the waters surrounding the islands of an archipelago. The evidence of State practice certainly points to the general acceptance of a rule under which uninhabited—and even uninhabitable—islands and rocks off the coast may be treated as territory possessing territorial waters. The evidence also points to a general recognition of

the fact that coastal islands, particularly islands at the mouth of an indentation, may, by their particular position and configurations in relation to the coast, actually enclose areas of sea within the frontiers of the coastal State. In the latter case the enclosed waters are regarded as in effect a bay, the arms of which instead of being a solid line of land are a broken line of islands. But the principle of the precedents—a logical, fundamental principle—is the actual enclosure of the waters by the physical configurations of the various pieces of territory. That is a very different principle from the recognition of sovereignty over all the sea lying between islands of an archipelago regardless of whether the sea can properly be said to be enclosed by the configurations of the islands. Still less is there any precedent for drawing long base-lines *along the outside of the island fringe.*

350. In consequence, the United Kingdom Government reaffirms its view, stated in paragraph 113 of the Memorial, that general international law has not recognized any special principle which either gives a peculiar status to the waters of an archipelago or in any way excepts them from the ordinary rules governing islands, bays and straits. That at any rate was the position before the 1930 Conference. The Norwegian Government, however, in paragraph 430 of the Counter-Memorial, maintains that international practice had long recognizeda special régime in archipelagos and that the failure of jurists to notice this practice is to be explained by the fact that they neglected this point as they neglected other points in maritime law. This is a bold contention in view of the many distinguished jurists who studied maritime law before the preparatory work of the Codification Conference began in 1926. The question of allowing a special régime for archipelagos is not a trivial point of detail but a fundamental question of much intrinsic interest and importance. Are we really to believe that, for example, the jurists and States, who directed so much attention to the régime of the Dardanelles, simply did not concern themselves with the régime of the channels between the Ægean archipelagos? If they did not concern themselves with these outer channels to the Black Sea, it was simply because it never occurred to them that the waters of the archipelagos could be governed by any other régime than the régime for straits.

351. The truth is that, when M. Alvarez and Sir Thomas Barclay in their reports to the International Law Association and to the Institute of International Law in 1927 (Counter-Memorial, para. 431) ventilated the question of a legal régime for archipelagos, they were largely pioneers in a new field. The Norwegian Government in paragraph 430 of the Counter-Memorial seeks to explain away the fact that the Resolutions of the Institute in 1894, unlike its Resolutions in 1928, were silent upon the question of archipelagos by saying that they were equally silent upon the question of islands and indeed

of all elevations of the sea bed. This argument, however, loses all its force when it is recalled that the first draft of the Resolution in 1894 did contain an article dealing with rocks and sandbanks, but that this article was deleted because members of the Institute were uneasy as to the risk of indefinite extension of territorial waters which might be involved in allowing rocks and sandbanks to count as base-points. Clearly, the Institute in 1894 contemplated still less that whole groups of widely separated islands might be used as base-points for the indefinite extension of territorial waters.

352. The Norwegian Government observes in paragraph 431 of the Counter-Memorial that it is a striking fact that, as soon as the attention of jurists in the various learned societies was drawn to the problem of archipelagos, they tended to resolve it in favour of the unity of a group of islands. The United Kingdom Government, in its Memorial, acknowledged that the resolutions, of the learned societies, like the work of the 1930 Conference, showed a tendency to adopt *de lege ferenda* the principle of the unity of groups of islands. However, they provide nothing whatever to support *(a)* the drawing of long base-lines on the outer side of the fringe of islands or *(b)* claims to all waters between the fringe and the mainland as internal waters irrespective of the width of the interval. There is moreover an extraordinary inconsistency between the Norwegian Government's estimates of the value of the work of learned societies as evidence of an existing customary law when it is discussing archipelagos in paragraphs 431 and 436 and when it is discussing the rule of the low-water mark in paragraph 311. It really cannot be supposed that in the years 1926-1928 the learned societies, when they framed a resolution in familiar terms about the well-known, generally accepted doctrine of the low-water mark with its exceptions, were merely speculating *de lege ferenda* but that, when they framed a novel resolution about a matter entirely neglected by jurists, they were merely restating a rule of the *lex lata*.

The tendency in the learned societies and at the 1930 Conference to support the introduction of a special rule for archipelagos was accompanied, as is pointed out in paragraphs 115 to 121 of the United Kingdom's Memorial, by an insistence on restricting the application of the special rule to cases where the intervals between the islands are of moderate size. Thus Basis of Discussion No. 13 imposed a limit of twice the width of territorial waters both in regard to ocean and coastal archipelagos.

The Hague Codification Conference (1930)

353. Turning to the Hague Codification Conference the Norwegian Government in paragraph 438 of the Counter-Memorial seeks to escape from any limit of the width of the interval between the islands by characterizing Basis of Discussion No. 13 as a compromise to win over the States which, like Great Britain, were wholly opposed

to the introduction of a new rule for archipelagos. No doubt, Basis of Discussion No. 13 was a compromise in the sense of being the middle line among conflicting views. But the observations of the Preparatory Committee on Basis of Discussion No. 13 (para. 437 of the Counter-Memorial) make it absolutely clear that the limit of distance was introduced into the committee's text not to catch the vote of Great Britain but as a necessary element in the proposed rule. Having referred to the view of some States that islands should always have their own territorial waters, the committee said (*Bases of Discussion*, p. 51) :

> "According to other governments, wherever two or more islands are sufficiently near to one another or to the mainland, the islands or the islands and the mainland form a unit and territorial waters must be determined by reference to the unit and not separately for each island ; there will thus be a single belt of territorial waters. This conception claims to be based on geographical facts. On the other hand, it raises more complicated questions than the other view. In the first place, it makes it *necessary* to determine *how near the islands must be to one another or to the mainland.*"

354. The genesis of Basis of Discussion No. 13 is not very difficult to discern. The Committee of Experts' original article on islands in their draft convention circulated to governments in 1926 allowed coastal islands to affect the base-line of the mainland only if not further distant from the mainland than the single breadth of the territorial sea but provided no criterion for determining the width of the permissible intervals in archipelagos. In 1927, under the guidance of M. Alvarez and Sir Thomas Barclay, the Institute of International Law undertook a more detailed study of the question of archipelagos. M. Schücking, Rapporteur of the Committee of Experts and the author both of their draft convention in 1926 and of Basis of Discussion No. 13 in 1928, was also a member of the Fifth Committee of the Institute and took part in their discussion of archipelagos in 1927. The discussion in the Fifth Committee is reported in the 1927 *Annuaire*, Volume I, pp. 78-81, where, after MM. de Lapradelle and de Boeck had argued for limiting the intervals between islands of an archipelago by reference to the *single* width of the territorial sea, it is recorded that (p. 80) :

> "Tous les membres sont d'accord pour admettre qu'en tous cas, une distance entre les îles supérieure à celle du double de l'étendue de la mer territoriale empêche l'application de la règle à élaborer en faveur des archipels."

The upshot was that the Fifth Committee in 1927 proposed an article on archipelagos which would apply the limit of twice the width of the territorial sea for archipelagos. The limit for the territorial sea proposed in an earlier article of the committee's draft was 6 miles, giving a 12-mile limit for archipelagos.

355. M. Schücking was not present at the plenary meeting at Stockholm in 1928, when it adopted the distance of twice the width of the territorial sea as the test for applying the proposed new rule for archipelagos, but he no doubt followed its proceedings with interest in his capacity as a League of Nations expert on the subject under discussion. The Institute substituted 3 miles for the 6 miles previously proposed for the width of the territorial sea, thus reducing the intervals in its rule for archipelagos from 12 to 6 miles. The Institute made one further change in its proposed article for archipelagos by providing expressly for the case of coastal archipelagos. The amendment was proposed by the Swedish jurist M. de Reuterskjöld whose intervention in the discussion is recorded as follows (1928 *Annuaire*, pp. 646-647) :

> "M. de Reuterskjöld propose un amendement à l'article 5 *qui n'est autre chose que la formule du Gouvernement suédois :*
>
> « Dans le cas où un archipel est situé le long d'une côte, l'étendue des eaux territoriales sera comptée à partir des îlots et récifs les plus éloignés de la côte, *pourvu que la distance des îles et îlots les plus proches de la côte ne dépasse pas le double de la mer territoriale.* »
>
> *L'article 5 est applicable non seulement à l'archipel de la Norvège,* mais aussi à celui de la Suède. Le Gouvernement suédois a fait des observations semblables lors de l'enquête de la Commission de Codification de la Société des Nations. Le Gouvernement suédois a eu en vue de compter l'étendue des eaux territoriales à partir des îles les plus éloignées de la côte. Si les rapporteurs pensent que la règle proposée par M. de Reuterskjöld est comprise dans le texte de l'article qu'ils ont formulé, celui-ci est prêt à retirer son amendement ; au cas contraire, il le maintiendra.
>
> M. Alvarez accepte l'amendement de M. de Reuterskjöld, sauf rédaction.
>
> *M. Diena demande à M. de Reuterskjöld s'il faut comprendre par l'expression « la double mesure de la mer territoriale » six milles marins.*
>
> *M. de Reuterskjöld déclare que c'est justement en ce sens qu'il faut comprendre l'expression susmentionnée.* »"

M. de Reuterskjöld therefore in 1928 shared the view expressed by M. Aubert in 1895 that the intervals between islands and the mainland must not exceed the distance of twice the width of territorial waters. The Institute adopted the additional clause proposed for coastal archipelagos and then its draft article was in substance precisely the same as the text adopted by M. Schücking in the following year for *Basis of Discussion No. 13.*

356. The Counter-Memorial, in paragraph 435, draws attention to an intervention by M. Wollebaek, in the same discussion of archipelagos at the Institute's meeting in 1928. M. Wollebaek was then the Norwegian Minister in Stockholm, and in 1912 had been chairman of the committee which drew up the 1912 Report. He asked for the insertion of an amendment safeguarding rights in

archipelagos to territorial waters acquired by international usage, but withdrew his proposal on being informed by the Chairman that his point was already covered by Article 2 of the Institute's draft. As Article 2 merely provided that a belt of territorial sea larger than 3 miles might be justified by an international usage, the Chairman must have understood M. Wollebaek as claiming for Norway a right to 8-mile intervals in archipelagos instead of to the 6-mile intervals allowed by the Institute's draft. It may be added that both M. Wollebaek and Article 2 of the draft contemplated an exception only for cases of *international usage*, not simply for national pretensions.

357. The suggestion in paragraph 438 of the Counter-Memorial that the introduction of a distance limit into Basis No. 13 was simply a vote-catching expedient is thus entirely contrary to the facts. At the 1930 Codification Conference the majority of Sub-Committee No. II showed a disposition to adopt, instead of twice the width of the territorial sea, the 10-mile limit proposed by Japan by analogy from the law of bays. The analogy, as was pointed out in paragraph 119 of the Memorial, is not a true one except where the channel between the islands of the archipelago leads towards inland waters and is therefore really the entrance of a bay. Where the channel connects two parts of the open sea, the considerations justifying the enclosure of bays within *inland* waters do not apply. The Norwegian Government contends in paragraph 440 of the Counter-Memorial that the distinction between treating the waters of an archipelago as inland waters or territorial waters is of no importance whatever in the present case. But the drawing of base-lines depends upon ascertaining the limit of inland waters. Moreover, in 1930 the attempt to formulate a special rule for archipelagos broke down on this very point. It broke down, because Sub-Committee No. II declined to treat as inland waters channels between islands which connect two areas of open sea. The conference therefore left the waters of archipelagos to be dealt with under the existing law of a 10-mile rule for bays and of ordinary territorial waters in straits.

358. The Norwegian Government, however, in paragraph 454 of the Counter-Memorial, cites as evidence of the existence of a special rule for archipelagos the statement of Higgins and Colombos *(International Law of the Sea* (1943), p. 76) that "the generally recognized rule appears to be that a group of islands forming part of an archipelago should be considered as a unit". This opinion is tentatively expressed and is supported only by a footnote which says "this is the *solution favoured* by the draft convention of the Experts' Committee submitted to the Hague Conference of 1930" and refers to Article 5 of the project of the Institute of International Law in 1928. The passage in this text-book cannot therefore

be regarded as affording proof of an *existing* special rule for archipelagos.

359. The United Kingdom Government, in paragraph 120 of the Memorial, cited a passage from Gidel expressing an opinion opposite to that in Higgins and Colombos's book. The passage reads :

> "*État actuel du droit.* — L'effort doctrinal important du Dr Münch permettra peut-être, si la question est reprise un jour ou l'autre dans une conférence internationale, d'établir des règles conventionnelles sur la question des archipels. *Pour le moment et en l'absence de règles spéciales à cet égard admises par le droit international, la solution à laquelle il convient de se tenir est celle qui résulte du droit commun de la matière de la mer territoriale.*" (*Op. cit.*, Vol. III, p. 717.)

The Norwegian Government, in paragraph 455 of the Counter-Memorial, seeks to get rid of this embarrassing passage by saying that it relates only to a suggestion made by Dr. Münch on the special subject of eliminating zones of high sea within a group of islands. But the most cursory examination of pages 709 to 718 of Gidel's third volume shows that there is no substance in this contention. Gidel, when considering groups of islands in isolation and without regard to their nearness to a coast, divides his discussion into six parts each with its own title. The first two parts are introductory ; the third and fourth deal with the work of the 1930 Conference. The fifth part deals with the status of the waters between the islands, saying that the question was not settled at the 1930 Conference and commenting upon Dr. Münch's suggestion. The last part entitled *État actuel du droit* unmistakably deals generally with the existing law of archipelagos, declaring that, in the absence of special rules accepted by international law, the customary law of territorial waters applies.

360. The Norwegian Government also observes that the above-mentioned passage appears at the end of the section in which Gidel views archipelagos "indépendamment de leurs relations juridiques avec une côte proche" and maintains that his real views are revealed more clearly in the next section dealing with archipelagos "dans ses relations juridiques avec une côte proche". But the full title of the first section is "Le groupe d'îles (archipel) envisagé *en lui-même* (indépendamment de ses relations juridiques avec une côte proche)." In other words, Gidel first considers the problem of archipelagos in isolation. He favours the introduction of a special rule, examines the evidence and finds that there is not yet a special rule for archipelagos in the existing customary law. In the second section he considers archipelagos in their relation to a mainland coast. Having already found that there is no unitary régime for archipelagos in the existing law, his discussion of coastal archipelagos is necessarily speculative and *de lege ferenda* as the Norwegian Government itself concedes. Why Gidel's views concerning the

existing law should more clearly emerge from these speculations *de lege ferenda* than from his account of "l'état actuel du droit" is a mystery.

Summary of United Kingdom views on the law relating to archipelagos

361. The United Kingdom Government accordingly maintains, first, that neither State practice nor the opinions of writers nor the work of the 1930 Conference provide evidence of a generally accepted customary rule relating to the delimitation of the territorial waters of coastal archipelagos which was already in existence before the 1930 Conference. Secondly, it maintains that State practice, the opinions of writers and the records of the 1930 Conference do not establish the introduction or crystallization of any such customary rule after 1925 in connection with the work of the Codification Conference. Thirdly, it maintains that if, contrary to its belief, a special customary rule for archipelagos must be held to have crystallized in the work of the conference, the rule is subject to an absolute limit of 10 miles on the length of the base-lines that may be drawn between units of the archipelago, and a similar limit as regards the distance between the island fringe and the mainland.

362. In general, the United Kingdom Government reaffirms its view that under the existing customary law the channels between the islands of an archipelago fall under the régime of straits or bays according as they connect two parts of the open sea or lead to inland waters. In the case of a channel connecting two parts of the open sea, there does not seem to be any good reason why the rights of the coastal State should be more favourably regarded when the two shores of the channel are islands or islets of an archipelago than when they are two individual pieces of territory. Indeed, when the shores are two individual pieces of territory of the same State, the total extent of the coast line which borders the strait may often be larger than when the channel lies between small islands of an archipelago. An example is the Northumberland Strait lying between Prince Edward Island and the coasts of Nova Scotia and New Brunswick in Canada. Equally, in the case of a channel leading to inland waters, there does not seem to be any good reason why the rights of the coastal State should be more favourably regarded when the two shores are the discontinuous islands of an archipelago than when they are the continuous arms of a bay. On the contrary, the perfect, unbroken arms of a mainland shore necessarily tend to a more complete enclosure of the waters than do the imperfect, broken arms of a line of islands. Consequently, where areas of sea are claimed to be enclosed by the configuration of the shores of islands there is certainly no less reason for applying the 10-mile rule than where the enclosure is claimed to be due to the configuration of a single, solid shore.

363. In concluding its observations on the principles applicable to groups of islands the United Kingdom Government again emphasizes its dissent from the proposition in paragraph 429 of the Counter-Memorial that the question for the Court is whether there is a rule of international law specifically forbidding a State to treat the islands of an archipelago as a unity. The establishment of maritime territory in international law is not simply a matter of national claim. *It is a matter both of national claim and of the acquiescence of other States in that claim.*

364. It is necessary also to bear in mind that all this examination of State practice with regard to coastal archipelagos arises because Norway is seeking to justify *(a)* the base-lines she has drawn in the 1935 Decree, and *(b)* her claim to treat as Norwegian internal waters the sea lying between these base-lines and the coast of the Norwegian mainland. Under this claim in the first place base-lines are drawn along what Norway describes as the "outer coast line"; that is to say, along the outward edge of the fringe of islands, islets and rocks which form the Norwegian "skjærgaard" and these base-lines are drawn on the principle of taking the rock or islet furthest out to sea and connecting it with another rock or islet in some cases as much as 40 miles, 19½ miles and 18 miles away. Thus, even on the outer side of this outer coast line, enormous areas of water are enclosed which have in no sense the configuration of a bay. In addition, all the waters between the "skjærgaard" (the outer fringe) and the mainland are also claimed the Norwegian internal waters without regard

(a) to the distance between the fringe and the mainland,
(b) to the question whether the shape of the island fringe in relation to the mainland is such as to make the waters between the fringe and the mainland have the configuration of a bay,
(c) and to the question whether these waters have the character of straits.

In all the evidence of State practice which Norway has produced, there is nothing which supports the way in which Norway has drawn her base-lines along the outer fringe (the most important issue from a practical point of view in this case). Nor is there anything to support an indiscriminate claim to treat as internal waters all water between a fringe of islands and the mainland. If there are special rules of international law with regard to coastal archipelagos, there is absolutely nothing in them which in any way supports what Norway has done in the matter of the base-lines of the 1935 Decree, and that is no doubt why Norway is at such pains to endeavour to dispute the validity of what is indisputably the primary rule with regard to territorial waters, namely, that the base-line is the tide mark on the land.

C.—Straits

(Paras. 471-510 of the Counter-Memorial)

Introductory

365. The principal contention of the Norwegian Government in regard to area of sea (1) lying between islands and rocks off the Norwegian coast (i.e. between islands and rocks forming part of the outer coast line) and (2) between the island fringe and the coast, is set out in earlier sections of the Counter-Memorial. It is that Norway is entitled under international law to enclose all those areas as inland waters by delimiting lengthy notional base-lines of her own choice. This contention is based on a supposed "outer coastline" doctrine, or alternatively, on a supposed doctrine of the unity of archipelagos. In fact, neither of these doctrines, to the extent that they can be said to exist, in any way justify the base-lines which Norway has drawn on the outer coast line, nor the inclusion of all the waters between the outer coast line and the mainland as *internal* waters, even if these waters are under Norwegian sovereignty. The United Kingdom Government, in the preceding sections of this Reply, has given its reasons for thinking that the principal Norwegian contention is without any legal foundation. It has also, both in previous sections of this Reply and in its Memorial, endeavoured to show that the extent of Norway's maritime territory, in connection with islands and rocks off her coast, is dependent essentially on the law governing the limits of territorial waters where there are bays and straits.

366. In answer to the arguments put forward in the United Kingdom Memorial referring to the law governing territorial waters where there are straits, the Norwegian Government now develops, in the section of its Counter-Memorial relating to straits, an argument which contests the existence of any rule of international law governing straits which could affect the delimitation of Norway's maritime territory in the channels between the islands and rocks off the Norwegian coast or between them and the mainland.

367. In the section of this Reply relating to straits, it has not been found convenient to follow the order of the material adopted in the Counter-Memorial or to adopt all the sub-headings which the Counter-Memorial adopts. Consequently, in this portion of the Reply, sub-headings are adopted which are different from those of the Counter-Memorial and an endeavour is made to indicate under each sub-heading those paragraphs of the Counter-Memorial which are being answered under that sub-heading in order to assist in reading the Reply and the Counter-Memorial together.

For convenience, in this section of the Reply, the four following terms will be used with the following meanings, namely :

(a) *Geographical strait*—any sea-water channel which connects two larger portions of sea water.
(b) *Legal strait*—any geographical strait which connects two portions of the high seas.
(c) *International strait*—any legal strait to which a special régime as regards navigation applies under international law because the strait is substantially used by shipping proceeding from one part of the high seas to another.
(d) *Inland strait*—a geographical strait which is not a legal strait. In other words an inland strait is a sea-water channel which leads essentially to internal waters.

In connection with the delimitation of territorial waters, it is only the second class of strait, namely, the legal straits, which have to be taken into consideration as straits, international straits (the third class) being only a sub-division of legal straits. Inland straits fall under the rules relating to bays in so far as the delimitation of territorial waters and national waters is concerned.

United Kingdom views concerning straits; criticism of these views by Norway and the United Kingdom's answer

(Counter-Memorial, paras. 471-489)

Relevance of straits in the determination of territorial waters

368. The Norwegian Government emphasizes (paras. 475-476 of the Counter-Memorial) that international law concerns itself with the régime of straits from two aspects *(a)* their use by foreign shipping and *(b)* the status of their waters. It maintains that of these two aspects the use of straits by foreign shipping is the one which has primarily engaged the attention of international law. It also maintains that the use of straits by foreign shipping is of no interest to the Court in the present case, as the Court has only to decide whether the Norwegian Government has infringed the rules of international law in tracing base-lines for its fisheries zone. It recalls that the distinction between inland and territorial waters is of no importance to fisheries. Up to this point there is no need seriously to dispute the contentions of the Norwegian Government summarized in this paragraph. However, the Counter-Memorial proceeds to develop another argument, namely, that, on the supposition (a supposition which, of course, is disputed by the United Kingdom) that a State is entitled to assume sovereignty over all the waters lying between a mainland and the exterior limit of a coastal archipelago [1], the only relevance

[1] There is certainly no general rule of international law to this effect. The question depends *inter alia* upon the distance between the coastal archipelago and the mainland. In Norway's case (as the charts in Annex 35 show), the United Kingdom does not contest Norwegian sovereignty over these waters.

of "the régime of straits" in the present case is whether international law requires certain parts of the waters within the exterior limit of the archipelago to be withdrawn from the coastal State sovereignty and treated as part of the high seas in virtue of the régime of straits. Apart from the fact that it is based on a supposition which is not true as a matter of general international law, though by reason of the particular facts it may be largely true as regards the particular case of Norway, the argument appears to misconceive the customary rules of international law concerning territorial waters in straits. Starting from a false hypothesis, it poses an inappropriate question, and this may in part account for the singular confusion which the section of the Norwegian Counter-Memorial dealing with straits (paras. 471-510) makes of the principles of international law relating to them.

369. The Government of the United Kingdom agrees that the question whether a given area of sea is territorial or inland waters does not affect the right of exclusive fisheries *in that area*. But it by no means follows that the question whether or not a given area of sea is inland waters is irrelevant to the determination of the extent of a State's exclusive fishing rights. The limit of the exclusive fisheries zone coincides with the limit of the territorial sea and the definition of the boundaries of inland waters is essential to the determination of the limit of the territorial sea. If a given area of sea may be treated as enclosed (inland) waters, the limit of the territorial sea and of the fisheries zone is measured from the line of enclosure. The importance of the rules regarding the delimitation of territorial waters in connection with legal straits is that, in some cases and to some extent (though not to the extent Norway claims), a legal strait has the effect of increasing the area over which the coastal State's sovereignty extends as compared with what the position would be if the channel was neither a legal strait nor could be treated as a bay (i.e. inland strait). On the other hand, in some cases it reduces the area over which the State can claim sovereignty as compared with what the position would be if the legal strait could be treated as a bay. The peculiarity, however, of the rules respecting territorial waters in straits is that they may affect, and indeed in some cases increase, the area which can be claimed as *territorial waters*, whereas bays create *internal waters*, with territorial waters outside them. Since bays are subject to one set of rules and straits another, it is necessary to see what waters can be claimed under both headings in order to ascertain the totality of waters which are subject to the coastal State's sovereignty and therefore within fishery limits. Straits may be wide or narrow. They may be narrow at the entrances and wide in the middle or narrow in the middle and wide at the entrances. But it is only when the separate pieces of territory on both sides of the strait are so close as to cause

their maritime belts to overlap or touch at some place along the strait that straits become relevant for the purpose of the delimitation of territorial waters—apart from cases where States can claim sovereignty over wider straits on the basis of historic or prescriptive title.

The question whether a channel is a legal strait is determined by geographical tests exclusively: economic considerations, such as the amount of user by shipping, are only relevant in connection with the question whether a legal strait is also an international strait

370. The United Kingdom Government agrees with the Norwegian Government that international law concerns itself with straits from the point of view of their use (i.e. the question of the right of innocent passage) and from the point of view of the status of their waters (i.e. whether they are high seas, territorial waters or internal waters). But it cannot agree with the apparent assumption of the Norwegian Government that it is only in connection with international straits that international law has special rules affecting the delimitation of territorial waters. The Norwegian assumption inverts the true principles of the law of straits. The extent of territorial waters in straits and the right of navigation for international maritime traffic, though related, are distinct questions. It is only after the extent to which the waters in the strait are territorial has been determined that the question has to be considered whether the strait is to be subjected to the special régime for international straits. If the delimitation leaves a free and adequate navigable channel for international maritime traffic through the centre of the whole of the strait, the occasion for a special régime of navigation does not exist. If, however, the strait narrows so as to bring at any point its whole width within the territorial sea, then the need for a special régime may arise. It is true that in any case foreign shipping is entitled in virtue of the general right of innocent passage through the territorial waters everywhere to navigate whether within or outside a strait. But except in international straits, this right is subject to certain powers of control and even of suspension by the coastal State in defence of its own security. This power to control, and in the last resort to suspend, international navigation in its territorial waters generally, which a coastal State has under customary law, is the occasion for subjecting international straits (i.e. straits which provide a useful route for international maritime traffic) to a special régime. The total suspension of international navigation through such straits is unacceptable and in consequence customary law attaches to them the special régime of an international strait in which the power of control is limited and the suspension of all navigation is forbidden. The position is the same whether the shores of the strait are in the hands of one or of two or more States. The Court, in the *Corfu Channel case*, has so recently

endorsed the existence in customary law of such a higher right of international navigation in straits falling into the category of international highways through which passage cannot be prohibited that it is necessary to say more on the subject.

371. The United Kingdom Government fully recognizes that in the *Corfu Channel case* the Court dealt only with the question of the higher right of navigation through the territorial waters of a particular class of strait and was not called upon to consider the question of the extent of territorial waters in straits. In its brief reference to the case in paragraph 110 of the Memorial the United Kingdom Government merely alluded to the Corfu Channel as a channel lying between a coastal island and the mainland and connecting two parts of the high sea which naturally fell to be considered under the head of straits. It regarded the decision in the *Corfu Channel case* as relating solely to the special régime of international navigation through territorial waters in a particular category of straits and did not therefore seek to draw any particular conclusion from the decision of the Court in that case. For the reasons given in the preceding paragraph of this Reply the precise definition of a strait which, like the Corfu Channel, attracts a higher right of innocent passage than ordinarily exists through territorial waters, is not a relevant factor in delimiting the extent of the territorial sea in any given strait. Consideration of the extent of the waters of the strait which are included in the territorial sea attaching to the coasts of the strait necessarily precedes consideration of whether, owing to the overlapping of the separate maritime belts, the strait by reason of its special importance to international navigation requires to be subjected to a special and higher right of innocent passage. The extent of the territorial sea in a legal strait does not in any way depend on whether or not it is an international strait and therefore whether or not it is a highway for international navigation. In consequence, no useful purpose would be served in replying to the observations of the Norwegian Government on the *Corfu Channel case* in paragraphs 479-480 of the Counter-Memorial, since these observations are directed to the definition of a strait which attracts a special régime of navigation and not to the extent of the territorial sea in a channel connecting two parts of the open sea.

Norwegian argument that there is no general rule governing straits

372. For the same reason, no useful purpose would be served in examining in detail the statements of writers which are cited in paragraph 477 of the Counter-Memorial as evidence of the diversity of straits and of the absence of a general rule covering all straits. These statements primarily relate to the absence of a general rule determining the régime of navigation for all straits. Dr. C. C. Hyde, in the dictum quoted in paragraph 477 of the Counter-

Memorial [1] is referring to the fact that some legal straits are subject to the special rules for innocent passage through international straits (of which again a few are subject to special régimes of their own in regard to passage, transit dues, etc.) whilst other straits are inland straits. The extent of the territorial sea is a different question and it does not at all follow, as the Norwegian Government suggests in paragraph 478 of the Counter-Memorial, that in regard to the extent of territorial waters, it is only possible for principles of customary law to govern a limited class of straits. The principles of customary law for the delimitation of territorial waters off the coasts of individual territories apply to each shore of every strait. The only disputable point of customary law is whether, when the territorial seas overlap at more than one point, pockets of high sea wholly enclosed within two overlapping areas of territorial sea may be assimilated to territorial waters. Sub-Committee No. II was prepared to allow the elimination of such pockets, if not more than 2 miles in width.

Territorial waters in straits.—The Hague Codification Conference (1930)

373. That the extent of territorial waters in a strait (Counter-Memorial, para. 491) is independent of the special régime of navigation and is determined by delimiting separately the territorial sea of each shore (subject to the possible elimination of small pockets) was assumed automatically in the Bases of Discussion and in Sub-Committee No. II's report. The rules laid down in the Bases of Discussion and in the report have been set out in paragraphs 110-111 of the Memorial. Bases of Discussion Nos. 15 to 17 dealt with the delimitation of territorial waters in straits without any reference whatever to a special régime of navigation, distinguishing only between straits connecting two parts of the open sea from straits leading to inland waters. Basis of Discussion No. 15 allowed that all the waters of a strait may be considered territorial, only when the entrances do not exceed twice the width of the territorial sea. (The Basis in that event contemplated the elimination of any pockets of high sea lying between the two entrances and caused by the receding of the shores inside the straits.) Moreover the "observations" on Basis No. 15 show how confident was the assumption that customary law requires territorial waters in a strait to be delimited separately for each shore *(Bases of Discussion*, p. 59):

[1] For convenience, Hyde's statement is reproduced here.

"There are straits and straits. Water areas so generally described because they connect high seas or parts thereof, greatly differ both in their geographical relationship to the land which they separate, and in their economic importance to the international society. Schemes that are unobservant of, or unresponsive to, such considerations, fail also to take cognizance of what have proved to be decisive factors in the practice of nations." (*International Law*, Vol. I, para. 150.)

> *"When the coasts of a strait belong to a single State and the strait is not wider than twice the breadth of territorial waters, agreement is easily reached for the view that all the waters of the strait are territorial waters of the coastal State.* It is reasonable to adopt the same solution when the entrances of the strait are not wider than twice the breadth of territorial waters, even though some parts of the strait may be broader. There would be no advantage in attributing the character of high sea to areas of sea situated within the strait.
>
> It is evident, and it is unnecessary to state, that, if islands belonging to the coastal State lie at the entrance of a strait, the distance of twice the breadth of territorial waters applies to the individual straits which lie between each island and the coast of another island. *It is equally unnecessary to state that, if the entrance to the strait is wider than twice the breadth of territorial waters, the limit of the territorial waters is to be drawn in the same manner as along any other coast."*

Similarly, the report of Sub-Committee No. II dealt with the question of territorial waters in straits entirely independently from the question of a special régime of international navigation in particular straits. It also stated that "in straits which form a passage between two parts of the high sea, the limits of the territorial sea shall be ascertained in the same manner as on other parts of the coast, even if the same State is the coastal State of both shores", without any indication of disagreement or any sign of doubt that this was the existing customary law. (See Minutes of the Second Committee, p. 220.)

Territorial waters in straits.—The views of Gidel

374. There is no better evidence of the existing principles of customary law governing the delimitation of territorial waters in straits than the confident, unequivocal statements of Sub-Committee No. II. Attention may, however, be drawn to the equally clear statements of Gidel in Chapter VIII of Volume III of his book, *Le Droit international public de la Mer*. Gidel there takes the view (p. 730) that, whereas geographically every maritime channel between two pieces of territory is a strait, the legal notion of a strait is limited to

> "tout passage naturel entre deux côtes, n'excédant pas *une certaine largeur* et faisant communiquer entre elles deux parties des espaces maritimes".

A few pages later (p. 735) he deals with the case of a geographical strait whose width exceeds twice the measure of the territorial sea as follows:

> "Supposons d'abord qu'il s'agisse d'un passage maritime dont les entrées et l'écartement en tous les points sont supérieurs à la double largeur de la mer territoriale. *Cette voie sera géographiquement un détroit; au point de vue du droit elle ne sera pas un « détroit »; en effet, cet espace maritime ne comportera pas l'application de règles*

particulières pour le tracé de la mer territoriale. Peu importe que les rives de ce détroit soient placées sous une seule ou sous plusieurs souverainetés. Une fois les zones de mer territoriales tracées conformément au droit commun de la matière, il restera entre elles d'un bout à l'autre du passage dont il s'agit une zone de mer libre."

Then he rejects as unacceptable a Romanian proposal in 1930 that where both shores belong to one State the waters of a strait should all be under its jurisdiction, even if the width exceeds twice the measure of the territorial sea. He only allows the possibility of sovereignty over such a larger strait as an historic title (p. 736):

"C'est seulement par application de la théorie des « eaux historiques » que l'État qui serait riverain unique d'un pertuis large en tous endroits de plus du double de la distance de la mer territoriale, pourrait prétendre exercer sa souveraineté au delà de sa zone normale de mer territoriale le long de chaque rive. Sinon ce pertuis n'est pas juridiquement un détroit. Ce sont deux côtes devant chacune desquelles la mer territoriale se trace conformément au droit commun.

Il n'y a juridiquement détroit que si la largeur des entrées tombe au-dessous d'une certaine distance. Si cette distance se trouve constamment dépassée, il y a détroit au sens géographique du mot ; il n'y a pas détroit au sens juridique."

When he turns to the case where the width of the strait is narrow and both shores are in the lands of one State, he expresses a preference for the 10-mile limit *de lege ferenda* but endorses twice the measure of the territorial sea as the existing customary law (p. 737):

"Examinons d'abord les cas où il n'existe qu'un seul riverain. Il ne peut être question de régime juridique particulier qu'à partir du moment où les rives du pertuis sont dans un certain rapprochement : pour les uns ce rapprochement est donné, nous l'avons vu, par la double distance de la mer territoriale *(et nous croyons que tel est le droit commun positif actuellement)*, pour les autres par une distance de dix milles (la règle nous paraîtrait heureuse à titre de *lex ferenda*). Supposons la condition remplie : juridiquement nous avons un « détroit »."

Finally, in the last section of his exposition of the territorial waters in straits (p. 762), Gidel approves the distinction between straits connecting two parts of the open sea and straits leading only to inland waters to which attention has been drawn by the United Kingdom in paragraphs 110-111 of the Memorial. He agrees that straits leading only to inland waters are assimilated to bays :

"Si le détroit constitue *l'unique voie* d'accès à une mer « intérieure », si les deux rives du détroit et toutes les rives de la mer « intérieure » sont soumises à la même souveraineté." (*Op. cit.*, Vol. III, p. 762.)

Straits.—Views of the United Kingdom Government

375. Accordingly, there is nothing novel or unorthodox in the United Kingdom's thesis that, where a channel links two parts of the open sea, it is a legal strait and (subject to the question of the elimination of pockets and possible cases of prescriptive rights over straits of greater width than the general rules allow) territorial waters are to be delimited in the normal way along each shore. Nor is there anything novel or unorthodox in its thesis that, where a channel leads to inland waters, it is to be treated as a bay. The Norwegian Government, however, complains in paragraph 481 of the Counter-Memorial that the United Kingdom's definition of a legal strait as a channel connecting two parts of the open sea is purely geographical and does not take account of economic realities. It is indeed purely geographical, but this criticism neglects the economic differences which spring from the geographical distinction. The potential economic use of a legal strait is different from the potential economic use of an inland strait. It is true that the question sometimes arises whether a channel can reasonably be said to connect two parts of the open sea and therefore there is a doubt whether it should be classified as a legal strait. Where this doubt arises in applying a purely geographical test, it was suggested in the United Kingdom Memorial that it should be considered whether the channel would reasonably be used for coastwise navigation by international maritime traffic. The Norwegian Government, however, complains that this test does not have regard to the quantitative or qualitative importance of the actual international use of the channel. But the actual volume of the international use of a channel at a particular moment in history, relevant though it may be in considering whether a strait is an international strait, is irrelevant to the question of the extent of territorial waters.

Straits.—The 1910 Arbitration

376. The Norwegian Government continues in paragraph 483 of the Counter-Memorial its attack upon the United Kingdom's exposition of the law of straits in the Memorial by claiming that the suggested test of potential use for coastwise navigation by international traffic is inconsistent with what Great Britain maintained in regard to bays in the 1910 Arbitration. A passage is cited from the case of Great Britain in 1910 explaining why different considerations apply to the case of *enclosed* waters from those which affect the open sea. Great Britain is said in this passage to have declared the two primary justifications of the régime of enclosed waters to be the greater control of the coastal State and the greater need for insuring its own security. Only thirdly was reference made by Great Britain to the fact that, commonly bays lie off the "ocean high-

ways" [1]. This is perfectly true but it is very unreasonable to interpret Great Britain's reference in 1910 to bays lying off the ocean highways as evidence of the inconsistency of Great Britain's view on this point at that date with the view expressed by the United Kingdom to-day. In 1910 Great Britain was not called upon to define the considerations justifying the régime of enclosed waters in any other than a quite general way and in any case the arbitration was concerned with bays, not straits. But her *general* approach to the principle of enclosed waters was essentially the same as it is to-day. The fact that Great Britain in 1910 pointed out the relevance of bays lying aside from the highways of international navigation is evidence of the consistency, not the inconsistency, of her views. The whole Norwegian contention founded upon this passage is extremely forced. It is extraordinary that, with all the attention given in the Counter-Memorial to this extract from the British Case in 1910, no significance is attached by the Norwegian Government to the fact that the phrase "enclosed waters" *is twice defined in the extract and does not include straits.*

377. The Norwegian Government pursues its argument about the justification of the régime of enclosed waters even further by citing in paragraphs 484 and 485 of the Counter-Memorial two passages from the tribunal's award. (These passages have also been examined previously in connection with the definition of bays; see paragraphs 224-225 above.) The gist of the Norwegian contention is that in these two passages the tribunal, when listing the elements which make up respectively the geographical and the territorial character of bays, emphasized primarily the security and economic interests of the coastal State. The Counter-Memorial points out that in only one of the passages was mention made of the position of bays in relation to "the highways of nations on the open seas". (This phrase is translated in the Counter-Memorial "les *grandes* voies internationales en *haute* mer". A more accurate rendering would be "les voies internationales en mer ouverte".) The general proposition is that the 1910 Tribunal would not have regarded the use of waters for international coastal navigation as sufficient to exclude the régime of "enclosed waters".

378. The 1910 Tribunal, however, was directing its remarks only to the case of bays where the penetration of the sea into the land and its termination in a cul-de-sac necessarily exclude the use of the waters for international navigation between the two external States except where the shores of the bay do not all belong to one

[1] This phrase "ocean highways" is translated in the Counter-Memorial as "*grandes* routes océaniques" whereas in the *Corfu Channel case* the Registry of the Court correctly translated "international highway" simply as "voies maritimes internationales". (I.C.J. *Reports 1949*, p. 28.) The word "highway" in English means no more than a public as distinct from a private way; it includes even a public footpath or bridle-path.

State. The problem in the case of a bay, the shores of which belong to one State, is primarily at what point the mouth becomes so large in proportion to the penetration inland that the waters must be held to form part of the open sea rather than enclosed waters. The legitimate interests of international maritime traffic in the navigation and use of the waters of a bay are determined essentially by the configurations and proportions of the shores of the bay and these elements were fully emphasized by the tribunal in both the passages cited in the Counter-Memorial. That the tribunal spoke rather more of the interests of the coastal State than of those of international navigation is very easily explained. The tribunal automatically adopted the standpoint that international use of the sea requires no explanation, but that an assertion of sovereignty by a State beyond the limit of the maritime belt measured from low-water mark at any point on its coast has to be *affirmatively justified.* In other words, it assumed that the burden of proof is on a coastal State claiming to appropriate areas of sea. The tribunal, as has been said, was directing its remarks only to the case of "bays". But if, as Norway suggests, straits were thought to be on the same footing as bays, it is a little surprising that the possibility of the Northumberland Strait being a Canadian bay never even entered into anyone's mind in the whole course of the case.

Straits.—The Harvard Research Draft (1929)

379. The Norwegian Government in paragraph 487 of the Counter-Memorial invokes in support of the same argument the fact that in their commentary upon Article 5 of the Harvard Research Draft, which deals with bays, the authors reproduce the passage from the Case of Great Britain in 1910 concerning the justification of the régime of enclosed waters. How little this passage really helps the Norwegian argument has already been shown. In any case, it is somewhat astonishing that the Norwegian Government should think it useful to draw the attention of the Court to the inclusion of this passage in the Harvard Research Draft as part of the commentary on Article 5 dealing with bays. Far more relevant are Articles 8, 9 and 10, dealing with straits. Where the shores of a strait are in the same hands, Article 8 (dealing generally with straits) allows the waters to be territorial only *if they do not exceed twice the width of the territorial sea.* Article 10, which provides for a special higher right of innocent passage in some straits, defines these straits subject to a special régime of passage simply as straits "connecting high seas".

Straits.—The projet of the Institute of International Law (1894)

380. In the same paragraph, the Counter-Memorial refers to Clause 2 of Article 10 of the projet of the Institute of International Law in 1894 (13 *Annuaire*, pp. 330-331), which, however, cannot be properly understood without the introductory clause at the

beginning of the article. The whole article, so far as it relates to straits whose shores are in the hands of one State, reads :

> "Art. 10. Les dispositions des articles précédents s'appliquent aux détroits dont l'écart n'excède pas douze milles, sauf les modifications et distinctions suivantes :
>
> 1° . . . . . ,
>
> 2° Les détroits dont les côtes appartiennent au même État et qui sont indispensables aux communications maritimes entre deux ou plusieurs États autres que l'État riverain font toujours partie de la mer territoriale du riverain, quel que soit le rapprochement des côtes.
>
> 3° Les détroits qui servent de passage d'une mer libre à une autre mer libre ne peuvent jamais être fermés."

Article 11 also reserved the régime of straits which are subject to conventions or special usages. As the Institute was proposing 6 miles for the width of the territorial sea, it is clear from the introductory clause in Article 10 that the Institute did not regard straits wider than twice the width of the territorial sea as raising any problem of territorial waters at all, though they might be subject to a convention or to a special usage under Article 11. It is true that paragraph 2 only insists that straits indispensable to maritime communications between two or more States shall be territorial, however close together their shores may approach.

Norway relies on paragraph 2 of the Institute's proposals because paragraph 2 uses the words "indispensable to maritime communication between two or more States other than the riparian State", and says that such straits always form part of the territorial waters of the riparian State (i.e. do not form part of its internal waters). The question is what the Institute meant by the words "indispensable to maritime communication" and in considering this it is well to look at the immediately following paragraph 3, which says that straits which serve as a means of passage from one high sea to another high sea can never be closed. It is clear from this that the Institute must consider that every strait which forms a means of communication from one piece of high sea to another is indispensable within the meaning of paragraph 2 because if this is not so the two paragraphs appear to be inconsistent one with the other. In paragraph 3 the Institute apparently considers, to use the terminology adopted in this Reply, that every legal strait is also an international strait. The Institute certainly did not mean that an international strait could be internal waters, whereas some other straits to which the special régime of an international strait does not apply must nevertheless be territorial waters. In fact, in its paragraph 3, the Institute appears to be further away from the contention of the Norwegian Government than are the contentions of the United Kingdom Government in the present case because the United Kingdom Government does not contend that all legal

straits are international straits, and indeed, the judgment of the Court in the *Corfu Channel case* shows that this is not so [1]. It is to be noted, however, that the description of the straits referred to in paragraph 3 of the Institute's article is expressed in the same terms as the test put forward here by His Majesty's Government as being the test of a legal strait.

Straits.—Statement by Secretary Wharton (1891)

381. In paragraph 488 a statement by Secretary Wharton concerning the division of the Straits of Juan de Fuca is cited :

> "The Straits of Juan de Fuca are not a great natural thoroughfare or channel of navigation in an international sense."

The Norwegian Government by picking out the one phrase "great natural thoroughfare" and neglecting the other phrase "or channel of navigation in an international sense" somewhat misrepresents Secretary Wharton's meaning. Moreover, it does not add that his statement continues by comparing the case of those straits to Delaware Bay which is to-day universally regarded as an historic bay. Indeed, in paragraph 541 of the Counter-Memorial the Norwegian Government itself invokes Delaware Bay as a classic example of historic waters and gives extracts from the opinion of Attorney-General Randolph in 1793 in which he affirmed the territoriality of Delaware Bay. It is not without significance in the present connection that in those extracts the Attorney-General twice emphasized that "the Delaware does not lead from the sea to the dominions of any foreign nation". In the other leading United States precedent on historic waters, the Alleganean, which affirmed the territorial character of Chesapeake Bay in 1885 and which is cited in paragraph 544 of the Counter-Memorial, the Court used the following significant words concerning this bay : "It cannot become an international commercial highway ; it is not *and cannot be made a roadway from one nation to another.*" Finally, there is the fact that in 1930 the United States endorsed the distinction between straits leading to inland waters and straits connecting two parts of the open sea. It also endorsed for the latter class of straits the rule under which the territorial sea is delimited from each shore separately whether the shores belong to one or more States.

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[1] In its judgment the Court stated :

"It may be asked whether the test is to be found in the volume of traffic passing through the strait or in its greater or lesser importance for international navigation. *But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Ægean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic.*" (I.C.J. *Reports, Corfu Channel case* (Merits), p. 28.)

The rules of international law with regard to the delimitation of territorial waters in straits

(Counter-Memorial, paras. 490-508)

Straits: remarks as to order of treatment

382. The Norwegian Government next proceeds to attack the rule of twice the width of the territorial sea as the normal measure for the delimitation of territorial waters in a strait whose shores are in the hands of one State. It does so first by criticizing the "projets" of learned societies and the work of the Codification Conference between 1926-1930 and, secondly, by citing opinions and precedents of earlier date. It will be more logical to deal with these citations in the reverse order.

Grotius, Vattel, Hall, Kent, Phillimore and Hershey

383. In paragraphs 495 to 498 of the Counter-Memorial reference is made to passages in Grotius (para. 495), Vattel (para. 496), Calvo (para. 497), Hall, Kent, Phillimore and Hershey (para. 498). It is true that Grotius and Vattel deal with straits and bays on the same footing, but it is also true that they deal with them on much the same footing as the territorial sea. Vattel, for example, having endorsed the cannon-shot for the territorial sea, merely says that the considerations which justify the appropriation of the territorial sea on the open coast apply with even greater force off the coasts of bays and straits. The nineteenth-century writers, Kent, Phillimore and Hershey, simply apply to straits the cannon-shot rule from each shore, which is merely a nineteenth-century version of twice the territorial sea. The passage cited from Hall [1] is admittedly more favourable to the Norwegian thesis, but the whole account of bays and straits in Hall is speculative, and he begins the discussion with the sentence: "It seems to be *generally* thought that straits are subject to the same rule as the open sea; so that when they are more than 6 miles wide the space in the centre which lies outside the limit of a marine league is free, and that when they are less than 6 miles wide they are wholly within the territory of the State or States to which their shores belong." What was generally thought in 1880 was also what was generally thought in 1930.

[1] This states, "In principle it is difficult to separate gulfs and straits from one another.... The power of exercising control is not less when water of a given breadth is terminated at both ends by water than when it merely runs into the land, and the safety of the State may be more deeply involved in the maintenance of property and of consequent jurisdiction in the case of straits than in that of gulfs." (*A Treatise on International Law*, para. 41.)

Calvo

384. In paragraph 497 of the Counter-Memorial the Norwegian Government refers to the extract from the other nineteenth-century writer, Calvo, quoted in paragraph 97 of the Memorial. This passage (which comes from paragraph 368 of *Le Droit international*, Vol. I), states:

> "On distingue deux sortes de détroits : ceux qui aboutissent à des mers fermées ou enclavées, c'est-à-dire dont la souveraineté absolue peut être revendiquée exclusivement par l'État dont elles baignent les côtes ; et ceux qui servent de communication entre des mers libres."

Thus Calvo is making a sharp distinction between straits leading to closed waters and straits linking two portions of the high seas. But in his *Dictionnaire de Droit international* (Vol. I, p. 243) Calvo made it plain that he did not regard straits connecting two portions of the high seas as subject to sovereignty except within cannon range of each shore. He said of these straits that they

> "*.... ne peuvent jamais devenir la propriété souveraine d'un seul et doivent rester absolument libres pour toutes les marines, comme les mers auxquelles ils conduisent.*
>
> Cette liberté d'accès et de transit admet toutefois les restrictions inhérentes au droit de conservation des États sur les côtes desquels sont situés les détroits; et lorsque *la configuration des détroits oblige les navires qui les traversent à passer sous le feu des forts placés sur l'un ou l'autre bord*, le souverain qui est maître de la côte a le droit incontestable d'en surveiller la navigation et de prendre, surtout en temps de guerre, les précautions que la prudence et le soin de sa sûreté peuvent rendre nécessaires."

In short, Calvo allowed that the coastal State in such a strait may exercise jurisdiction within the territorial sea (cannon range) along each shore, but that is all.

Queensland, British Honduras, Cook and Fiji Islands

385. The first of the precedents from State practice which are invoked in paragraph 501 of the Counter-Memorial (as being inconsistent with the rules set forth by the United Kingdom Government for the delimitation of the territorial sea in straits) is the supposed British claim to sovereignty over the channels off Queensland and British Honduras and over the waters between the islands of the Cook and Fiji groups. These claims have already been shown, in dealing with archipelagos, to be non-existent (paras. 313-317 above).

The Straits of Kalmar

385 A. The next precedent (para. 502) is a claim to the Straits of Kalmar voiced by Sweden in its reply to the *questionnaire* (see

Bases of Discussion, p. 190). Sweden maintained in its reply that a distinction should be made between straits between open seas and other straits, but, somewhat illogically, proposed that all straits between islands near a coast and the mainland or between islands of a group should be treated as inland waters. The Straits of Kalmar were mentioned as an example of a strait between a mainland and an off-shore island. This proposal was made *de lege ferenda* and was rejected in Sub-Committee No. II.

The Baltic

386. In paragraph 503 of the Counter-Memorial reference is made to the Belts and the Sounds which form the entrances into the Baltic. It is surprising that the Norwegian Government should think it more appropriate to cite passages relating to the abolition of the Sound dues in the middle of the nineteenth century than the views of the Danish Government in 1930 as to the existing customary law. The Danish reply to the *questionnaire* (*Bases of Discussion*, p. 123) clearly refers to the existing law and quite explicitly makes the same distinction between straits leading to inland waters and straits connecting open seas as is made by the United Kingdom Government :

> "Speaking generally, the rules for determining and calculating the extent of territorial waters in straits are the same as in other parts of the coast. *If both coasts belong to the same State, and if the strait connects two open seas, the above-mentioned rules concerning bays would not be applicable. On the other hand, if the strait leads into an inland sea, all the coasts of which belong to the same State, rules similar to those concerning bays could properly be applied.*
>
> If the coasts belong to two or more States, and their distance apart is less than double the breadth of the territorial belt, the waters must be divided by a median line—in other words, a line drawn throughout at an equal distance from both coasts. Several treaties concluded by Denmark contain a provision of this kind. In this case also, the distance would be measured from the low-water mark, or it may be from the islands, rocks and reefs situated along the coast; no account would, however, be taken of artificial islands, lighthouses, etc. (*cf.* para. VI)."

The Straits of Magellan

387. Paragraph 504 of the Counter-Memorial cites the claim of Chile to the Straits of Magellan. The precise attitude of other States to Chile's claim to jurisdiction over all the waters of the strait is not clear, nor is it clear that Chile claims the Straits of Magellan as *internal* rather than *territorial* waters. But, in the light of the rules governing straits which are generally accepted by States, this claim must be regarded as exceptional and its validity dependent on historical considerations.

The Strait of Tsougar

388. Paragraph 505 of the Counter-Memorial mentions a Japanese claim to the Strait of Tsougar which is 16 kilometres wide. This is admittedly a little wider than twice the 3-mile limit which is recognized by Japan as the measure of the territorial sea. But this is not to say that Japan considers a coastal State entitled to claim straits as territorial regardless of their width. At the 1930 Conference she proposed the application of the 10-mile rule to straits no doubt with the idea of legalizing her claim to the Tsougar Strait. But her proposal was regarded as going beyond the existing law and was not accepted even *de lege ferenda*.

The Shelikof Strait, Long Island Sound and the Strait of Juan de Fuca

389. Paragraphs 506-508 of the Counter-Memorial refer to three straits washing the shores of United States territory. The first case, the Shelikof Strait situated between Alaska and the islands of Kadiak and Afganiak, is mentioned in a footnote by Hyde in the vaguest terms and apparently by way of illustration. He cites no authority for the reference and there is no trace of any exceptional United States claim to this strait in the digests of Moore or Hackworth or in the reply of the United States to the *questionnaire* before the 1930 Conference. In the other two cases, Long Island Sound and the Strait of Juan de Fuca, the channel leads essentially to inland waters. Long Island Sound does not properly serve coastal navigation except such navigation as is bound for the ports of New York, Brooklyn and Jersey City. It is therefore not a legal strait but an inland strait. The United States has an historic title to the whole sound which is wider than 10 miles at its northern end. In fact the case of *Mahler* v. *Norwich and New York Transportation Company* (Scott's *Cases on International Law*, p. 219) provides ample evidence of an historic appropriation of Long Island Sound, which is really an inland strait and therefore to be classified as a bay.

Juan de Fuca Strait is claimed jointly by Canada and the United States and to that extent navigation inevitably has some international character. Juan de Fuca Strait is probably an inland strait, but perhaps a case can be made for saying that it is a legal strait. Whichever it is, Canada and the United States have a prescriptive title for claiming an inlet of this exceptional breadth. It also seems that the anxiety of the United States delegation at the 1930 Conference to have it recorded that the principle of historic waters applies to straits was primarily directed to the case of the Juan de Fuca Strait. The United States in 1930 fully endorsed the measure of double territorial sea for ordinary straits.

Straits.—The Hague Codification Conference (1930)

390. Accordingly, the United Kingdom submits that the opinions of writers and the precedents of State practice which are cited in the Counter-Memorial do nothing to affect the validity of the customary rules concerning straits which were formulated in Bases of Discussion Nos. 15 and 17 and endorsed by Sub-Committee No. II in its report. The Norwegian thesis that there is no rule establishing a limit of width for territorial waters in straits and that all straits between territory of the same State may be subjected to its sovereignty is in conflict with the great body of learned opinion, of State practice and the work of the 1930 Conference. Indeed, the citations in paragraph 500 of the Counter-Memorial, which are collected as evidence of the application of the principle of historic waters to straits as well as to bays, are imperative proof of the general conviction that territorial claims in straits are subject to a definite limit under the rules of customary law.

391. The existing customary law determining the limit of territorial claims in straits apart from historic usage is without doubt that they are in principle restricted to the territorial sea attaching to each shore separately. The suggestion in paragraph 491 of the Counter-Memorial that even in 1930 there was a serious discordance between the formulation of the rule in Basis of Discussion No. 15 and in Sub-Committee No. II's report is entirely specious. Sub-Committee No. II merely defined more accurately what is to be understood by "entrance" for the purpose of the rule. Paragraph 492 of the Counter-Memorial concedes that the rule of twice the limit of the territorial sea adopted by Sub-Committee No. II has the support of some learned societies but says that in 1928, owing to a doubt expressed on the point by a member, the Institute reserved the whole question of straits. It is, however, the fact that the project submitted to the meeting of the Institute gave expression to the rule of twice the radius of the territorial sea and that the reservation was of the *whole* question of straits.

392. It is said in paragraph 492 of the Counter-Memorial that the draft convention circulated to States by Schücking in the name of the Committee of Experts proposed the 10-mile rule. That is true. But the preparatory work of the 1930 Conference in reality testifies to the general acceptance of the rule of double the radius of the territorial sea. Schücking in his original report had proposed 6 miles for the territorial sea and 12 miles for straits (*American Journal of International Law*, Vol. 20, Special Supplement (1926), p. 117). On reducing the width of the territorial sea to 3 miles to conform with the practice of the majority, Schücking, without explanation, altered his rule for straits to the 10-mile limit. *But, after receiving the comments of States, the Committee restored the double-radius rule for straits* in Basis of Discussion No. 15. Sub-Committee No. II not only

endorsed the double-radius rule for straits but, in the event of pockets of high sea being enclosed in a strait between two separate overlapping zones of territorial waters belonging to the same State, declined to allow these pockets to be treated as territorial unless they do not exceed 2 miles in width. The sub-committee considered and rejected the proposal to adopt *de lege ferenda* a 10-mile limit for straits and thus showed unmistakably its preference for the existing rule of the width of the territorial sea along each coast.

The United Kingdom Government, accordingly, adheres to its view that the generally accepted rules of customary law for the delimitation of territorial waters in straits are those contained in the report of Sub-Committee No. II which are set out in paragraphs 110 and 111 of the Memorial.

The Indreleia route

(Paras. 509-510 of the Counter-Memorial)

393. The Norwegian Government, in paragraphs 509-510 of the Counter-Memorial, emphasizes the land-locked character of the channels forming the Indreleia route with particular references to the British Admiralty's publication *Norway Pilot*. The channels of this route lead to inland Norwegian ports but they also form a continuous passage to the Arctic Sea from the North Sea which is used by international maritime traffic. Thus these channels do connect two parts of the open seas and are legal straits, i.e. territorial waters, not internal waters. The fact that in 1939 the Norwegian Government permitted the German prize, the *City of Flint*, to proceed through the whole length of the Indreleia route suggests that it then recognized the route to be a route over which some international right of passage exists (see the official Norwegian statement printed in the United States War College's *International Law Situations* 1939, pp. 26-27). It would have been wrong of Norway to permit passage of the *City of Flint* through internal waters. Much of this route however is in any event within Norwegian territorial waters and, on historic grounds, the United Kingdom Government is not disposed to contest Norway's right to treat all these channels as territorial waters subject to Norwegian sovereignty. It is therefore unnecessary to examine in detail the observations of the Norwegian Government in paragraphs 509-510 of the Counter-Memorial concerning the physical features of the Indreleia channels. The implications of the United Kingdom's recognition of Norwegian sovereignty over these channels as territorial waters in regard to the delimitation of the base-lines of Norway's territorial waters will be examined at a later point in this Reply after considering the law relating to historic waters (see paras. 507-508 and Chapter V below). The United Kingdom Government considers the Indreleia route as a legal strait to end in the north at a place earlier than that shown in chart No. 4 of Annex 2 of the Counter-Memorial,

namely in the waters between Ingøy and Hjelmsøy. The United Kingdom Government considers the channels of this route westward of the line joining Geitingen to Gavlodden, the natural western entrance points of Breisund south of Hjelmsøy, to be Norwegian *territorial* waters on the basis that in the relatively few places where the channels are more than 8 miles wide, Norway can rely on an historic title. The United Kingdom Government considers the waters eastward of this line, in so far as they consist of channels joining two larger portions of sea-water, to be inland straits which are assimilated to bays and which are therefore Norwegian *internal* waters.

Summary and conclusions of Chapter II

(Counter-Memorial, paragraph 510 *(a)*)

394. The Norwegian Government, in paragraph 510 *(a)* of the Counter-Memorial, has summarized the points which it claims to have established in Chapter II, and it may be convenient here to summarize the contentions of the United Kingdom Government in reply to the Norwegian arguments :

Preliminary

1. Responding to the Norwegian Government's request for clarifications (Counter-Memorial, para. 243), the United Kingdom Government has explained that it recognizes that Norway possesses on historic grounds a right to a maritime belt precisely four sea miles in extent. The United Kingdom Government at the same time emphasizes that Norway is not entitled to assert against the United Kingdom in these or any other proceedings a maritime belt of any greater extent (paras. 148-152 above).

2. The Norwegian thesis (Counter-Memorial, para. 245) that, owing to a supposed absence of any fixed limit to Norway's maritime belt, it is nonsensical to attach importance to base-lines, is therefore inadmissible. This thesis is, in fact, contradicted by the practice of States for at least 150 years and by Norway's own practice (paras. 154-156 above).

3.—*(a)* The law primarily applicable in this case is agreed to be "international custom, as evidence of a general practice accepted as law" under Article 38 (1) *(b)* of the Statute of the Court.

(b) Contrary to the Norwegian contention (Counter-Memorial, paras. 252-262), the generally recognized rules of customary law concerning the delimitation of a maritime territory are binding on Norway except to the extent that she has obtained a right to depart from these rules by the express acquiescence of other States or by historic usage (paras. 162-164 above).

(c) Norway's contentions (Counter-Memorial, paras. 247-253 and 261-266) in regard to the formation and proof of customary law do not accord with the doctrinal position under international law or

with the practice of the Court. The Court exercises a wide freedom both in appreciating the evidence of custom and in determining whether a custom constitutes a general practice accepted as law (paras. 160-161 and 163-167).

4. Contrary to the Norwegian contention (Counter-Memorial, paras. 267-282), the work of the Hague Codification Conference of 1930 contains most valuable evidence of the rules of customary law governing the delimitation of maritime territory. The conference took as its starting point the existing practice, and the report of Sub-Committee No. II showed a wide measure of agreement concerning the main rules for delimiting maritime territory (paras. 168-179).

The tide-mark rule

5.—*(a)* Contrary to the Norwegian contention (Counter-Memorial, paras. 283-306), there does exist a general rule of international law requiring a State in principle to delimit its maritime belt by reference to the tide mark on its actual coasts and requiring any departures of the base-line from the tide mark to be justified under one of the specifically recognized exceptions to the rule. The tide-mark rule is accepted in international practice and in the opinions of writers and was automatically adopted as the existing law at the 1930 Codification Conference (paras. 180-199).

(b) The principal Norwegian argument (Counter-Memorial, paras. 289-295) in opposition to the tide-mark rule is founded upon a complete and patent misrepresentation of the views of Gidel and Boggs, both of whom entirely support the tide-mark rule as the fundamental rule (paras. 183-188 above).

(c) Contrary to the Norwegian contention (Counter-Memorial, paras. 296-306), the tide-mark rule is a general rule of international law binding upon Norway except to the extent that she can either bring herself within a generally recognized exception or can establish a special historic title (paras. 188-201 above).

(d) Contrary to the Norwegian contention (Counter-Memorial, paras. 296-306), international law to-day specifically forbids the method of constituting a wholly imaginary coast line by joining lines between extreme points arbitrarily selected along the coast. "King's Chambers" are inadmissible and the "headland theory" is admitted only in connection with the 10-mile rule for bays and with "historic bays" (paras. 188-201 above).

6. Contrary to the Norwegian contention (Counter-Memorial, paras. 308-316), the tide-mark rule is the fundamental rule determining the base-line for delimiting the maritime belt to which the rules concerning bays, islands, etc., are exceptions. It is so recognized in international practice, the writings of individual jurists, the work of learned societies and the work of the Codification Conference (paras. 203-209 above).

The burden of proof

7.—*(a)* The Norwegian contentions (Counter-Memorial, paras. 317-318) that the respective positions of the parties in regard to the burden of proof are determined by the intrinsic nature of the dispute and that the general burden of proof lies on the United Kingdom as complainant in the case, are concurred in (paras. 210-211 above).

(b) However, the basic facts on which the United Kingdom relies in the present case, namely, the limits prescribed by the Royal Decree of 1935 and the geography of Norway, are not susceptible of dispute. These undisputed facts show that the limits of Norway's maritime territory promulgated in the 1935 Decree are in complete conflict with the generally recognized rules of international law concerning the delimitation of maritime territory. In short, the United Kingdom Government, on the undisputed facts, has made a *prima facie* case against the legality of the 1935 Decree (para. 212 above).

(c) Accordingly, unless the statements of the United Kingdom Government in regard to the applicable rules of law, which are supported by the practice of States, the opinions of writers and the work of the 1930 Codification Conference, are entirely incorrect, the burden now lies upon Norway to demonstrate on what grounds her exceptional maritime limits are to be justified *(ibid.)*.

8. The Norwegian contention (Counter-Memorial, paras. 318-327) that a burden rests upon the United Kingdom to prove not only the facts but also the applicable rules of customary law, is inadmissible for the following reasons :

(a) There is, in general, no burden of proof in regard to the law : *iura novit curia*. It is only when the rule which is relied upon operates as an exception to a primary rule that it has to be satisfactorily established before the primary rule will be held to have been displaced (paras. 213-214 above).

(b) The primary rule on which Norway relies, namely, the rule that restrictions on the sovereignty of a State are not to be presumed, has no application in the present case, the circumstances of which are entirely different from those of the *"Lotus" case*. In the *"Lotus" case* the exercise of Turkish jurisdiction was indisputably within Turkish territory. *Here, the whole question is whether the area to which the 1935 Decree applies is within Norwegian sovereignty at all* or whether it is not rather subject to the sovereign rights of each and every State (paras. 215-217 above).

(c) In the present case, which concerns the delimitation of maritime territory, the primary rule of international law—a well-settled rule—is that the maritime belt is in principle measured from the tide mark along the coast. This rule imposes a general restriction upon States in delimiting their maritime territory and,

under the reasoning of the "*Lotus*" *case*, the burden is upon Norway to show that her wholesale infringements of this general rule are justifiable by reference to some permissive rules specifically authorizing these infringements (para. 217 A above).

9. *A fortiori* does the burden lie upon Norway to demonstrate on what grounds the 1935 Decree is to be justified if, as the United Kingdom Government submits, the predominant principle of international maritime law is the freedom of the seas. (Paras. 218-219 above.) The Norwegian contention (Counter-Memorial, para. 285) that Gidel did not endorse the freedom of the seas as the predominant principle in his book *Le Droit international public de la Mer* is refuted by numerous passages in the book (paras. 220-221 above).

Bays

10.—*(a)* The Norwegian contention (Counter-Memorial, paras. 331-335) that, in the absence of a geometrical formula giving precise definition to the concept of a bay, there can be no rule of international law governing bays, is inadmissible. It is in conflict with the attitude of governments in international practice and of international and municipal tribunals in their decisions (paras. 223-230 above).

(b) Contrary to the Norwegian contention (Counter-Memorial, paras. 332-334), the award of the tribunal in the *North Atlantic Fisheries Arbitration*, 1910, and other precedents, support the view of the United Kingdom Government that the critical factor in the definition of a bay is the proportion between the width of the mouth and the penetration into the land (paras. 224-228 above).

11.—*(a)* Contrary to the Norwegian contention (Counter-Memorial, paras. 336-353), State practice and judicial decisions in the nineteenth century and up to 1910 provide clear evidence of the evolution of a general rule defining the width of territorial bays and of a distinct tendency to accept 10 miles as the proper limit of width except in the case of historic bays (paras. 231-242 above).

(b) Contrary to the Norwegian contention (Counter-Memorial, para. 362), the attitude of Great Britain in the *North Atlantic Fisheries Arbitration*, 1910, was fully consistent with a position in which:

(i) customary international law recognized a general principle that claims to territorial bays are subject to a limit of width and,

(ii) a rule defining the limit as 10 miles was in the final stages of its formation (paras. 245-247 above).

(c) Contrary to the Norwegian contention (Counter-Memorial, paras. 354-377), the award and the recommendations of the

tribunal in the 1910 Arbitration and the dissenting opinion of Judge Drago lend strong support to the view that customary law already recognized claims to territorial bays to be subject to a limit of width and that the 10-mile limit was emerging as the actual limit prescribed by customary law (paras. 248-255 above).

(d) Contrary to the Norwegian contention (Counter-Memorial, paras. 364-392), the judicial precedents, the practice of States, the opinions of writers and the work of the 1930 Codification Conference confirm the general recognition after 1910 of a customary rule limiting claims to territorial bays and the emergence of the 10-mile limit as the actual limit prescribed by customary law except in the case of historic bays (paras. 256-279 above).

(e) Such inconsistencies and divergencies as may be found in State practice concerning territorial bays relate, not to the existence of a general rule limiting the width of territorial bays, but rather to the precise definition of the rule. They are a natural feature of the gradual process of formulating and crystallizing a customary rule in over a century of State practice and do not militate against the recognition of the 10-mile limit as a rule of customary law under Article 38 (1) *(b)* of the Statute of the Court. The work of the learned societies before 1930 and the work of the Codification Conference in that year provide cogent evidence of the final definition of a rule which had gradually taken shape in State practice and in the writings of jurists (paras. 280-282 above).

Islands, rocks and banks

12.—*(a)* Contrary to the Norwegian contention (Counter-Memorial, paras. 395-403), the work of the jurists quoted by the United Kingdom Government in the Memorial confirms its statement that the question how far areas of sea may be converted into inland waters by the grouping and positioning of islands only received general attention on the eve of the 1930 Conference (paras. 284-291 above).

(b) The Norwegian contention (Counter-Memorial, para. 401) that Lord Stowell in his judgment in the *Anna* applied the "outer coast line" theory to a coastal archipelago entirely misconceives his reasoning in the case and attributes an entirely wrong meaning to his words "protection of territory" (para. 289 above).

13. Contrary to the Norwegian contention (Counter-Memorial, paras. 404-420), the rule adopted in 1930 by Sub-Committee No. II, whereby a rock which is not permanently visible may not be taken into account if it lies outside the maritime belt of permanently dry land measured from the latter's tide mark, has support in State practice and in the opinions of important writers. Indeed, it is supported by Norwegian practice and opinion in the nineteenth century (paras. 292-304 above).

14. The Norwegian contention (Counter-Memorial, paras. 424-429) that the burden lies on the United Kingdom to establish that international law forbids States to treat coastal archipelagos as units or as mere extensions of the mainland, is an incorrect formulation of the issue in regard to coastal groups of islands. The principal rule for the delimitation of territorial waters is the tide-mark rule and, under the decision in the *"Lotus" case*, it is for Norway to demonstrate that a permissive rule of international law exists authorizing a departure from the tide mark in the case of coastal archipelagos. The examination of State practice and of the opinions of jurists in the Counter-Memorial is in consequence made upon an entirely wrong basis (paras. 308-309 above).

15.—*(a)* The precedents invoked by the Norwegian Government (Counter-Memorial, paras. 445-470) do not establish that customary law recognizes a special régime for coastal archipelagos. The majority relate simply to the appropriation of unoccupied islets and rocks as part of the State's territory or else to the enclosure of bays by islands or to the enclosure of waters by islands and rocks in a manner analogous to the enclosure of bays. The principle of the claims in these precedents is the enclosure of the waters by the particular geographical configuration of the mainland coasts and of the coasts of the off-shore islands (paras. 311-345 above).

(b) The opinions of writers and the work of the learned societies and of the 1930 Codification Conference which are also invoked by the Norwegian Government (Counter-Memorial, paras. 430-444 and paras. 454-455), equally do not provide evidence of an existing rule of customary law recognizing a special régime for coastal archipelagos (paras. 346-360 above).

(c) Although a tendency developed in the learned societies immediately before the 1930 Codification Conference and in the discussions at the conference itself to introduce a special rule for coastal archipelagos *de lege ferenda*, no such rule, in fact, crystallized in 1930. Moreover, the work of the 1930 Conference shows that a special rule for coastal archipelagos was only contemplated at all on the basis that there would be an absolute limit of 10 miles on the width of the intervals between units of the archipelago or between such units and the mainland (paras. 353-360 above).

(d) Even if—which the United Kingdom Government denies—there does already exist a rule of customary law creating a special régime for waters within a coastal archipelago, this rule would not provide any authority for the exceptionally long base-lines *along the outside* of Norway's island fringes which result from the Royal Decree of 1935 (paras. 362-364 above).

Straits

16.—*(a)* The Norwegian contention (Counter-Memorial, paras. 471-489) that there is no general rule of international law concerning the delimitation of territorial waters in straits is inadmissible. It completely confuses the distinct questions of the delimitation of territorial waters and the régime of international navigation through the strait. It is in flat contradiction with the opinion of Gidel, the work of learned societies and the work of the 1930 Codification Conference (paras. 365-381 above).

(b) The opinions of jurists and the precedents of State practice which are invoked by the Norwegian Government (Counter-Memorial, paras. 490-508) do not in the least affect the validity of the statement of the customary rules of international law concerning the delimitation of territorial waters in straits, which are set out in paragraphs 110-111 of the Memorial. The records of the 1930 Codification Conference unequivocally confirm that the normal rule for straits is that the maritime belt is to be delimited along each shore separately. When the maritime belts of the two shores overlap in more than one place a question may arise of eliminating small pockets of high seas within the strait, but that is the only special feature of the rule for straits (paras. 382-392 above).

(c) It is only in the case of an historic strait that all the waters may be claimed as territorial, whatever the distance between the shores (para. 391 above).

(d) The United Kingdom Government considers the channels of the Indreleia route westward of the line joining Geitingen to Gavlodden, the natural western entrance points of Breisund south of Hjelmsøy, to be Norwegian *territorial* waters on the basis that, in the relatively few places where the channels are more than 8 miles wide, Norway can rely on an historic title. The United Kingdom Government considers the waters eastward of this line, in so far as they consist of channels joining two larger portions of sea-water, to be inland straits which are assimilated to bays and which are therefore Norwegian *internal* waters (para. 393 above).

CHAPTER III

Norway's attempted justification of her alleged system of base-lines

(Counter-Memorial, paras. 511-576)

The diversity of situations and the flexibility of the legal principles to be applied to them

(Counter-Memorial, paras. 511-524)

Norwegian argument that the United Kingdom system is too rigid

395. The Norwegian Government in paragraph 511 of the Counter-Memorial recalls its previous contentions that the burden lies on the United Kingdom to establish the illegality of the provisions of the 1935 Decree and that the United Kingdom has failed to discharge this burden. It then states that it is not satisfied with such a negative defence of the 1935 Decree and seeks in succeeding paragraphs to show that the decree is justifiable on general principles—quite apart from the question of an historic title. The United Kingdom Government has already dealt with the contentions of the Norwegian Government that the burden of proving the illegality of the 1935 Decree lies upon the United Kingdom (paras. 210-222 above). It will now examine the argument advanced in the Counter-Memorial by way of general justification of the decree.

396. The argument begins in paragraphs 513-515 by criticizing the system of legal rules set out in the United Kingdom's Memorial for its rigidity and its tendency towards uniformity. The system of rules which the United Kingdom is asking the Court to apply in the present case does not in fact result in limits for the Norwegian territorial sea, which can either be said to be rigid or to sacrifice Norway's legitimate interests. This will be apparent from the manner in which the United Kingdom system is worked out on the charts in Annex 35. The Norwegian Government, however, attacks the system advocated by the United Kingdom on the alleged grounds that it is animated by the wish to restrict a State's maritime territory as much as possible, that it lacks flexibility and that it is unreal. In this connection the Counter-Memorial cites passages from the lectures of Brierly and Schindler the gist of which is that, owing to the nature of States, uniformity is at once more difficult and less desirable to achieve in the rules of international law than in the rules of municipal law.

The general argument that uniformity in the rules of international law is undesirable has most manifest dangers because it strikes at the whole basis of international law and order. If every

State is to be allowed to invoke its own individual nature, needs and aspirations in justification of its claims, conflicts of interest will be multiplied and there will be no criterion for solving them. It is of the essence of law that there should be a very large measure of uniformity in the formulation of its rules. No doubt it is true that the different character of the "subjects" of international law may require a somewhat less strict uniformity in some parts of international law. But to condemn uniformity in a system of principles of international law as if it were a positive vice—which is what Norway appears to do—is totally inadmissible. Briefly, it may be noted, is concerned, in the passages cited in the Counter-Memorial, to warn against the danger of striving after *absolute* uniformity in *reforming* international law. Similarly, M. Alvarez, in a passage cited in paragraph 515, said only "il ne faut pas établir des principes *trop* absolus ni *trop* rigides".

Norwegian arguments against uniformity based on the Hague Codification Conference, 1930

397. The Norwegian Government, however, seeks in paragraphs 516-521 of the Counter-Memorial to find further support for its argument in the work of the 1930 Conference. First, as so often in the Counter-Memorial, it looks for aid to the observations of M. de Magalhães, the Portuguese delegate, and cites two passages from his comments upon the first draft submitted by Schücking to the Committee of Experts. The first passage is a quotation from a speech by the Portuguese Admiral d'Eca in 1921 at a fisheries congress. After referring to the importance of the continental shelf to marine biology, the Admiral staked a claim for Portugal to have the whole area of her continental shelf as territorial waters, on the ground that it was so narrow that she must possess all the superjacent waters. He also intimated that Norway's position is similar in this respect. It does not seem to have occurred to the Admiral or to M. de Magalhães that Canada might with equal force say that she is a very large country with a growing population and must therefore have exclusive fisheries up to the limit of Canada's continental shelf. Such an interest would be just as "legitimate" under the Norwegian doctrine as any interest of Portugal in her own coastal waters. Yet no State attaches more importance to its fishing rights off Canada than does Portugal. The second comment of M. de Magalhães related to bays and it need only be said that the traditional system adequately covers the question of bays through the 10-mile rule supplemented by the theory of historic waters. So far as Norway is concerned, her fjords are commonly regarded as historic waters and the United Kingdom Government fully recognizes that Norway possesses sovereignty over her fjords in northern Norway in virtue—where a particular fjord is more than 10 miles in width at the entrance—of an historic title.

398. The Counter-Memorial next draws attention to the fact that Dr. Schücking, in the light of M. de Magalhães's comments, added the following clause to his Article 2 concerning the extent of territorial waters:

> "exclusive rights to fisheries *continue* to be governed by *existing practice and conventions*". (*American Journal of International Law* (1926), Vol. 20, Special Supplement, p. 141.)

It then sets out in full Dr. Schücking's note explaining the additional clause. It is perfectly true that in this note Dr. Schücking referred with apparent approval to M. de Magalhães's remarks about the relation between geographical conditions and the extension of fisheries. But it is equally clear from the text of the additional clause and the explanatory note that Dr. Schücking's primary intention was to reserve *existing rights* under customary practice and treaties. He was secondly concerned not to interfere with measures taken by States for the policing and conservation of fisheries even outside territorial limits. In other words, he thought that the formulation of a uniform rule would have to take account of established rights. On that basis the additional clause was plainly needed, particularly as the only reference to historic waters in Dr. Schücking's draft was an exception to the rule for bays. It is thus misleading to say, as the Norwegian Government does, that Dr. Schücking decided "le mieux était de réserver purement et simplement la question". He reserved *existing practice and treaties*.

In any event, the Norwegian Government's use of this evidence is somewhat too selective. M. de Magalhães, having developed his argument about Portugal's fishery needs, proposed a 12-mile limit for territorial waters instead of the 6-mile limit in the original draft. The United States member of the committee, Mr. Wickersham, objected and proposed a 3-mile limit. What did Dr. Schücking do? Was he so far persuaded by M. de Magalhães's arguments as to increase the limit to 12 miles? On the contrary, he reduced it from 6 to 3 miles.

399. In paragraph 518 of the Counter-Memorial the Norwegian Government recalls that the Preparatory Committee of the Conference in *Bases of Discussion* Nos. 3, 4 and 5 proposed to solve the question of territorial waters by prescribing a 3-mile limit, with a list of specific States entitled to a larger limit and with a general right for all States to customs and sanitary jurisdiction up to 12 miles from shore. No doubt, these proposals indicate the committee's lack of confidence in the project of securing unanimity at the conference for making the 3-mile limit a universal rule. But that is all. It is, indeed, worth recalling that the observation attached to Basis No. 5, which would have allowed special jurisdiction in customs and sanitary matters up to 12 miles, said of fisheries: "On the other hand, the government-replies do not make it possible to expect that agreement could be secured for an extension

beyond the limits of territorial waters of exclusive rights of the coastal State in regard to fisheries." (*Bases of Discussion*, p. 34.)

400. The Norwegian Government next invokes, in paragraph 519 of the Counter-Memorial, the statements of seven delegates in the Second Committee of the 1930 Codification Conference as giving support to its thesis that uniformity in the rules concerning territorial waters is undesirable. These statements certainly draw attention to the diversity of the practical situations to be regulated by international law and the difficulty of "imposing a *strictly identical* international régime upon all countries without exception", to borrow the expression of the Swedish delegate. That is, however, a very different thing from denying the existence and even desirability of any general rules of international law regulating the delimitation of maritime territory. The statements have, of course, to be read in their context, namely, the discussion at the fourteenth meeting which followed the meeting at which the proposal to make the 3-mile limit universal had been defeated. The proposal concerning the 3-mile limit would have admitted of no exceptions whatever and it was the impossibility of reaching agreement upon an absolutely uniform rule for the width of the maritime belt that was in the minds of the delegates. Substantial portions of the observations of delegates cited in the Counter-Memorial were directed essentially to the difficult problem of the width of the belt. The adoption of the 3-mile limit as the sole limit for the maritime belt in the future was indeed regarded by some delegations as involving a sacrifice or abandonment of existing rights by their countries. There was no question on the other hand of the conference denying the validity of the existing practice and law. It was the difficulty of reducing the practice and law to absolute uniformity which impressed the delegates at the fourteenth meeting.

401. The Norwegian Government, in paragraph 520 of the Counter-Memorial, makes a point of the fact that delegates were inclined to refer to Norway as an illustration of a country not easily fitted into an absolutely uniform system. In this connection the statement of Sir Maurice Gwyer at the eleventh meeting (Minutes, p. 112) is cited : "it must be recognized by all of us here that the coast of Norway and Sweden presents very special problems of its own, problems which must receive, I think, the sympathetic attention of all their neighbours". The Norwegian Government then adds that it is not asking for "good neighbour" concessions but that its vital interests should not be sacrificed on the altar of legal uniformity. The Norwegian Government does not mention that Sir Maurice Gwyer's observation was made at a different session, i.e. towards the end of the discussion on "historic waters" or that his immediately following words were *(ibid.)*:

> "The Swedish delegate, towards the end of his speech, said that, in his view, every State must have a right to claim what its own

> historic waters were ; but, having gone as far as that, his logical mind revolted from the conclusion to which that argument seemed to lead, and he added that, of course, that right must not be exercised in an arbitrary fashion. In other words, he recognized that there must be rules to govern every State."

It is plain that Sir Maurice Gwyer recognized, as the United Kingdom Government has recognized in these proceedings, that Norway may have a right to some exceptional maritime territory on historic grounds. What he objected to was that Norway and Sweden—or any other State—should be allowed to declare what their historic waters are without regard to the rules of international law or to the views of other States. This can scarcely be described as sacrificing Norway's vital interests on the altar of legal uniformity. On the contrary, Sir Maurice Gwyer was afraid that the interests of other States might be sacrificed on the altar of Norway's arbitrary pretensions to historic waters. What guarantees did Norway and Sweden in their proposed amendment to *Bases of Discussion* Nos. 6, 7 and 8 offer against arbitrary claims ? Only those which Gidel condemned as amounting to "*la négation de tout ét at de droit*". (See paras. 138 and 139 of the Memorial.)

General Norwegian argument that uniformity in international law is not feasible

402. The Norwegian Government then proceeds, in paragraphs 521-523 of the Counter-Memorial, to renew its attack upon the alleged "uniformity" of the system of rules for the delimitation of maritime territory which were discussed at the 1930 Conference and which are relied upon by the United Kingdom in the present case. It denies that there is any trace of uniformity in international law as evidenced by the practice of States and, while acknowledging the need to bring some discipline into the law of coastal waters by codification, says that this can only be achieved if the illusion of uniformity is abandoned. The whole purpose of the Norwegian Government's attack on what is, after all, the traditional system of delimiting maritime territory is to support its argument in paras. 238-243 of the Counter-Memorial that there are no generally recognized rules of international law and thus to open the way for the Norwegian thesis that each State may fix its coastal waters according to its own view of its legitimate claims.

The Norwegian argument against the "uniformity" of the traditional system is entirely artificial because it depends on attributing to the system an *absolute* uniformity which it does not possess. Its treatment of the matter is also far from consistent. It criticizes the system of general rules which concern the tide mark, bays, islands, etc., protesting that the system is driven to admit "safety valves" in the form of historic waters and sedentary fisheries. Yet, almost in the same breath, the Norwegian Government condemns that system of general rules on the ground that its uniformity does not

take sufficient account of the geographical and economic realities. The thought, obvious although it is, does not appear to have occurred to the Norwegian Government that the traditional system of general rules plus "safety valves" may be the proper way—and perhaps the only way without international legislation—to achieve an acceptable compromise between the general interests of the international community in the freedom of the seas and the special interests of some States due to their special geographical circumstances. Nor does it attempt to explain why in 1930, when an attempt was made to codify the law starting from the basis of the existing practice, the proposals automatically took the form of general rules with exceptions. The reason, of course, was that such was the generally recognized system.

In point of fact, the attack launched by the Norwegian Government on the "rigidity" of the traditional system of delimiting maritime territory is greatly overdone. The primary rule that the belt of territorial sea is to be measured from the tide mark along the whole coast has several exceptions, the precise object of which is to take account of special facts. Thus, the primary rule does not apply in the case of bays where the 10-mile rule comes into play. Other exceptions are the rules for islands and rocks, straits and historic waters. The Norwegian Government ridicules this system as if it were merely a medley of different expedients framed to satisfy fresh pretensions of coastal States. This representation of the historical evolution of the system, which is, after all, the traditional system, is a travesty of the true position. The various claims to maritime territory which are admitted under this system naturally developed in the practice of States empirically as new requirements arose, but these claims achieved the status of rules of international law because they were consistent with the interests of the community of States and therefore received general acceptance. They do not represent a collection of unilateral expedients, but rather a homogeneous system resulting from the experience of international life.

The traditional system, with its safety valves, has, in fact, sufficient flexibility to ensure a reasonable compromise between the legitimate interests of the coastal State and the legitimate interest of the community of States. What the Norwegian Government advocates is a system that would enable a coastal State to determine the extent of its own rights without taking any account of the legitimate concern of other States in the extent of those rights. The traditional system, through its safety valve of historic waters (i.e. of allowing exceptional claims in which others acquiesce), permits relaxations from the general rules, but at the same time insures that both the coastal States and the community of States shall be concerned in the establishment of the exception. If the traditional system contains elements of restriction, viewed from the position of the coastal State, these are essential if the fundamental doctrine of the freedom of the seas is to retain any legal content. Viewed from

the position of the community of States the general rules of international law governing the delimitation of maritime territory are the necessary guarantees of the freedom of the seas against unilateral pretensions to maritime dominion.

403. One of the more extraordinary parts of the Norwegian argument is its attempt in paragraph 522 of the Counter-Memorial to deride the United Kingdom's practice of seeking to settle any difficulties by agreement with other interested States. The United Kingdom Government does not shrink from admitting that it attaches the highest importance to the settlement of international differences by agreement. The Norwegian Government, on the other hand, complains that a State seeking to escape the application of a generally recognized rule of international law by means of a treaty would have to secure the consent of another State. What is to become of international law and particularly the international law of the sea if, as Norway seems to maintain, everything is to be left to the unilateral determination of each and every State ?

404. The "system" of delimiting maritime territory, which the Norwegian Government in paragraphs 523-524 of the Counter-Memorial offers in place of the traditional system of general rules, is the doctrine of "legitimate interests" which has already been shown to be without any legal content (paras. 140-142 above). The Norwegian Government claims that its principle is simpler than the traditional system. Certainly the so-called principle has the simplicity of naked self-interest. The Norwegian Government seeks to veil the fact that its principle is nothing but self-interest by allowing that a coastal State's power of unilaterally defining its maritime territory is limited by its legitimate interests. But the veil is very thin. The coastal State, according to the Norwegian Government, need not justify the exercise of its sovereignty in declaring the limits of its maritime territory. It is for the State which challenges the exercise of sovereignty to prove that the coastal State has exceeded its "legitimate interests". And what is to be the measure of the "legitimate interests" of the coastal State? Legitimate interests are apparently those which are "en harmonie avec les conceptions dont s'inspire l'organisation de la société internationale et des rapports réciproques des États". It is impossible to regard this jumble of vague phrases as having any value whatever as legal criteria for determining international rights. A State challenging the decree of a coastal State would have no means of knowing in what legal terms to frame its challenge. And, to make the coastal State's position absolutely secure, the Norwegian Government emphasizes that the "interests" of the coastal State have to be understood in the widest sense.

As was pointed out in paragraphs 140-142 above, there is not the slightest trace in the Norwegian thesis of the *compromise* between the freedom of the seas and the interests of the coastal State which

Norway insists is the basis of the modern law of coastal waters. Nor is there the slightest trace of the "equality" of the principles of the freedom of the seas and of sovereignty over coastal waters for which Norway contends in paragraph 320 of the Counter-Memorial. The argument now, in effect, is that absolute priority is to be given to the coastal State. It has also been pointed out in paragraph 147 above that the Norwegian thesis is in clear contradiction with the whole long history of the law of territorial waters, with the whole approach to the delimitation of maritime territory at the 1930 Conference and with the recent attitude of Denmark and Sweden in regard to territorial waters in the Baltic. The Norwegian thesis has in fact no basis in law and has been constructed in the Counter-Memorial from a single reference to "legitimate interests" in the report of the Second Committee at the 1930 Conference. As has been explained in paragraph 143 above, this passage was not directed to the question of the extent of coastal waters while the whole work of the conference in regard to the delimitation of coastal waters is entirely inconsistent with the Norwegian thesis.

Exceptional character of the case of Norway

(Counter-Memorial, paras. 525-528)

Views of Gidel

405. The Norwegian Government, in paragraph 525 of the Counter-Memorial, asserts that all specialists and jurists who have studied the problem of territorial waters recognize the case of Norway to be so exceptional as to justify an exception being made from the normal rules for delimiting territorial waters. The Norwegian Government does not expressly say so but it implies that the character of the Norwegian coast is such as to justify Norway not merely in claiming *some* exceptional maritime territory but in claiming to be released from all the known rules concerning the delimitation of maritime territory. In support of its assertions it cites in succeeding paragraphs passages from Gidel, Boggs and Jessup.

406. In paragraph 526 of the Counter-Memorial the Norwegian Government first cites the text of the joint Norwegian-Swedish amendment to *Bases of Discussion* Nos. 6, 7 and 8, which, in effect, proposed that each State should be allowed to fix its own base-lines by joining imaginary lines between any landmarks including islands and reefs. The only restriction was to be that the lines must not be longer than is "justified by the rules generally admitted either as being an international usage in a given region or as principles consecrated by the practice of the State concerned and corresponding to the needs of that State or the interested population and to the special configuration of the coasts or the bed of the sea covered by the coastal waters". This proposal was only a more complicated

version of Norway's "legitimate interests" doctrine and, as explained in paragraph 139 of the Memorial, it was condemned by Gidel as really being, on a close analysis, a negation of any law concerning the delimitation of territorial waters. The Norwegian Government in the Counter-Memorial concedes that the joint amendment did not find favour with Gidel but says that his objection to it was that it was too flexible to be a *general* rule. The Norwegian Government insists—and this is not, of course, disputed by the United Kingdom Government—that Gidel admitted the Norwegian coast to be exceptional and to require exceptional treatment. The Norwegian Government supports its contention by setting out various passages from Gidel emphasizing the exceptional character of Norway's coastal waters.

It is first to be observed that Gidel examined the Norwegian claims under the heading of historic waters. Secondly, it is to be observed that he strongly objected to the supposed principle on which these claims appeared to him to be based if put forward as of general application. He said (*op. cit.*, Vol. III, p. 651) that this principle, as expressed in the joint amendment, "*doit être sans hésitation considéré comme nuisible pour le développement du droit international maritime*". Thirdly, he was emphatic in stating that an exceptional claim such as that of Norway depends on the acquiescence of other States. Having conceded that the various elements mentioned in the Norwegian-Swedish amendment may properly be taken into consideration, he went on (*ibid.*, pp. 640-641) :

> "mais ils ne sauraient l'être ni à titre exclusif ni sous la simple appréciation de l'État riverain, comme le texte précité le suppose. Ils valent pour justifier des exceptions à une règle générale et non pas à titre de règle générale. Confrontés avec le désir légitime des autres États de ne pas voir restreindre au delà d'une mesure à déterminer leur droit d'utilisation des espaces maritimes, ils apportent, lorsque des conditions particulières, géographiques, démographiques ou hydrographiques se trouvent réalisées, un correctif d'équité au jeu strict d'une règle faite en vue de données physiques autres, mais il faut que, si les États intéressés ne tombent pas d'accord pour déférer le cas à une autorité juridictionnelle ou autre, l'appréciation de ces éléments soit soumise à l'influence modératrice de l'usage international : par lui se dégagera une résultante qui fera sa part légitime à chacune des forces en présence."

Then, having examined Norwegian practice as described in the Rapport of 1912, he said that the theory of historic waters is a necessary safety valve which should not be confined to bays. But, he added (*ibid.*, p. 651) :

> "Mais si la théorie des eaux historiques est une théorie nécessaire, c'est une théorie exceptionnelle ; son application est rigoureusement liée à des conditions physiques données ; il ne suffit pas que l'État riverain émette la prétention de considérer telles ou telles eaux comme lui étant « propres » pour que les autres États aient le

devoir de s'incliner devant cette prétention ; la consécration de ces prétentions ne peut dériver — en l'absence d'organes ayant reçu formellement qualité à cet effet et investis expressément par chacun des États intéressés d'un pouvoir de décision — que de l'acquiescement international."

In other words, Gidel did not regard the exceptional factors affecting Norway's coastal waters as freeing Norway from taking any account of legal principles in fixing her maritime territory, but as providing a basis for Norway putting forward a claim to exceptional maritime territory *under the theory of historic waters.*

407. It is true that Gidel appears to have considered that the principles which Norway now claims to form a traditional Norwegian system have received general recognition from other States. But it is also true that the evidence on which Gidel formed this opinion was simply the statements of the Norwegian Commission on Territorial Waters in the Rapport of 1912. Thus, a large part of Gidel's examination of Norwegian practice in pages 643-649 of the third volume of his book consists simply of extracts from the Rapport, as, indeed, can be seen from the passages cited in paragraph 526 of the Counter-Memorial. The United Kingdom Government has shown in Part I of this Reply that the evidence discussed in the Rapport is susceptible of a very different interpretation from that given to it by the Norwegian Commission. The United Kingdom Government has also shown in Part I of this Reply that the alleged Norwegian system had not received a general recognition on the part of other States by 1906, which is the critical date in the present dispute. Moreover, Gidel, when he wrote about Norwegian practice, did not have before him the additional evidence which has been presented to the Court by the United Kingdom Government in the present case. Nor, quite naturally, did he attempt to examine the accuracy of Norwegian assertions as to what was traditional Norwegian practice. He accepted the assertions at their face value. The United Kingdom Government, however, has established in Part I of this Reply, and particularly from Norwegian documents not available to Gidel, that Norwegian practice before 1935 was much less certain and much more limited in scope than it was understood to be by Gidel on a reading of the Rapport of 1912. It is also to be borne in mind that the actual base-lines recommended by the 1912 Commission were not published with the Rapport and that no one knew until 1935—Gidel's book had already been published—what very extravagant base-lines Norway had in fact decided to claim off her northern coasts.

Views of Boggs

408. In paragraph 527 of the Counter-Memorial, the Norwegian Government cites the view of Boggs, the Geographer of the State Department, that straight base-lines are both justifiable and almost

inevitable on the Norwegian coast by reason of the fringes of islands and rocks. Boggs, of course, wrote as a geographer, not as a lawyer, and he referred to the Norwegian coast—as he himself said—*parenthetically*, dealing with the whole matter very briefly. The object of his article in the *American Journal of International Law* (Vol. 24, 1930) was to explain the American proposals at the 1930 Conference for applying the "arcs of circles" method of delimitation with elimination of small pockets of high seas. He referred to the Norwegian coast as one difficult to cover by his method of delimitation and sought to "eliminate this coast from the operation of the system proposed in the American amendment for general application". In point of fact, adopting the usual 10-mile rule for bays and arcs of circles method of delimitation, it is far from impossible from a technical point of view to apply the general rules of international law regarding maritime territory to the Norwegian coast. This can be shown in the lines representing the British proposals which are shown on the charts used in the 1924 Oslo negotiations. Boggs does not attempt to examine the legal aspects of the Norwegian system of "arbitrary straight lines" and satisfies his conscience on that head by a bare statement that Norwegian waters are "commonly accepted as historic". The Norwegian Government, however, seizes on these brief words to argue that he regarded the Norwegian system as *legally* justified without reference to an historic title to the waters concerned. As already stated, he simply did not examine the law. Nor did he examine the evidence by which the so-called Norwegian system was to be taken as having been established. There is no indication that he knew anything of the contents of the Rapport and still less that he knew anything of the additional evidence adduced by the United Kingdom Government. He was, no doubt, familiar with the brief representation of the Norwegian thesis at the 1930 Conference but that was all. Writing in 1930, he could not be aware, any more than the United Kingdom was aware in 1930, of the very extravagant form which the so-called Norwegian system was to take in the Royal Decree of 1935. It is one of the striking things about the alleged application of the so-called traditional system in the 1935 Decree that not a word was allowed to leak out at the 1930 Conference that these were in fact Norway's claims on her northern coasts.

Precise definition of coasts is only necessary when the delimitation of coastal waters departs from the generally accepted rules

409. The Norwegian Government, in the same paragraph, asks how exactly the coast is defined on the west of Scotland and Ireland. The definition of these coasts is not called for in these proceedings. Indeed, precise definition is, generally speaking, necessary in practice only when the delimitation of coastal waters departs radically from the accepted rules for the tide mark and for bays and islands as is the case with the 1935 Decree. The citation of the cases of

Florida, British Honduras and Queensland in the Counter-Memorial as if claims were made off these coasts of the same general character of Norway's claim in 1935 is too erroneous to require comment (see paras. 314, 317 and 333 above).

Views of Jessup

410. The Norwegian Government, in paragraph 528 of the Counter-Memorial, cites a passage from Jessup by way of a final authority in support of its pretensions. The authority of Jessup is considerable, and he certainly said that the coasts of the Scandinavian countries present unique features. But, unfortunately for the Norwegian Government, he only regarded these special features, *together with Norway's apparently long and unwavering insistence on its claim*, as a reason for recognizing Norway's *4-mile limit*. In other words, he considered the exceptional features relied on by Norway to raise only a question of an *historic title requiring recognition* and the only historic title he had in mind was Norway's claim to a 4-mile limit.

Summary of the views of these writers

411. Nothing emerges more clearly from the writings of Gidel, Boggs and Jessup cited in the Counter-Memorial than that they considered the exceptional character of Norway's coast line to be material essentially in connection with her claim to historic waters. None of these writers undertook a critical examination of the evidence on which Norway founds her historic claim or considered its practical application to the area now under dispute. The precise nature and extent of Norway's historic rights is one of the chief issues in the present case and, in the submission of the United Kingdom Government, it can only be decided in the light of all the evidence submitted to the Court. The question of Norwegian historic rights is examined at length in paragraphs 432 *et seq.* below.

The "Norwegian system"

(Paras. 529-536 of the Counter-Memorial)

Inconsistencies in the Norwegian attitude

412. This section of the Counter-Memorial consists in a large measure of a repetition of the arguments already put forward in Part I of the Counter-Memorial. They have already been answered in full in Part I of this Reply. The Government of the United Kingdom will therefore content itself in this place with a brief restatement of the contentions there put forward which, in its submission, effectively demonstrate that there was nothing "historical" or, until the Decree of 1935, even certain about the Norwegian system, apart from Norway's claim on historic grounds to a 4-mile belt of territorial waters and to her fjords and sunds.

413. Before replying to the Norwegian arguments in detail, the Government of the United Kingdom considers that it may be useful to recall certain well-informed and authoritative Norwegian statements on the subject of Norway's historic position which were made before the exigencies of the present litigation.

Professor Hjort, a former director of Fisheries, who was the head of the Norwegian delegation to the Oslo and London conversations of 1924-1925 and an acknowledged authority on all matters affecting Norwegian fisheries, stated his opinion as follows (the quotation is from the report of the Ministry for Foreign Affairs to the Storting, 1926) :

> "The above report has been submitted to Professor Hjort who in a letter dated 22nd May, 1925, states, *inter alia*, 'In several of the documents transmitted to me, e.g. a report from the Ministry of Justice dated 23rd March, 1925, it is affirmed that the legal position of Norway in the territorial waters question is regarded as strong, and, as is known, this has for a large number of years been maintained by many authorities with a great knowledge of international law. As is known, this legal view is based upon the fact that during the last 150 years Norway has consistently claimed territorial waters of 1 geographical mile or about 4 miles in breadth. Without desiring in any way to minimize the recognition due to the admirable juridical-historical work which in the due course of time has been carried out by such men as the late Professor Aubert, the Sea Boundary Committee of 1911 and in particular its Chairman, Minister Wollebaek, Dr. Ræstad and Assessor Boye, yet, as far as I am concerned, it has for many years been a fact of greater practical and actual importance in deciding this case that Denmark, which was united with Norway at the time when the important legal decisions in this case were made, has in the course of the last generation in fact decided that it was necessary to abandon the point of view which Denmark-Norway had at that time held. Both in the North Sea on the stretch of waters off the west coast of Jutland as far as Hanstholmen and in the waters round the Faroes and Iceland, Denmark has abandoned the 4-mile belt and adopted the 3-mile belt like the other North Sea countries. Furthermore, the Danish Government as regards the same waters has relinquished the clause regarding the drawing of the base-line for bays and fjords, which in any case has existed from ancient times in the minds of the people in Norway and Denmark. It is important for our understanding of the case that the activities of foreign fishermen brought about an alteration in the attitude towards territorial limits, in spite of the fact that the same legal arguments for the ancient historical Danish territorial waters could be put forward as for the Norwegian territorial waters. This fact has already for a number of years appeared to me as decided proof that the Norwegian maintenance of territorial waters must in any case be expected to meet with great opposition and little support in the international *milieu* where these questions are decided.' " (St. med. nr. 8 (1926), p. 12 [1].)

[1] See observations in paragraph 58 above regarding this document.

414. The Norwegian Ministry of Foreign Affairs, at the same time (1926), after expressing the opinion that Norway had a strong case for claiming the 4-mile belt, expressed the following views :

> "On the other hand, with regard to the question of the base-lines for calculating territorial waters, the case is more doubtful. No defined principle is formulated in international law regarding base-lines for calculating territorial waters. In some cases the question has been solved in treaties between foreign States. In others its application has been decided by the national legislation of the countries concerned and by arbitral judgments. These various solutions, however, are to some extent conflicting, and provide no adequate foundation for the acceptance of any definite principle. In some cases a line double the width of territorial waters has been taken as a basis : this must necessarily result in various solutions since the extent of territorial waters in different countries is a variable factor. In other cases arbitrary base-lines have been used. In a number of treaties the base-line of 10 nautical miles has been adopted especially concerning fishery questions. In some countries base-lines of 12 and 20 miles have been established for certain purposes. Base-lines of 12 nautical miles were also proposed by l'Institut de Droit international in 1894 and the International Law Association in 1924. .
>
> *With regard to Norwegian territorial waters no general regulation regarding the calculation of the base-lines has been issued. There exists no rule as to the length to be given to the base-lines for our territorial waters."* (*Ibid.*, p. 25.)

And then, after referring to the Rescript of 1812, the Decrees of 1869 and 1889 and Norwegian legislation concerning the Varangerfjord, the Ministry continued :

> "The earlier Territorial Waters Commission of 1911 which was to clear up this side of the matter proposed base-lines for the Counties of Finnmark, Troms, Nordlands, North and South Trøndelag and certain parts of Møre County. *These base-lines, which in some cases are very long, were drawn more with a view to local interests than on the basis of any general principle.* At the same time, the commission also prepared tables of other base-lines for the said stretches of coast, under the assumption that no base-line should be more than 10 or 12 nautical miles respectively." (*Ibid.*, p. 25.)

In the face of these statements can Norway still maintain that the limits of 1935, based upon the recommendations of the Commission of 1911-1912, are drawn according to any principle, historically sanctioned ; or that there existed in 1935, or exists now, any clear principle in Norwegian theory or practice as to the manner in which base-lines should be drawn in respect of the coast line in general ; or even that as regards bays any clear principle exists in Norwegian theory and practice as to the points at which the lines can be drawn ? Is it not clear, on the contrary, as the description of the Norwegian system given in the Counter-Memorial itself makes plain, that these lines are drawn with a view only to the

protection of Norway's own interests and without regard to the interests of others or to rules of international law ?

415. Passing now to the more detailed contentions restated by Norway, it is first said in paragraph 529 of the Counter-Memorial that from time immemorial the fjords and the host of islands, islets, rocks and reefs which protect her coasts and determine the structure of the fjords, have formed part of her national territory. This statement is an amalgam of undisputed statements and of tendentious claims which requires careful analysis.

First, as regards fjords : the Government of the United Kingdom is prepared and has for many years been prepared to concede that many, if not most, of the Norwegian fjords [1] are Norwegian national waters. The dispute centres on the question how a fjord is to be defined and limited. It has already been shown that even Norwegian opinion had no fixed views on this point (see para. 68 above), that in 1908 the Norwegian Government felt that a 10-mile rule had some status in international law (para. 63 above) and that the Commission of 1911-1912 felt sufficiently uncertain as to Norway's position in this matter to draw alternative lines based on

(a) no limit of length ;
(b) a limit of 12 miles ;
(c) a limit of 10 miles

(see paras. 70 and 414 above).

Second, as regards islands, islets, rocks and reefs, it has been shown (para. 23 above) that the claim to treat these as Norwegian *land* territory was asserted in the Rescript of 1745, abandoned in the period between 1759 and 1810, and re-established in the Rescript of 1812 (possibly passed to make it clear that even uninhabited islands and rocks belonged to Norway) and, finally by interpretation stated in 1908, to cover islands "not continuously run over" (see para. 48 A above) but that at no time did any Norwegian rescript or decree attempt to regulate the manner in which base-lines were to be drawn between islands or rocks. The manner in which this was to be done was regarded as uncertain by the 1912 Commission (Rapport, pp. 45-49) and by the Ministry of Foreign Affairs in 1926 (para. 414 above).

Third, the words "which protect the coast" are used no doubt so as to benefit from the decision of Lord Stowell in the *Anna*. It has already been explained above (para. 289) that a proper interpretation of Lord Stowell's judgment and in particular of his words "protection of territory" lend no support to a theory of the "outer coast line" as put forward by Norway. The words refer

[1] The word "fjord", although primarily used to denote an indentation that is geographically a bay, appears sometimes to be used to denote areas of water between islands and the mainland or between groups of islands.

to the protection which a neutral vessel enjoys when sailing close to the coast of a neutral Power.

Fourth, the words "and determine the structure of the fjords" are apparently used for the purpose of asserting an historic title to all waters enclosed by lines drawn from islands which extend the boundaries of a fjord. The Government of the United Kingdom does not accept this position but considers that islands may only be made use of in connection with base-lines to be drawn across bays subject to the 10-mile rule (see para. 109 of the Memorial).

416. Paragraph 529 of the Counter-Memorial continues by restating Norway's claim to an outer coast line drawn outside the "skjærgaard"—using again the words "natural appendage", which are intended to attract the support of Lord Stowell's judgment in the *Anna*. It has already been explained (paras. 334-364 above) that even granting Norway's right, in general, to draw her limit of territorial waters outside the "skjærgaard", this does not confer upon her any right to use the system she has adopted in the 1935 Decree, namely, of base-lines of indefinite length drawn at discretion. The general theory of an "outer coast line" has been criticized in paras. 311-333 above.

417. The paragraph continues with a reference to the Rescripts of 1745 and 1812—which have been sufficiently examined—and then repeats that Norway's 4-mile claim represents a reduction on her previous claims. The irrelevancy of this reduction for the purposes of these proceedings has been demonstrated on more than one occasion (see para. 58 above). The paragraph concludes by stating that the lines drawn are straight lines between the outermost islands and islets: this is certainly the basis on which the lines are drawn in the 1935 Decree and it is this to which the Government of the United Kingdom takes exception. The Government of the United Kingdom submits, in fact, that such a method of drawing base-lines could only be justified by a theory which permits the coastal State to draw the base-lines as it wishes and as it considers conducive to its own interest—which is precisely the theory which Norway seeks to establish before the Court.

418. Paragraph 530 of the Counter-Memorial draws a contrast between the alleged stability of the Norwegian system and the inconsistencies of British practice. It is certainly not claimed that the latter has been free from inconsistency over the centuries. The United Kingdom has endeavoured to adjust her theory and practice, not only to the needs of very different territories and populations (and this entirely refutes the charge which Norway makes elsewhere of undue and unrealistic rigidity in the United Kingdom conceptions), but to the movements in legal opinion according to the changes of the time.

Norway has, it can readily be conceded, shown a substantial degree of pertinacity in maintaining her own views, but her record, since the time when a serious conflict of interest arose over the extent of her territorial waters, can hardly be claimed as one of entire consistency. In 1894 her most authoritative spokesman (M. Aubert) said that islands could not be used as base-points if they were more than 8 miles from shore, and that it was an open question how the lines across a bay should be drawn. (See paras. 53-54 above.) In 1898 the Department of the Interior consulted the Faculty of Law on the matter of drawing the territorial limit and both the questions and the reply demonstrated the fundamental uncertainty of Norway's position (para. 39 above). In 1908 the Norwegian Government based its practice, in part, on the existence of a 10-mile rule for bays (see para. 63 above). The 1912 Commission discarded the 8-mile limit and, with hesitation, the 10-mile limit for bays, but apparently drew alternative lines based on both 10-mile and 12-mile limits (see para. 414 above). The report of the commission was not published or acted upon. In 1924 the Norwegian Government gave as its official opinion (without prejudice to subsequent revision) that the red lines represented the limits of its territorial waters (see para. 75 above)—stating that these lines had been drawn according to the principles of the Decrees of 1869 and 1889 (see para. 78 above). In 1933 it decided to extend these to the blue lines and issued instructions accordingly, but later in the same year issued instructions related again to the red lines (see para. 91 above). In 1934 the Norwegian Government secretly issued instructions again to enforce the blue lines (see para. 87 above) and finally promulgated the blue lines in 1935, asserting that these lines, too, were drawn according to the principles of the Decrees of 1869 and 1889. In the course of these proceedings Norway has repudiated the red lines although their existence and the use made of them was officially recognized by the Foreign Affairs Committee of the Storting and by the Ministry of Foreign Affairs. Does this represent an attitude of consistence which compares so favourably with the attitude of the United Kingdom?

419. Paragraph 531 of the Counter-Memorial repeats the Norwegian claim that the 1935 Decree merely applies to one part of the coast principles applied elsewhere by the Decrees of 1869 and 1889. The Government of the United Kingdom has shown in paragraphs 33-38 above that the Decrees of 1869 and 1889 reflect no clear principle as to the method of drawing base-lines which is applicable elsewhere, but in so far as they reflect any principles these are

(i) that a State is not, merely by virtue of the fact that its coastal population may have enjoyed the use of certain waters, entitled to claim the exclusive use of such waters against other nations, and

(ii) that base-lines should be drawn by reference to "fixes" on land: and that the lines determined by the 1935 Decree are not in any event drawn according to the alleged principles or any principle.

419 A. The same paragraph refers also to the proclamations of 1881 and 1896 affecting the Varangerfjord: this was, however, special legislation affecting one individual fjord and laid down no general principle. On the other hand, the fact that in the drawing of this line, the limit was somewhat reduced in order to avoid conflicts (para. 46 above) shows clearly that Norway recognized that even in the drawing of lines across the mouth of fjords, some rule of international law must be observed.

Essential characteristics of the "Norwegian system"

420. Paragraph 531 of the Counter-Memorial continues by asserting that the decree which is the subject of this litigation is not arbitrarily drawn but based upon this system—the system being that described in paragraph 62 of the Counter-Memorial. The Government of the United Kingdom will now proceed to examine this claim.

The essential characteristics of the system applied are asserted to be:

(1). No maximum length for base-lines, the length depending on the configuration of the coast and the lines following the general direction of the coast.

(2) Choice of base-lines so as to form angles as close as possible to 180°.

The first comment to be made on this system is its extreme imprecision. What is meant by "the general direction of the coast"? Clearly this expression must depend for its meaning upon the length of the individual strips of coast under consideration: what then is the rule which indicates what this length may be? Thus, if very long strips of coast are chosen, it is possible greatly to restrict the number of base-lines: in fact, it is possible, using a small-scale chart, such as that contained in Annex 2, No. 2, of the Counter-Memorial, to draw as few as thirteen base-lines from Utsira (south of Bergen) to the North Cape, all of them departing to a small extent only from the angle of 180°. Such lines are no doubt very long, but according to the Norwegian system there is no limit on the length which may be used. What then would prevent, according to the Norwegian system, the use of these lines even longer and enclosing more waters than the "blue lines"? If the Norwegian contentions are valid, the 1935 lines cannot be taken as the final limit of Norwegian claims: at any time, if a different view of her "legitimate interests" were taken, these would be capable of a formidable degree of extension.

421. The above argument, it may be said, does not take proper account of the configuration of the coast and it is necessary to look at the coast more closely on larger scale maps. The Government of the United Kingdom agrees and will now proceed to examine how far, on a realistic approach to the coast, and therefore using charts of a scale suitable for use by fishermen and other persons likely to navigate in coastal waters, it is true in any sense to say that the 1935 lines follow the general direction of the coast. In the view of the Government of the United Kingdom they do not do so as the following examples show. (References to base-points are, except where otherwise mentioned, references to the 1935 base-points as shown on the charts in Annex 2 of the Counter-Memorial) :

(a) Between points 11 and 12, a distance of 39 miles across Sværholthavet, the blue line does not follow the general direction of the coast.

(b) Between points 18 and 19 the red line is a nearer approximation to but even this departs substantially from the general direction of the coast.

(c) Between points 19 and 20 the red line is a nearer approximation to the general direction of the coast.

(d) Between points 20 and 22 the blue line follows neither the general direction of the coast nor the so-called "outer coast line". Point 21 is a rock awash about 8 miles from the nearest islet and so should not be considered as part of even the "outer coast line". The red line between these points forms a nearer approach to but is still a substantial departure from the general direction of the coast.

(e) Between points 25 and 26 the blue line follows neither the general direction of the coast nor the "outer coast line".

(f) Between points 30 and 31 the blue line does not follow the line of the mainland nor the "outer coast line" of rocks and islets. The line should follow the coast of Andøy and then take a natural closing line across Gavlfjord.

(g) Between points 31 and 33 the red line (chart No. 7 of Annex 2 of the Memorial) is a nearer approximation to the general direction of the coast.

(h) Between points 34 and 35 (a distance of 25 miles) the blue line neither follows the general direction of the coast nor the "outer coast line" but crosses the entrance to the bight in which are Eidsfjord, Hadselfjord, Grimsoystraumen, etc. The red line (chart No. 7 of Annex 2 of the Memorial) is a nearer approximation to but still a substantial departure from the general direction of the coast.

(i) Between points 38 and 39 the blue line follows the general direction of the coast but is some 1½ miles distant from it for some 12 miles.

(j) Between points 39 and 41 the red line (chart No. 8 of Annex 2 of the Memorial) is a nearer approximation to the general direction of the coast.

(k) Between points 46 and 48 the blue line follows the direction of the "outer coast line".

In addition, as is shown in detail in the analysis of the blue line in Chapter V below, the blue line consistently fails to take account of the natural limits of fjords and sunds.

Even if there is a Norwegian system the 1935 Decree does not conform to it

422. The above analysis shows, in the submission of the Government of the United Kingdom, that, even assuming a Norwegian system, based upon the Decrees of 1869 and 1889, to be established, of the character set out in paragraph 62 of the Counter-Memorial, the lines drawn by the Norwegian Government do not conform to it. It is therefore inexact to claim, as is asserted in paragraph 531 of the Counter-Memorial, that the decree in question in this case follows from the previous decrees. On the contrary, the lines drawn by it are to a great extent arbitrary lines which do not conform to any rule—this point will be further illustrated in Chapter V below by references to the lines drawn across the mouth of fjords. The Government of the United Kingdom has already remarked (para. 61 above) on the pressure which was being brought upon the Norwegian Government from 1906 onwards to expand its territorial waters in order to exclude the operations of foreign fishermen, and (paras. 81 and 86-93 above) upon the steady extension of the Norwegian claims. It maintains its contention that the 1935 Decree represents a determination of the limits of territorial waters, not based upon any legal principle, but on a policy of expansion in the exclusive interest of the coastal State.

423. It is claimed (para. 531 of the Counter-Memorial) that the "unity of the Norwegian system" has been underlined in decisions of the Norwegian courts. The Government of the United Kingdom has already referred (paras. 28-34 of the Memorial and para. 82 of this Reply) to the case of the *Deutschland*, decided in 1927, which shows that the Supreme Court, basing itself on the opinion of Dr. Ræstad, at that time considered it far from certain how base-lines ought to be drawn in respect of an area of the coast not covered by the Decrees of 1869 and 1889. In the *Loch Torridon* case (para. 39 of the Memorial and para. 84 of this Reply), the Court, apart from finding in favour of a particular line, which was the line contended for by the Norwegian authorities, did nothing more than express the opinion that there was no rule of international law that a base-line across a fjord must not exceed

10 miles in length ; it did not refer to, or approve, any Norwegian "system". In the *St. Just* case (paras. 45-46 of the Memorial, para. 85 of this Reply), the majority of the Court found in favour of the prosecution's line, basing itself upon the report of the 1912 Commission which at this time (1934) the Norwegian Government had decided to accept, and it is not disputed that the majority opinion follows a line of reasoning which anticipates, in many respects, the arguments put forward in this case. It will be appreciated, however, that the decision was given only shortly before the promulgation of the 1935 Decree, when Norwegian informed opinion was already prepared to accept the lines laid down thereby, that the Court had before it the Rapport of 1912 (including, it appears, the commission's recommendations regarding base-lines), and that even so two judges dissented from the majority's view. The Government of the United Kingdom, as has already been stated, protested strongly against this decision.

The Government of the United Kingdom is not aware of any other cases (other than perhaps the case of the *Lord Roberts* which was only concerned with the Varangerfjord) which are claimed by the Norwegian Government as "underlining the unity of the Norwegian system" and submits that the decisions referred to, as a whole, lend no positive support to the Norwegian contention.

424. The Norwegian Government further relies on communications to foreign governments and on the Rapport of 1912. The Government of the United Kingdom has fully examined the former in paragraphs 40-45 of this Reply and does not propose to repeat the arguments there put forward. The Rapport of 1912 has also been discussed at length in paragraphs 67-70 of this Reply, and it has been shown that the Rapport itself drew attention to the many uncertainties outstanding in the Norwegian system of delimiting territorial waters. The Government of the United Kingdom has previously commented on the conspicuous reluctance of the Norwegian Government to publish or implement the recommendations of the commission.

425. The preamble to the Decree of 1935 is next cited as supporting the Norwegian claim. The preamble no doubt contains in summary form a statement of the Norwegian case in support of the decree which is developed at length in the Counter-Memorial. It would be remarkable if the validity of a decree could be supported by the mere *ipse dixit* contained in the decree itself. It is on the contrary incumbent on the Norwegian Government to show—as it attempts to show by the Counter-Memorial—that these claims so stated can be supported in fact and in law.

The Government of the United Kingdom has, in fact, already refuted both the claim that the 1935 Decree is in conformity with the Decrees of 1869 and 1889 (see paras. 33-38 and 78 above) and

that the 1935 Decree is justified by the need to protect the vital interests of the Norwegian population (see paras. 9 and 10 above).

The Government of the United Kingdom, of course, entirely rejects the *in terrorem* argument which follows—to the effect that an attack on the 1935 Decree involves the whole Norwegian "system" and all the legal and administrative measures based upon it. The attack on the decree only involves the waters between the pecked blue lines and the pecked green lines on the charts in Annex 35 of this Reply. The Norwegian argument assumes the correctness of precisely that hypothesis which is denied by the United Kingdom, namely, that there exists a complete Norwegian system from which all measures, including the Decree of 1935, are derived. The Government of the United Kingdom completely denies the existence of any such unified system ; its argument in Part I of this Reply was directed to show that the various Norwegian legislative and administrative measures from 1745 to 1908 neither are wholly consistent nor provide any rules (except the rule as to a 4-mile limit) on which the Decree of 1935 can be said to have been based. The Decrees of 1869 and 1889, which the Norwegian Government complains have been "left in the shade", have been fully examined in this Reply. The Government of the United Kingdom has not been concerned directly to attack them, because their validity is not an issue in the present case ; but it hopes that it has made clear that it does not accept and never has accepted these decrees as doing more than prescribe particular limits in an individual area (to which limits admittedly Norway may have by now established a prescriptive right) and in particular not as laying down any system for application elsewhere.

Any finding by the Court that the lines laid down in 1935 exceed what is permitted by law can consequently not affect Norway's rights established under the Decrees of 1869 and 1889 ; certainly cannot affect Norway's rights declared over the Varangerfjord since these are admitted, or her rights over the Vestfjord within appropriate limits since these also are admitted ; and finally would leave all the Norwegian legislation (which constitutes the majority of Norwegian enactments) which define Norwegian policy "within territorial waters" intact and fully applicable within the area of "territorial waters" defined by the Court.

Norway's reluctance to make known her "system"

426. Paragraph 532 of the Counter-Memorial seeks to show that the Norwegian system has been known for a long period. This statement was evidently recognized to go too far since the second sentence states that no doubt the precise limits in the area covered by the 1935 Decree were only definitively laid down by that decree. Not only is that the case, but it will be remembered that over a long period of years the Government of the United Kingdom has been unsuccessfully pressing the Norwegian Government to make

known the limits applicable in this area. This process began in 1908, almost immediately after the coasts of Lofoten and Finnmark began to be of interest to British vessels, when the British Minister at Christiania asked for copies of any laws or decrees referring to exclusive fishery within the Vestfjord and Lofoten Islands and of any laws dealing with fishing limits generally since 1889 (Annex 32 of Counter-Memorial, No. 1). The reply was not to send copies of laws defining "the principles applicable to the Norwegian coast" but only to send certain decrees expressed to be "relative to *certain* parts of the territorial sea in Norway".

A reply of the same character (except that it stated a general claim to "fjords and bays") was sent to the French Consul-General on 20th July, 1895 (Annex 30 of Counter-Memorial, No. 2).

It will be remembered that the portions of the Rapport 1912, which contained the recommendations of the commission, were not published : that, in response to enquiries made after the war of 1914-1918 the Norwegian Government first stated its inability to define the limits (see report of Mr. Lindley quoted in paragraph 13 of the Memorial) and finally, under pressure, sent a map showing Norwegian claims in E. Finnmark (which, in effect, showed the "red line" in this area—Annex 43 of Counter-Memorial) and later, during the Oslo conversations, instructed its representatives to draw —on a non-authoritative basis—the red lines for the whole of the coast. Subsequently to this, the Government of the United Kingdom made repeated efforts to obtain a definitive statement of Norwegian claims (see para. 22 of the Memorial), but always without success. The Government of the United Kingdom was not even informed of the instructions issued on 22nd February, 1933 (Annex 49 of Counter-Memorial), in which certain definite limits were laid down corresponding almost exactly with the subsequently adopted blue line.

To say, therefore, that the Norwegian system was well known, when the Norwegian Government itself, which was in possession of data not known to other governments, showed such hesitation in declaring it, appears something of an exaggeration.

The Government of the United Kingdom does not propose to comment further in this place upon the alleged communications to foreign governments which have already been sufficiently examined in paragraphs 32 and 40-45 above.

Norwegian argument that other States knew of and acquiesced in the "Norwegian system"

427. The Norwegian Government refers again (para. 532 of the Counter-Memorial) to the *Behring Sea Arbitration* and to the *North Atlantic Fisheries case*. The *Behring Sea Arbitration* appears to be relied on for two purposes : first, to show that, in 1903, the Government of the United Kingdom was acquainted with the Norwegian Decree of 1869. This is not disputed, but, as has been shown (para. 43

above), this cannot be invoked against the United Kingdom to prove acquiescence in anything more than the limits laid down by that decree.

Secondly, the case is referred to for the purpose of showing that the United Kingdom in 1903 was contending for an unlimited right to draw limiting lines across the mouth of bays. This represents too superficial an interpretation of the British argument, which is set in its proper perspective in paragraph 241 above.

The British argument in the *North Atlantic Fisheries case* of 1910 has been fully discussed in paragraphs 245-247 above and it has been shown that this was concerned with refuting the United States thesis of a 6-mile limit and was not in any way inconsistent with the recognition of some limit on the length of lines which can be used in relation to bays or even with a 10-mile rule.

428. Reliance is once more placed (para. 532 of the Counter-Memorial) upon expositions of the "Norwegian system" made before learned bodies and particularly upon those made by M. Aubert at the Institute of International Law. It has already been shown (paras. 53-55 above) that the Norwegian Government has substantially distorted what was said by M. Aubert: that this eminent authority, so far from demonstrating the certainty of the "Norwegian system", drew attention to certain important points in which it was uncertain, notably on the maximum length of lines which could be drawn across bays, and put forward views of his own which were far from consistent with the present Norwegian position and that in any event no kind of approval or assent was given by the Institute to the rules so stated.

The Government of the United Kingdom has previously commented in detail on the Rapport of 1912 (paras. 67-70 above). The published portion of the Rapport (which did not, of course, contain its recommendations concerning territorial limits) was certainly communicated to the Government of the United Kingdom—as shown in the Norwegian note at Annex 38, No. 2, of the Counter-Memorial. The Government of the United Kingdom could, however, hardly be expected to comment on the Rapport without any knowledge of what the commission had proposed—more especially since the note referred to had stated that in view of the possibility of arranging a *modus vivendi*:

> "Le Gouvernement norvégien ne croit cependant pas en cette occasion devoir entrer dans une argumentation en faveur des règles relatives à l'étendue des eaux territoriales norvégiennes...." (Annex 38, No. 2, of Counter-Memorial, at p. 112 of Vol. II.)

The Government of the United Kingdom has commented on the decisions of Norwegian Courts in paragraphs 82-85 above.

429. Paragraph 533 of the Counter-Memorial repeats the Norwegian arguments based on alleged international acquiescence. It refers:

(a) to the alleged Russian payment for the right to fish more than 1 league from the coast. It has already been amply shown (paras. 25-31 above) that the Russian payment was not for this right at all but for the right to carry on certain operations *within* the limit of territorial waters ;

(b) to the exchange of correspondence with France on the subject of the Vestfjord. This has been examined in paragraph 32 of this Reply and it has been demonstrated that France, after in her first note of 6th June, 1868 (Annex 15, No. 1, of the Counter-Memorial), clearly stating her position under international law, in her later note of 27th July, 1870 (Annex 18, No. 5, of the Counter-Memorial), made it clear that her assent to Norwegian claims in the Vestfjord had been given in a spirit of conciliation and on the basis that this was an exceptional case which would not prejudice what France considered as the true principles in the matter. In other words France recognized this particular Norwegian claim while fully maintaining her position on principle ;

(c) to the correspondence exchanged on the Decrees of 1869 and 1889. This has been discussed in paragraphs 40-42 above and again it is plain that France's attitude was adopted for practical reasons quite apart from any considerations of international law ;

(d) to the absence of any protest regarding the Decree of 1869 from the United Kingdom or any other Power. As has been explained (para. 43 above), the United Kingdom did not regard this decree as establishing a principle ; and her acquiescence could at most have the result of conferring upon Norway a prescriptive claim to the waters enclosed by the decree ;

(e) to the requests for information from other governments. These have been sufficiently commented upon in paragraphs 40-45 with the submission that no conclusions can be drawn from them.

Norwegian arguments based on the acts of Norwegian fishermen

430. Paragraph 534 of the Counter-Memorial returns to the argument that Norwegian fishermen have for centuries exercised a monopoly which "their customs and their national legislation" recognized opposite their coasts, that this has never been contested, that the United Kingdom has "implicitly admitted" it and has allowed "this state of affairs" to perpetuate itself.

The confusions which are inherent in this argument should be apparent from the observations contained in the earlier portions of this Reply.

First, what is the nature of the monopoly claimed ? It is said to be a monopoly recognized by Norwegian legislation. But, as has already been shown, Norwegian legislation relating to fisheries (the earliest example of which in relation to the coasts of Finnmark was

the Law of 13th September, 1830 (Annex 13, No. 10, of the Counter-Memorial)), merely referred to "Norwegian territorial waters" without specifying their extent. The only exceptions to this were the Decree of 1869, which defined territorial waters for Søndmøre and which, it should be noted, omitted from this definition certain banks, admittedly exploited from ancient times by Norwegian fishermen, on the grounds that an extension so far of territorial waters could not be justified ; the Decree of 1889 applying to Romsdal ; and the proclamations of 5th January, 1881, and 17th December, 1896, relating to the Varangerfjord. It is quite inaccurate to say that Norwegian legislation assured to Norwegian fishermen a monopoly of fishing in the waters declared to be territorial waters by the Decree of 1935.

Secondly, as to custom : it has already been pointed out (para. 17 above) that a practice developed by individuals to fish in certain areas of sea cannot of itself confer upon the Norwegian State any rights under international law against other States. And moreover there is no evidence of any custom under which the disputed areas of sea within the area covered by the 1935 Decree were reserved for exclusive use by any particular communities of Norwegian fishermen.

Thirdly, there is no justification for asserting that the United Kingdom has implicitly admitted "the international validity of this state of affairs". Apart from the disputes which arose during the reign of Queen Elizabeth (sixteenth century), when British fishermen, supported by the Queen, repudiated Norwegian claims to a monopoly in Norwegian waters, the international validity of Norwegian claims in the waters with which this case is concerned never came in question until 1906 and thereafter the United Kingdom has continuously refused to recognize Norwegian claims to appropriate any greater extent of sea than is properly comprised within territorial waters.

The Norwegian argument under this head would, in fact, only be valid if it led to a claim on the part of Norway that all the waters concerned were "historic waters". The mere fact of user of certain waters (even assuming this is proved) without any evidence of exclusion of other States, or any evidence of the acquiescence of other States in such exclusion, cannot establish such a claim and, as will be shown in the next section of this Reply, Norway does not bring forward the necessary elements for an establishment of a claim of this kind.

The Government of the United Kingdom has already sufficiently commented on paragraph 535 of the Counter-Memorial in paragraph 98 above.

The effects of trawling and the significance of the conversations of 1924-1925

431. Paragraph 536 of the Counter-Memorial opens with the proposition, the truth of which is assumed without proof, that the operations of the British trawlers were disastrous for the coastal inhabitants. It has already been shown in paragraph 9 above that this is not the case and that the Norwegian Government, in the report of its own committee set up in 1947 (extracts from the report, dated 1949, are given in Annex 28 of this Reply), has recognized this fact ; also that Norway's own trawling activities may properly be extended.

The Counter-Memorial proceeds to refer again to the conversations of 1924-1925 and to claim that it has rectified errors of fact and of interpretation in the Memorial. The Government of the United Kingdom is content to refer without further comment to paragraphs 73-80 of this Reply and to leave it to the Court to decide where these errors lie. It repeats that it does not seek and never has sought to make use of these conversations or of the information provided in the course of them as evidence of a binding agreement on the part of Norway as to the fixing of territorial limits. It has only been concerned to point to the progressive character of the Norwegian claims and the inconsistency and hesitancy on the part of the Norwegian Government in advancing them.

It confirms once more that it has no desire to use against Norway any concession or leniency which Norway may have shown in applying the Decree of 1935 after it was promulgated—that is to say after Norway had clearly defined her claims. The same principle, however, does not apply to the anterior period—from 1908-1935—while Norway's attitude was undetermined.

Norway's claim to an historic title

(Paras. 537 to 575 of the Counter-Memorial)

Preliminary considerations (Counter-Memorial, paras. 537-540)

432. The Norwegian Government, in paragraph 537 of the Counter-Memorial, contends that in any event Norway's claim to the waters enclosed within the base-lines of the 1935 Decree is justifiable under the theory of historic waters and in succeeding paragraphs examines the elements of this theory. It begins in paragraph 538 by arguing that the concept of historic waters is linked to what Norway calls the rigid system of international rules imposing strict and mechanical limits on the maritime territory of a State. It quotes a dictum of Gidel to the effect that the theory of historic waters acts as a kind of safety-valve to the general rules for the delimitation of territorial waters. It declares that if, like Norway,

you do not accept the system of strict, mechanical rules, the safety-valve of historic waters is unnecessary.

The above argument leads directly and immediately to a conclusion which the Norwegian Government does not draw but which is destructive of the whole Norwegian thesis concerning the delimitation of maritime territory under customary law. The very fact that the theory of historic waters is a generally—perhaps universally—recognized rule of international law is imperative proof of the existence of general rules of customary law imposing definite limits on claims to territorial waters. Thus Gidel, in a passage to which attention has previously been drawn (para. 229 of this Reply), said with particular reference to the rules restricting claims to territorial bays (*op. cit.*, Vol. III, p. 537) :

> "pour écarter le jeu de ces principes, il faut que le gouvernement dont les prétentions sont contestées excipe de circonstances exceptionnelles et des arguments de l'ordre de la prescription internationale autour desquels gravite la théorie des baies « historiques ». La simple existence de cette catégorie, que personne ne conteste, des « baies historiques » suffirait à elle seule à démontrer péremptoirement l'existence d'un droit international commun en la matière."

433. The Norwegian Government, when it applies the epithets "rigid" and "mechanical" to the general rules restricting claims to maritime territory, uses them as terms of opprobrium. But Gidel, when he describes the theory of historic waters as "necessary" and as "a kind of safety-valve", does not mean to condemn the system of specific limits adopted by customary law. On the contrary, throughout his book Gidel accepts and approves the system of specific limits. In a paragraph which follows immediately after the passage cited in paragraph 358 of the Counter-Memorial, he insists on the exceptional character of the theory of historic waters (*op. cit.*, Vol. III, p. 651) :

> "Mais si la théorie des eaux historiques est une théorie nécessaire, c'est une théorie exceptionnelle ; son application est rigoureusement liée à des conditions physiques données ; il ne suffit pas que l'État riverain émette la prétention de considérer telles ou telles eaux comme lui étant « propres » pour que les autres États aient le devoir de s'incliner devant cette prétention ; la consécration de ces prétentions ne peut dériver — en l'absence d'organes ayant reçu formellement qualité à cet effet et investis expressément par chacun des États intéressés d'un pouvoir de décision — que de l'acquiescement international ; c'est l'usage prolongé qui, généralement, en fournira la manifestation ; et telle est la part de vérité que contient le mot « historiques » à l'aide duquel la théorie est désignée. Théorie exceptionnelle devant sa naissance à des conditions physiques d'exception, la théorie des eaux historiques doit rester telle."

In fact, the view of Gidel, like that of the United Kingdom Government, differs *toto cœlo* from that of the Norwegian Government concerning the true function of the theory of historic waters in

the delimitation of maritime territory. The reason is that he regards the rules for the delimitation of a State's coastal waters as essentially a compromise between the interests of the coastal State in adjacent waters and those of the community of States in the high seas and as therefore involving the element of express or tacit acquiescence of other States in the claims of individual States. The Norwegian Government, in paragraph 185 of the Counter-Memorial, pays lip-service to the doctrine that the customary law of maritime territory is a compromise between the freedom of the seas and the interests of coastal States. But a very large part of its argument in the Counter-Memorial is devoted to denying the existence of any criterion for the legitimacy of claims of a coastal State save the interests of the coastal State as conceived by its own government at any given moment. The Norwegian Government in its argument persistently refuses to regard the interests of other States in the boundaries of the high seas as of any relevance in determining the limits of a coastal State's maritime territory.

The true function of the rules of customary law concerning the limits of maritime territory and the theory of historic waters is to express the greatest common measure of agreement amongst States.

434. The Norwegian Government, as will be shown, pursues its attempt to empty the customary law relating to maritime territory of all its restrictive content even in its exposition of the theory of historic waters by disputing the relevance of the acquiescence of other States in an historic claim. It is therefore necessary briefly to recall the true functions respectively of the general rules of customary law determining the limits of maritime territory and of the theory of historic waters.

The limits of maritime territory under the rules of customary law, as Norway acknowledges, represent essentially the line of compromise between the freedom of the seas and the interests of coastal States. The function of the customary rules is therefore to express the greatest common measure of agreement among States from the double point of view of their interests as coastal States and of their interests as users of the high seas. This point is emphasized by Gidel in discussing the width of the territorial sea (*op. cit.*, Vol. III, p. 132) :

> "La distance servant d'expression au domaine d'exercice des droits de l'État riverain sur ses eaux adjacentes, ne saurait procéder que d'une fixation empirique : la distance susceptible de réaliser l'accord ne peut être que celle qui assurera un ajustement satisfaisant entre les intérêts de chaque État considéré tour à tour comme riverain et comme utilisant les espaces maritimes autres que ceux situés dans le voisinage immédiat de ses côtes. Il serait vain de prétendre rechercher par le raisonnement quelle peut être cette distance."

That such is the function of the customary rules follows automatically from the most fundamental norm of international law under which its rules result from the consent of States. Thus, the general rules of customary law governing the delimitation of maritime territory express the greatest common measure of agreement as to the boundaries alike of the high seas and of coastal territory. The existence of these general rules serves itself as conclusive proof of the acquiescence of all States in claims to coastal territory which do not exceed the limits prescribed in the rules.

435. The United Kingdom Government in paragraph 122 of its Memorial has set out what it conceives to be the general rules of customary law for the delimitation of maritime territory, which are applicable in the present case. Customary law, the Codification Conference having failed, does not go so far as to forbid the assertion of a claim which exceeds the limits prescribed under its general rules. But such a claim is *prima facie* a claim to appropriate an area of sea which other States consider to be high seas. Such a claim is *prima facie* an encroachment on the rights of other States individually to use and enjoy the waters appropriated and to exercise an exclusive sovereignty over their own shipping within those waters. The acquiescence of other States in such a claim is therefore necessary and cannot be taken for granted. Consequently, when the claim is invoked against another State, the acquiescence of that State in the claim has to be particularly and affirmatively proved.

The principal function of the theory of historic waters is to supply the want of express evidence of the acquiescence of other States

436. The theory of historic waters relates simply to the proof of the acquiescence of other States in a claim exceeding the generally recognized limits and *its principal function is to supply the want of express evidence of the acquiescence of the particular State against which the claim is invoked.* Of course, this State *may* have bound itself expressly to recognize the excessive claim either by treaty or by an unilateral act recognizing the claim, and a claim to an area of sea resting on successive treaties with several States is no doubt an historic claim ; but there would have been no need for a theory of historic waters if only waters covered by express acquiescence were to be included. Frequently, however, evidence of express acquiescence by the particular State is lacking and then the claimant State is entitled, if it can, to raise an inference of the general acquiescence of other States, by proving the historic character of its claim by long usage. The historic element is thus relevant precisely in regard to the acquiescence of other States in an appropriation of maritime territory which,

apart from the acquiescence implied from long usage, they would be entitled to regard as an invasion of their rights.

Norwegian argument that national usage, without the acquiescence of other States, is sufficient to confer an historic title

437. The Norwegian Government in paragraphs 539 and 540 of the Counter-Memorial makes two points concerning the theory of historic waters:

(a) that the theory is not confined to historic bays but extends to all other waters capable of being included within the maritime territory of a State; and

(b) that the rôle played by usage in the theory of historic waters is not clear.

The first point is developed in later paragraphs of the Counter-Memorial and it is to *(b)*, the importance of "usage", that the Norwegian Government first addresses its argument. In effect, by an examination of State practice, doctrine and the work of the 1930 Conference, it seeks to show that the element of "usage" in the theory of historic waters is not international usage but the national usage of the claimant State and that the acquiescence of other States in the national usage is not necessary. The Norwegian Government, in paragraph 540, before proceeding to this examination, takes as the text for its exposition of this thesis the remarks of the United States delegate at the eleventh meeting of the Plenary Committee in 1930 on territorial waters and the terms of the rule for historic waters proposed by the United States delegation. It will, however, be more logical to examine the attitude adopted by the United States delegation in 1930 towards the problem of historic waters in connection with the work of the Codification Conference (para. 463 below) and to consider the instances of State practice before considering the Codification Conference. It will then be seen that the work of the Codification Conference, taken as a whole, provides no warrant for the thesis of the Norwegian Government concerning the rôle played by purely national usage in the theory of historic waters.

State practice

(Paras. 541 to 547 of the Counter-Memorial)

Delaware Bay

438. The first precedent, cited in paragraph 541 of the Counter-Memorial, is the United States claim to Delaware Bay, which was recognized in 1793 by Great Britain and France as a result of the capture of the English vessel, *The Grange*, by a French warship inside the bay. Extracts from the well-known opinion of Attorney-General Randolph are given in the Counter-Memorial from which the Norwegian Government draws the following conclusions:

(a) The Attorney-General did not consider the territoriality of Delaware Bay to result only from usage but from a combination of circumstances in regard to which usage provided an important confirmation of other considerations, geographical, economic and political.

(b) He considered the usage to be established by reference simply to the attitude of the local Sovereign, that is, of the United States and, before the United States came into being, of Great Britain.

(c) He made no reference to the attitude of foreign governments and the acquiescence of France in the United States claim was in fact only given afterwards when she released the English vessel.

In 1793 the modern rules for the delimitation of maritime territory were in their infancy and the definition of the principles determining the territoriality of bays had scarcely begun. It was not, therefore, to be expected that Attorney-General Randolph would give full expression to the subsequently developed modern theory of historic waters as an exception to the general rules for the delimitation of maritime territory. If, as is stated in the Counter-Memorial, Delaware Bay is *now* to be regarded as one of the classic examples of historic waters, its canonization as a classical precedent dates from a much later period than that of Attorney-General Randolph's opinion. Consequently, it is really somewhat striking that, contrary to what is said in paragraph 541 of the Counter-Memorial, Attorney-General Randolph in his opinion gave so much attention to the attitude of other States to the United States claim. Thus among the "essential facts" listed in the first extracts cited by the Norwegian Government he emphasized:

> "That the Delaware *does not lead from the sea to the dominions of any foreign nation;*
>
> That, from the establishment of the British provinces on the banks of the Delaware to the American Revolution, it was deemed the peculiar navigation of the British Empire;
>
> That, by the Treaty of Paris, on the third day of September, 1783, His Britannic Majesty relinquished, *with the privity of France*, the sovereignty of those provinces...."

And, again, in the second extract cited by the Norwegian Government, he said:

> "These remarks may be enforced by asking, *What nation can be injured in its rights, by the Delaware being appropriated to the United States?* And to what degree may not the United States be injured, on the contrary ground? *It communicates with no foreign dominion; no foreign nation has, ever before, exacted a community of right in it, as if it were a main sea;* under the former and present Governments, the *exclusive* jurisdiction has been asserted...."

The italicized words in the above extracts from his opinion show that the United States Attorney-General even at that date did not by any means neglect the attitude of other States towards the United States claim or disregard the international aspects of the usage in regard to Delaware Bay. However, the short answer is that it is not Attorney-General Randolph's opinion which makes Delaware Bay an historic bay but the fact that the United Kingdom and France at once acquiesced in the claim and other States thereafter.

The first Bristol Channel case; Regina v. *Cunningham (1859)*

439. In paragraph 542 of the Counter-Memorial the English case of *Regina* v. *Cunningham* (1859) concerning the Bristol Channel, which the Norwegian Government cited in connection with bays, is again invoked [1]. The Norwegian Government emphasizes that in the relevant passage of his judgment Chief Justice Cockburn does not concern himself with the attitude of other States. That is true. But it is perfectly understandable that in *Regina* v. *Cunningham* the Court should not in its judgment have directed its attention to international considerations. The crimes had been committed on a foreign merchant ship which was lying in the roadstead of a British port *well within 3 miles from the shore*. The status of this part of the Bristol Channel came in issue because the trials were held before the Courts of Common Law which, before the passing of the Territorial Waters Jurisdiction Act, 1878, had jurisdiction *only if the waters concerned formed part of the adjacent County of Glamorgan*. If the area was not within the body of a county (if in other words the waters were not a bay, i.e. internal waters—but were territorial waters), then, although the Crown had jurisdiction so far as international law was concerned, the Crown had not conferred such jurisdiction on the English Common Law Courts. (See paras. 145-146 above, on the subject of the Territorial Waters Jurisdiction Act, 1878.) Moreover, the Bristol Channel at the point where the crimes were committed is no more than 10 miles wide and the general rule of international law governing the territoriality of bays had not yet been defined in 1859. It is not therefore surprising that the Court should have directed its attention to the jurisprudence of the common law to Lord Hale's test of the range of vision.

The Conception Bay case (1877)

440. The next precedent, cited in paragraph 543 of the Counter-Memorial, is a passage from the well-known judgment of the Privy Council concerning Conception Bay in *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (1877 Law Reports 2,

[1] The substance of this case is explained in para. 135 of the United Kingdom's Memorial, especially in footnote No. 11, p. 91, Vol. I.

Appeal Cases 394). The Privy Council in this case based the British title to Conception Bay in Newfoundland expressly on historic grounds and the Norwegian Government concedes that the theory of historic waters appears more visibly in this precedent than in those dealt with in the previous paragraphs of the Counter-Memorial. The Norwegian Government, however, makes a somewhat equivocal comment on the language of the judgment when it says: "On constatera que la Cour ne soutient aucunement que le titre historique soit le seul qu'on puisse invoquer pour justifier la territorialité de la baie de Conception. Elle admet que la territorialité des baies dépend de divers facteurs, parmi lesquels leurs dimensions et leur configuration jouent un rôle important." If this comment is intended to convey that the Court regarded the territoriality of Conception Bay, a bay over 20 miles in width at the mouth, to be justifiable apart from an historic title, it goes beyond the language of the judgment. Moreover, the comment obscures the clear acceptance by the Court of an historic title *as a distinct and exceptional ground of justification*. The preceding paragraph of the judgment, which is essential to the understanding of the passage given in the Counter-Memorial, reads (*ibid.*, p. 419):

> "It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon-shot from shore to shore, or 3 miles; some a cannon-shot from each shore, or 6 miles; some an arbitrary distance of 10 miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg.* v. *Cunningham* was decided to be in the County of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his Commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable."

The addition of this paragraph makes it clear that the Privy Council recognized *(a)* that the general rule determining the territoriality of bays concerned the *two elements of configuration and dimension*; *(b)* that the dimensional test of a bay accepted as territorial under the general rule was in 1877 not yet finally settled but that the tests suggested by most writers would exclude Conception Bay; and *(c)* that it was unnecessary for the Court to lay down a general test because Conception Bay fell under the different and exceptional principle of historic waters. The Court did not refer to Great Britain's historic title as merely an additional element confirming a title valid on other grounds. On the contrary, it regarded the historic

title as a distinct ground for justifying Great Britain's claim *whether or not it was valid under the general law.*

The Norwegian Government makes a further comment upon the language of the judgment of the Privy Council :

> "Les juges constatent que le Gouvernement britannique a exercé son autorité sur la baie de Conception « for a long period » et que cette attitude a reçu l'assentiment des autres nations, de telle sorte que la baie a été exclusivement occupée par lui. Le point de vue des États étrangers entre cette fois en considération, mais on le déduit plutôt de leur abstention que d'un acquiescement formel et spécial aux prétentions de la Grande-Bretagne sur la baie litigieuse. Les éléments de preuve positifs sur lesquels la décision s'appuie sont fournis par la pratique de la Grande-Bretagne, par les mesures d'ordre interne qu'elle a prises et notamment par les actes du Parlement."

The comment is correct that the Court adduced no formal or special acquiescence on the part of other States. If there had been formal acquiescence, there would have been no need to infer acquiescence from conduct. But it is to be observed that the Court did in fact make mention of the Treaty of 1818 with the United States and that in a later passage it emphasized that the British legislation asserting jurisdiction over the bay in pursuance of the treaty was expressly framed to apply not merely to United States nationals but to all foreigners (*ibid.*, p. 421) :

> "It enacts not merely that subjects of the United States shall observe the restrictions agreed on by the convention, but that all persons, not being natural-born subjects of the King of Great Britain, shall observe them under penalties."

Again, the fact that the Court deduced the acquiescence of other States in Great Britain's claim primarily from their inaction in face of the British assertion of dominion does not mean that the Court attached little weight to the acquiescence of other States. On the contrary, it reverted to the question of acquiescence in two separate passages of its judgment. Thus, in the extract given in the Counter-Memorial, the Court said (*ibid.*, p. 420) :

> "It seems to them [the judges of the Court] that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that *their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important.*"

Then, having explained that the British legislation applied to all foreigners and imposed penalties on them if they disobeyed the restrictions, the Court concluded (*ibid.*, p. 421) :

> "No stronger assertion of exclusive dominion over these bays could well be framed. As has been already observed, Conception Bay is in every sense of the words a bay within Newfoundland,

> though of considerable width ; and as there is nothing to justify construction of the act limiting it to bays not exceeding any particular width, this is an unequivocal assertion of the British legislature of exclusive dominion over this bay as part of the British territory. *And as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh convention was made, this would be very strong in the tribunals of any nation to shew that this bay is by prescription part of the exclusive territory of Great Britain.* As already observed, in a British tribunal it is decisive."

It is, as has been explained in paragraph 436 above, the primary function of the theory of an historic title to raise from long usage an inference of the positive acquiescence by other States when evidence of express acquiescence ("acquiescement formel" in Norway's words) is absent.

Capture of The Alleganean *in Chesapeake Bay (1885)*

441. The last precedent from the jurisprudence of national tribunals is *Stetson* v. *United States* (1885 Scott, *Cases on International Law*, p. 232) cited in paragraph 544 of the Counter-Memorial. This case, which was decided by the United States Court of Commissioners of Alabama claims, concerned the capture of the vessel *The Alleganean* in Chesapeake Bay during the American Civil War. The Court dismissed the claim on the ground that the capture had taken place not on the high seas but within the inland waters of the United States. After citing selected passages from the judgment, the Norwegian Government comments that the decision was far from being based only on the United Kingdom theory of historic waters (i.e. on the acquiescence by other States in the exercise of the jurisdiction). Usage is said to be invoked side by side with other arguments such as the importance of Chesapeake Bay to the security of the United States, its configuration and geographical features, the fact that it is not a pathway linking foreign nations, its status in comparison with other bays. This is true if it be added that another argument particularly mentioned is the absence of any objection by other States. But how should a court do otherwise, especially in 1885 when the general rules of international law governing the breadth of the opening of an ordinary (not historic) bay were not yet clearly defined. Chesapeake Bay has all the characteristics of a bay in a marked form. It is a long narrow inlet going up 170 miles into the land and less than 12 miles at the mouth. But for the question of the breadth of the opening, it was obviously qualified to be considered as a bay. The Court was concerned to point this out, but since the bay had an opening only 12 miles wide at the mouth and it was not settled in 1885 what the breadth of the opening for ordinary bays was, the Court invoked the exercise of jurisdiction over the bay by the United States and the apparent acquiescence in such jurisdiction by other States. In other words, the position of the Court was that there were grounds for holding Chesapeake Bay to

be internal waters of the United States on the basis of the general rules of international law, but if this was doubtful then it could be so claimed on historic grounds. The criteria which the Court adopted for the historic character of the bay are exactly those from which, according to the United Kingdom contention, an historic title can be presumed.

The Norwegian Government further comments on the judgment that the traditional usage on which the Court relied was essentially the attitude of the United States, particularly the legislation of Congress, and that the Court only noted the absence of reactions from other Powers. But national usage is, of course, a *sine qua non* of an exceptional claim to national sovereignty over a bay, for otherwise there is no ground even for making pretensions to the bay. If there are no reactions from other States over a long period, that is something from which acquiescence can be inferred. In any case the United States Court being bound to decide in accordance with Acts of Congress could scarcely be expected to do more than draw attention to the absence of international reaction to the national claim. If Acts of Congress violate international law, that is a matter with which the United States Government has to deal on the diplomatic plane and not a matter which any United States court can put right. (Surely the position of any Norwegian Court in regard to the 1935 Decree is the same.) It is not the decision of the United States Court which is the basis of the United States claim but the Statutes of Congress and the exercise of acts of jurisdiction by the executive just as it is the attitude of other States towards the claim before and after 1885 (and not the decision of the United States Court) which is the basis of the historic title. In any event, the passages from the judgment which are given in the Counter-Memorial do less than justice to the reasoning of the Court concerning the acquiescence of other States in the United States claim. The Court (*ibid.*, p. 235) referred to *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (Conception Bay case) as "perhaps the most thoroughly considered and important case", and cited the passage set out in paragraph 543 of the Counter-Memorial which emphasized the acquiescence of other States in the British claim to Conception Bay. The Court having referred also to Attorney-General Randolph's opinion concerning Delaware Bay added (*ibid.*, p. 237) :

> "If it be said that the mere claims of a nation to jurisdiction over adjacent waters are to be accepted with some degree of hesitation, then the action in reference to the *Grange* (the ship concerned in the Delaware Bay incident) is of much weight, for there the claim made by the United States was promptly acquiesced in by two great foreign Powers...."

In other words, the Court inferred from the acquiescence of Great Britain and France in the claim to Delaware Bay the probable

acquiescence of other States in what the Court considered to be the comparable claim to Chesapeake Bay.

The Alaskan Boundary Arbitration (1903)

442. In paragraph 545 of the Counter-Memorial the Norwegian Government gives an extract from the Counter-Case of Great Britain in the *Alaskan Boundary Arbitration* of 1903 (*Proceedings*, Vol. IV, p. 30 of the British Counter-Case). It points out that in this extract the theory of historic waters only finds expression in the phrase "the actual exercise of national authority over the waters claimed". The passage extracted was however directed to the general question of ordinary bays rather than to the particular problem of historic waters. On the previous page, the British Counter-Case had referred to the Conception Bay case as "the only reported English case in which the headlands question *in its international aspect* was really discussed. And, then, immediately before the passage which is extracted in the Counter-Memorial, the Counter-Case said of the Privy Council's decision :

> "But it became unnecessary to lay down a general rule, because Lord Blackburn held that the territoriality of the Conception Bay was established by prescription and acquiescence. Hence, it is still the case that the question : 'What are the rules as to dimensions and configuration which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts' has never been made the ground of any judicial determination."

Consequently, there is nothing in the British Counter-Case in that arbitration to deny the relevance of the acquiescence of other States in appreciating the validity of an historic claim.

The North Atlantic Fisheries Arbitration (1910)

443. In paragraph 546 of the Counter-Memorial the Norwegian Government reverts once again to the *North Atlantic Fisheries Arbitration* of 1910. It points out that the majority judgment merely noticed the existence of the theory of historic bays without finding it necessary to examine it. The reason, of course, was that the majority regarded the word "bay" in the 1818 Treaty as having been used in a purely geographical sense. Judge Drago, however, dealt with the theory of historic waters at some length and the Counter-Memorial sets out an extract from his dissenting opinion. The comments of the Norwegian Government upon this extract are that, according to Judge Drago, *(a)* "immemorial usage" is only one of the elements to be taken into account ; *(b)* assertion of sovereignty by the coastal State is not by itself sufficient but it is the indispensable, primordial basis of the historic title ; *(c)* the other elements in an historic title are merely particular circumstances which support and justify the pretensions of the coastal State. It is further said that, in illustrating what he meant

by particular circumstances justifying the claim, Judge Drago not only placed "immemorial usage" alongside geographical considerations and the needs of defence but also stressed that the needs of defence are more important than usage. The general implication of the Norwegian Government's argument is that Judge Drago must be interpreted as not having considered the acquiescence of other States to be a fundamental element in an historic title.

Judge Drago, in the extract from his opinion cited in the Counter-Memorial, did not in terms refer to the acquiescence of other States. But, as the Norwegian Government concedes, Judge Drago indicated that the assertion of sovereignty over a bay is not by itself enough and requires justification. In international law, a system of law which has its origin in the consent of States, what other "justification" can there be of such claim to sovereignty if it is not the acceptance of the claim by other States? Judge Drago in the immediately preceding paragraph of his opinion had in fact mentioned with approval the language of the Privy Council in the *Conception Bay case* where, it will be recalled, the Court underlined the acquiescence of other States in the British claim. If, however, Judge Drago did not refer expressly in his dissenting opinion to the acquiescence of other States in an historic claim, he left no doubt about the importance of such acquiescence when commenting on the 1910 Arbitration in an article published in the *Revue générale de Droit international public* of 1912 (Vol. 19, p. 5). Speaking of the headland theory, he there said (at p. 37):

> "Les États-Unis semblent avoir abandonné cette théorie exagérée; tout au moins, dans le litige qui nous occupe, ils adhérèrent à la règle stricte des six milles d'entrée pour la généralité des baies.
>
> Mais ils mirent à part, comme il était nécessaire qu'ils le fissent, avec un grand luxe d'autorités et d'arguments, leurs baies vitales.
>
> Ces baies exceptionnelles apparaissent dans plusieurs traités, et la doctrine les reconnaît expressément.
>
> L'usage continu, les nécessités de la défense, la volonté d'approprier expressément manifestée doivent, en ce cas plus qu'en aucun autre, garder tout leur poids. Ils donnent tout son effet à la prescription acquisitive considérée comme source régulière du droit, et font des baies historiques une catégorie spéciale et distincte, dont la propriété appartient aux pays qui les entourent. *Ces pays, lorsqu'ils ont procédé à l'affirmation de leur souveraineté, en acquièrent la possession et les incorporent à leur domaine, du consentement des autres nations.*"

He then illustrated his statement concerning historic bays by mentioning the Rio de la Plata as an example together with Conception, Plaisance, Delaware and Chesapeake Bays. As his previous reference to the Rio de la Plata in his dissenting opinion had been criticized in an English newspaper he added the following argument with the object of justifying his inclusion of the Rio de la Plata among the historic bays (*ibid.*, pp. 37-38):

> "... l'estuaire du Rio de la Plata a la configuration d'une baie, et nous devons le considérer et le défendre comme tel, attendu qu'il constitue de ce point de vue, et par définition, la baie historique par excellence et une baie historique de toute ancienneté, présentant un caractère très net *et acceptée comme telle par le consentement de toutes les nations depuis de longues années*".
>
> "... non seulement nous, mais notre prédécesseur, la Couronne d'Espagne, avons fait des déclarations non équivoques de souveraineté en ce qui concerne cet estuaire, *et de temps immémorial*, et de plus que ces affirmations ont *obtenu l'assentiment publiquement exprimé de toutes les grandes Puissances y compris l'Angleterre*".

It is therefore impossible to understand Judge Drago as having held the view that the acquiescence of other States is not a fundamental element in an historic claim.

The Gulf of Fonseca case (1917)

444. The last precedent from international jurisprudence, which is cited in paragraph 547 of the Counter-Memorial, is the judgment of the Central American Court of Justice in 1917 relating to the Gulf of Fonseca (*American Journal of International Law*, Vol. 11 (1917), 674, at pp. 700 *et seq.*). The Norwegian Government declares that in determining the status of its waters the Court relied primarily on the vital character of the interests linked to the possession of the gulf. The Court is said to have made a point of public works in the bay, of economic and financial conditions and the strategic importance of the gulf and the islands, all of which "make it absolutely indispensable for the coastal States to possess the gulf as completely as is required by these primordial interests and the needs of their national defence". The implication of the Norwegian argument again appears to be that the Central American Court did not regard the acquiescence of other States as a fundamental consideration in an historic title, but looked only to the vital interests of the coastal State.

The method of handling this precedent in the Counter-Memorial is very remarkable. It is perfectly true that the Court mentioned the vital interests of the coastal States as one reason for holding the gulf to be territorial. But it also mentioned other things which the Norwegian Government forbears to mention. The Court opened its discussion of the legal status of the gulf with the proposition (p. 700) :

> "In order to fix the international legal status of the Gulf of Fonseca it is necessary to specify the characteristics proper thereto from the threefold point of view of history, geography and the vital interests of the surrounding States."

The Court next referred to an assertion of sovereignty over the gulf by the coastal sovereign or sovereigns during the three periods of its political history from 1522 onwards and then said (pp. 700-701) :

> "During these three periods of the political history of Central America the representative authorities have notoriously affirmed their peaceful ownership and possession in the gulf ; *that is, without protest or contradiction by any nation whatsoever, and for its political organization* and for police purposes, have performed acts and enacted laws having to do with the national security, the observance of health and with fiscal regulations. *A secular possession such as that of the gulf, could only have been maintained by the acquiescence of the family of nations ; and in the case here at issue it is not that the* consensus gentium *is deduced from a merely passive attitude on the part of the nations,* because the diplomatic history of certain Powers shows that for more than half a century they have been seeking to establish rights of their own in the gulf for purposes of commercial policy, but always on the basis of respect for the ownership and possession which the States have maintained by virtue of their sovereign authority."

Later in its judgment, after listing the "vital interests" of the coastal States, the Court added (p. 705) :

> "It is clearly deducible from the facts set forth in the preceding paragraphs that the Gulf of Fonseca belongs to the special category of *historic* bays and is the exclusive property of El Salvador, Honduras and Nicaragua ; *this, on the theory that it combines all the characteristics or conditions that the text writers on international law, the international law institutes and the precedents have prescribed as essential to territorial waters, to wit, secular or immemorial possession accompanied by* animo domini *both peaceful and continuous and by acquiescence on the part of other nations,* the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that those States should possess the gulf as fully as required by those primordial interests and the interest of national defence."

Thus the brief and highly selective account given in paragraph 547 of the Counter-Memorial seriously misrepresents the jurisprudence of this precedent. The Court certainly attached great importance to the vital interests of the coastal States as a ground for other States recognizing their pretensions. But it equally attached great importance to that recognition having, in fact, been given by other States.

Conclusions to be drawn from these precedents

445. The thesis which underlies the comments of the Norwegian Government upon the above precedents dealt with in paragraphs 541 to 547 of the Counter-Memorial is that the decisions of tribunals, particularly international tribunals, do not treat historic usage as a distinct, independent ground of title to sovereignty but merely as one among several different grounds for justifying a coastal State's pretensions to sovereignty. This view of historic waters is necessary to the anarchical Norwegian doctrine of maritime

territory which would permit a State to fix its own extent of maritime territory according to its own view of its legitimate interests and without regard to the interests of other States. The Norwegian Government is therefore constrained to deny that the precedents, particularly the precedents of international tribunals, treat the acquiescence of other States as a *necessary* element in an historic claim to a larger extent of maritime territory than is generally admitted by other States. Finding that the precedents in fact give an important place to the acquiescence of other States in an historic claim—either by express mention or by implication in the phrase "immemorial usage"—the Norwegian Government is further constrained to argue that the theory of historic waters is not applied in these precedents as an independent ground of title but merely as one among several methods of justifying the claim. Hence comes the constant harping on the fact that references to historic usage in the precedents are found only in conjunction with other "justifications" such as geographical configuration and defence interests.

446. The United Kingdom Government, much earlier in this Reply, has given its reasons for repudiating the Norwegian doctrine of unilateral determination of maritime territory by the coastal State (for the United Kingdom's criticism of the Norwegian doctrine, see paras. 139-147 above). It has now shown that the precedents, especially the international precedents, relating to historic waters which are relied on by the Norwegian Government in fact indicate that the acquiescence, express or implied, of other States is an essential part of the theory of historic waters. It has also pointed out that, as international law derives its authority from the consent of States, the whole notion of the "justification" of claims to maritime territory can only relate to securing the acquiescence of other States. The fact that references to acquiescence by other States or to immemorial usage are commonly found in conjunction with references to geographical configuration and to defence needs has a very simple explanation. An exceptional appropriation of the seas is not regarded as capable of being even put forward unless it is the result of the special configuration of the coast of the claimant State and of the latter's special needs. In other words, geographical configuration and reasonable need are basic factors without which there is no prospect whatever of the exceptional claim receiving the assent of other States. Consequently, even when an historic title is invoked, stress is inevitably placed upon these factors. But, where the claim goes beyond what is accepted under general customary international law, it is the acquiescence of other States, express or implied from long usage, that sets the seal of legal validity upon the exceptional claim. That this is the case follows inevitably from the fact that the consent of States is the fundamental basis of the international legal order. The deduction which

the Norwegian Government wishes to draw from the juxtaposition of "immemorial usage" or "acquiescence" with geographical and other considerations in some of the precedents is, therefore, entirely unwarranted.

Opinions of jurists

(Para. 548 of the Counter-Memorial)

Norwegian argument that the theory of historic waters has never been applied in isolation but only in conjunction with other considerations

447. The Norwegian Government, in paragraph 548 of the Counter-Memorial, asserts that in international jurisprudence the theory of historic waters has never been applied in isolation but has only been applied in conjunction with other considerations when the territoriality of particular bays has been recognized. It also asserts that it is primarily in the opinions of jurists that the theory has been conceived of as an independent, self-sufficient theory. The United Kingdom Government, for the reasons given in the immediately preceding paragraphs of this Reply, submits that these assertions misconceive the function of the historic element in the establishment of a title to historic waters. This function is to raise an inference of the acquiescence of other States in the exceptional claim, when express evidence is lacking. If a territorial claim to a bay does not exceed what is admitted by generally recognized rules of customary law, there is no need to establish the acquiescence of other States because this is conclusively presumed from the general rule. The test of the application of the theory of historic waters is thus simply whether resort is made to the historic element because it is not considered, or it is uncertain, that the particular claim in issue was covered by the generally recognized rules. The theory of historic waters was undoubtedly applied, for example, in the *Conception Bay* and *Gulf of Fonseca cases*. It may be added that Conception Bay was later excluded from the consideration of the tribunal of the 1910 Arbitration *because the United States had acquiesced in the decision of the Privy Council.* (Award of the Tribunal, Wilson's *Hague Arbitration cases*, p. 188.)

The precedents invoked by Norway are themselves sufficient to show that the theory of historic waters has been applied in international practice and the statement in the Counter-Memorial that the theory never has been applied "in isolation" seems to be misconceived. The theory of historic waters cannot be isolated either from the general rules of international law concerning the delimitation of maritime territory or from the general circumstances, particularly the geographical facts, surrounding the particular waters claimed on historic grounds. The United Kingdom Government can, however, agree with the Norwegian Government that jurists

have strongly endorsed the theory of historic waters. Jurists have endorsed it as an exception to the general rules for the delimitation of maritime territory and in that sense have recognized it as an independent rule.

Work of the Institute of International Law in 1894 and 1928

448. The Norwegian Government acknowledges the support to the theory of historic waters as an independent rule given by jurists through the resolutions of learned societies, but seeks to whittle down the effect of these resolutions by examining the language of some of the texts. It first examines the work of the Institute of International Law pointing out that in 1894 the Institute mentioned the theory of historic waters as an exception only to the general rule for bays and in the following form :

> "à moins qu'un usage *continu et séculaire* n'ait consacré une largeur plus grande (article 3)".

It then turns to the resolutions of 1928 pointing out that the terms in which the theory of historic waters was expressed in that resolution were different and that the scope of the theory was not on that occasion confined to bays. As to the latter point, the Institute again allowed, in Article 3 of its draft, an historic claim as an exception to the general rule for bays but it also recognized, in Article 2 of its draft, the possibility of justifying a claim to a larger maritime belt (e.g. Norway's claim to 4 miles) by reference to historic usage. The Norwegian Government here repeats its contention that the minutes of the discussion show that Article 2 was understood to allow historic claims to archipelagos as well. The United Kingdom has previously pointed out that this contention goes beyond what was said in the discussions and that the Institute seems to have understood only that an historic claim to an enlarged maritime belt would be equally valid for the maritime belt of archipelagos (see para. 356 above). The United Kingdom does not, however, press this interpretation since it holds the view that in accordance with fundamental principles of international law an exceptional claim to territorial waters in archipelagos is valid if it has received the assent of other States either expressly or by implication from historic usage (see para. 471 below).

The phrase in which the theory of historic waters was expressed in both articles of the 1928 text was simply "an international usage". The Norwegian Government states that a proposal of Baron Rolin-Jaequemyns to use the phrase "usage incontesté" was rejected with the result that the word "incontesté" was omitted. This statement is not quite correct because the word "incontesté" is to be found in the original text proposed by M. Alvarez and Sir Thomas Barclay (*Annuaire 1928*, p. 637). It is true that the word "incontesté" was dropped, but the word "*international*" was retained to express the

principle that a *unilateral national pretension is not sufficient*. The national usage must have received *international recognition*.

Work of the International Law Association in 1926

448 A. The Norwegian Government, also in paragraph 548 of the Counter-Memorial, examines the text of Article 2 of a resolution of the International Law Association in 1926. This learned society had in fact included the theory of historic waters in its earlier draft of 1895 in precisely the same terms as the Institute the year before and with reference only to bays. In 1926, as the Norwegian Government points out, it applied the theory generally to the rules for the delimitation of maritime territory in the following formula :

> "....each maritime State shall exercise territorial jurisdiction at sea within the limits hereinafter provided and not further, save to the extent that jurisdiction is conferred by this and other international conventions or treaties or by an occupation or established usage generally recognized by nations".

The Norwegian Government appears to suggest that this clause admitted the extension of maritime territory by simple "occupation". But this cannot be the case ; the words "generally recognized by nations" apply no less to "occupation" than to "established usage". Not only is this the natural meaning of the words but, if this is not their meaning, it was wholly futile to formulate the carefully drawn general rules for the maritime belt, bays, islands, straits, etc., which are found in the society's draft (*American Journal of International Law* (1929), Vol. 23, Special Supplement, pp. 373-375). It may be added that Article 13 of the same draft declares :

> "*No State or group of States may claim any right of sovereignty, privilege or prerogative over any portion of the high seas* or place any obstacle to the free and full use of the seas."

It is quite clear that the International Law Association did not contemplate the appropriation of the seas without the express or implied assent of other States.

Next, in the same paragraph is quoted the phrase used in Article 6, dealing with bays, of the American Institute's draft of 1927 : "unless a greater width shall have been sanctioned by *continued and well-established usage*". The only comment that need be made upon this phrase is that when international jurists speak of well-established usage, they necessarily mean a usage well established among States, or, in other words, a well-established *international* usage.

The Harvard Research draft (1929)

449. Lastly, paragraph 548 of the Counter-Memorial gives the text of Article 12 of the Harvard Research draft (*American Journal of International Law* (1929), Vol. 23, Special Supplement, April 1929, p. 288) :

"The provisions of this convention relating to the extent of territorial waters do not preclude the delimitation of territorial waters in particular areas in accordance with *established* usage."

The Norwegian Government observes of this text that the reservation of historic waters was to be of general application. That is quite true. But even more interesting is the comment of the authors of the Research draft which followed immediately upon their formulation of the article :

"The article seems necessary because of historic claims made by certain States *and acquiesced in by other States* with reference to certain bodies or with reference to particular areas of water. The simplest case is that of an historic bay such as Chesapeake Bay or Conception Bay. It seems desirable that the convention should not interfere with *historic claims of this kind based upon usage which has been established* before this convention comes into force. Such claims may enlarge or diminish the extent of territorial waters. Similarly it seems desirable that it should be recognized that usages with respect to other areas may become established in the future and that well-founded claims may be based upon such established usage."

This comment abundantly confirms that in the work of learned societies, as in the precedents of State practice, the theory of historic waters is regarded as relating to *international* usage *and to the acquiescence of other States in an exceptional claim.*

Westlake

450. The views of individual jurists are not cited in the Counter-Memorial. As, however, individual jurists are able to express themselves more explicitly and more precisely in their books than can learned societies in their brief texts, it is worth seeing what four jurists of high reputation in the present century have to say in regard to historic waters. The first writer is Westlake (1910), who took the view that general recognition of territorial bays is limited to bays with entrances not exceeding twice the width of the maritime belt. He then continued (2nd edition, p. 191) :

"But although this is the general rule, it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognized by immemorial usage as territorial sea of the States into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit to such appropriation."

After mentioning as examples of these larger claims to "gulfs" by immemorial usage Conception, Chesapeake, Delaware and Cancale Bays, he referred also to the "King's Chambers" as shallow bays *formerly* claimed and summed up as follows (*ibid.*, p. 192) :

"But it is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid ground for the assumption of sovereignty, *and even in that case the geographical features which may warrant the assumption are too incapable of exact definition to allow of the claim being brought to any other test than that of accepted usage.*"

Ræstad

451. The second writer is the Norwegian jurist Ræstad (1911), to whose views concerning the operation of the consent of States in the establishment of claims to maritime territory attention has already been drawn in dealing with the extent of the maritime belt (see para. 117 above). In a passage there quoted he said with general reference to appropriation of the sea (*La Mer territoriale*, p. 167) :

"Le plus important, ce n'est pas, du reste, à mon avis, de savoir quand et comment a eu lieu l'occupation ou l'usurpation de tel ou tel droit sur la mer côtière. *L'important, c'est de savoir quand et comment a eu lieu le consentement exprès ou tacite des nations qui donne à l'occupation ou à l'usurpation la qualité d'un titre de droit.*"

Could any words be more explicit ? In a later passage, addressing himself to the particular point of long usage, he said (*ibid.*, p. 174) :

"La prescription telle qu'elle a été introduite dans les législations nationales n'existant pas, exception faite des cas prévus par les traités, dans le droit international, *un état de choses qui existe depuis longtemps n'est sanctionné par le droit des gens que si l'existence prolongée de cet état de choses prouve le consentement tacite des nations ;* ici, le consentement des nations les plus intéressées, en raison du voisinage ou autrement, oblige également les nations moins intéressées ou dont les intérêts ont surgi à une époque postérieure à la sanction définitive de cet état de choses. Autrement, un état de choses, eût-il duré depuis le commencement du monde, ne serait jamais inviolable, au détriment manifeste des intérêts de toutes les nations."

Fauchille

452. The third writer is Fauchille (1925), who examined the theory of historic waters more fully than any other writer except Gidel. Having referred to the 10-mile limit as apparently the dominant principle for bays to-day and having mentioned that many writers and some States recognized the existence of an exception to this principle in "les baies historiques ou vitales", he said (*Traité de Droit international public*, Book I, Part II, p. 380) :

"Quelle est exactement la définition qu'il convient de donner des baies historiques ou vitales ? Ce sont les grands golfes et les grandes baies dont le caractère de territorialité a été *reconnu par un usage longuement accepté* et une coutume non controversée."

He then described Judge Drago's criterion as being slightly broader, not apparently being aware of Judge Drago's further explanations of historic waters in the article cited in paragraph 443 above. As to judicial precedents Fauchille said *(ibid.)*:

> "C'est également *l'acquiescement des États* qui, d'après des décisions judiciaires, *explique le caractère de territorialité des baies historiques.*"

And, in support of this statement, he cited the Conception Bay, Delaware Bay and Chesapeake Bay precedents together with the Anglo-French Treaty of 1839 by which Great Britain recognized France's title to the Bay of Cancale. Fauchille finally summed up the results of his analysis (*ibid.*, pp. 381-382):

> "C'est l'acquiescement de certains États à la réclamation de souveraineté élevée sur ces baies par la nation riveraine et l'absence de protestation des autres États contre cette réclamation qui en ont fait des baies historiques et leur ont donné le caractère territorial. — Cette théorie des baies historiques repose-t-elle sur une base légitime ? Tout État ayant le droit de renoncer à un droit qui lui appartient, il nous semble que les États *qui ont expressément consenti à accepter la territorialité* d'une baie qui par sa largeur constituait une mer libre et où ils avaient par conséquent le droit de naviguer librement ne sauraient s'opposer à l'exercice de la souveraineté exclusive de l'État riverain sur ces baies. Mais la territorialité de celles-ci doit-elle être considérée aussi comme obligatoire vis-à-vis des États qui se sont simplement abstenus de réclamer ? *Leur abstention peut-elle équivaloir à un consentement? Cela est plus douteux.* Et, de fait, bien des jurisconsultes ont contesté l'exactitude de la doctrine des baies historiques. C'est ainsi que Perels fait observer que « l'exercice unilatéral de prétendus droits, même quand il ne soulève pas les réclamations d'autres États, soit par connivence, soit par impuissance de résister, *ne peut jamais être opposé à ceux qui n'ont pas acquiescé expressément ou par des actes dont l'intention est évidente* ». Baty et River considèrent que, malgré l'opinion des Anglais et des Américains, les baies de Conception, de Delaware et de Chesapeake dont l'entrée a respectivement 15, 18, 12 milles, sont, à l'exception de la zone territoriale, des parties de la mer libre."

Fauchille thus seems even to have regarded the implication of the acquiescence of other States from their inaction alone to be a doubtful doctrine.

Gidel

453. The fourth and last writer is Gidel (1934), whose views are stated in a passage to which the attention of the Court has been drawn at the beginning of the present discussion of the Norwegian contentions in regard to historic waters (para. 433 above). In that passage he laid particular stress on the acquiescence of other States as the touchstone of the legal validity of an exceptional claim (*op. cit.*, Vol. III, p. 651):

> "*Il ne suffit pas que l'État riverain émette la prétention de considérer telles ou telles eaux comme lui étant « propres » pour que les autres États aient le devoir de s'incliner devant cette prétention ; la consécration de ces prétentions ne peut dériver* — en l'absence d'organes ayant reçu formellement qualité à cet effet et investis expressément par chacun des États intéressés d'un pouvoir de décision — *que de l'acquiescement international ; c'est l'usage prolongé* qui, généralement, en fournira la manifestation ; et telle est la part de vérité que contient le mot « historiques » à l'aide duquel la théorie est désignée."

The United Kingdom Government submits that the above words of Gidel, with which it is in entire agreement, are fully borne out by the precedents and by the opinions of jurists which it has examined in the immediately preceding paragraphs of this Reply. The element which is essential to the validity of exceptional appropriation of the sea is the acquiescence of other States. This may be express or it may be implied from an international usage of long standing and in the latter case the claim is commonly described as being validated under the theory of historic waters. It is in the light of this concept of historic waters, supported as it is by a formidable weight of authority, that the work of the 1930 Conference has to be appreciated.

The work of the Hague Codification Conference, 1930

(Counter-Memorial, paras. 549-552)

454. The Norwegian Government, in paragraph 549 of the Counter-Memorial, declares that the preparatory work of the 1930 Conference and the discussions at the conference throw light on the theory of historic waters. They are said to have *established* that the theory is of general application and is not confined to bays. As neither the Plenary Committee nor Sub-Committee No. II formulated any text concerning historic waters, it is perhaps permissible to wonder what has here become of the deep-seated distrust of the work of the 1930 Conference as evidence of customary law which Norway displays earlier in the Counter-Memorial in regard to matters on which texts were formulated. Nevertheless, on more general grounds which will be explained later (paras. 471-472 below), the United Kingdom Government is not disposed to contest that the theory of historic waters is of general application. It will be convenient to examine first the light thrown by the records of the conference on the actual elements composing the theory in regard to which it is said in the Counter-Memorial that opinion at the conference was more divided.

455. In considering the work of the 1930 Codification Conference relating to historic waters it has to be remembered that one of the chief objects of the conference was to crystallize not minimum but *maximum* rules for the delimitation of maritime territory. If this

object had been achieved, the result would have been, in the absence of a saving clause, to invalidate at once by the terms of the convention all claims in excess of the agreed maximum rules, *including claims that had already gained international recognition*. The insertion of a clause in the convention which would reserve "historic" rights had therefore a particular significance at the 1930 Conference. So long as the general rules of international law remained customary and expressed merely the agreement of States as to the ordinary limits of maritime territory, the validity of a larger claim would be simply a matter of proving the acquiescence of other States either by express evidence or by implication from a usage long applied internationally. If, however, the general rules became conventional and expressed the agreed maximum limits of maritime territory, then, in the absence of express evidence of acquiescence, the convention itself would provide very strong, perhaps conclusive, evidence that States did not accept the larger claim as legally valid. It is essential to have this consideration in mind in reviewing the work of the 1930 Conference.

456. Thus, the clause relating to historic waters in the original Schücking memorandum was plainly regarded simply as a saving of existing historic rights from destruction by the general rules of the convention. Schücking proposed to deal with all special rights by a system of registration in an International Waters Register and after stating his general rules for bays in Article 4 he added (*American Journal of International Law* (1926), Vol. 20, Special Supplement, p. 85) :

> "As regards the recognition of rights which are in contradiction with the tenor of the general rules, the provisions of Article 3 concerning presentation and registration in the International Waters Register shall apply. *It shall not be possible to acquire such rights in the future.*"

Both the other members of the Committee of Experts commented on this text. The Portuguese expert, M. de Magalhães, argued in favour of covering cases in which

> "*even* in the absence of continuous and immemorial usage, *recognition* might be given to the absolute necessity for the State concerned to secure its defence and its neutrality and to maintain navigation and maritime police services" (*ibid.*, p. 132).

After invoking in support of his argument the theory of Judge Drago in the 1910 Arbitration and the remarks of Captain Storni which are set out in paragraph 550 of the Counter-Memorial, he suggested an addition to Article 4 in order to give effect to his proposal. The United States expert, Mr. Wickersham, commented on the suggestion of M. de Magalhães as follows (*ibid.*, p. 141) :

> "In my opinion, the clause which M. de Magalhães suggests, added to the first paragraph of M. Schücking's Article 4, would

make general a rule which finds supports only in special cases *and would meet with great opposition.*"

Schücking, having agreed with his colleagues to omit the proposal for an International Waters Office, amended his clause relating to historic bays to read simply as follows (*ibid.*, p. 142) :

"unless a greater distance has been established by continuous and immemorial usage".

In explaining the change in his text Schücking said (*ibid.*, p. 146) :

"I should have no objection if the International Waters Office were to be created, but without such an office *the right asked for by M. de Magalhães would be, to some extent, dangerous.*"

457. Ten of the replies of governments relating to bays referred directly to historic bays of which seven used phrases relating to the recognition of historic bays by other States (*Bases of Discussion*, pp. 39-45). Thus, Germany (*ibid.*, p. 39) thought that the coastal State must prove its claim "through long usage *generally recognized by other States*" ; Australia (*ibid.*, p. 39) and Great Britain (*ibid.*, p. 41) took as the test "general acquiescence" ; Japan's test (*ibid.*, p. 42) was "time-honoured and *generally accepted* usage" ; Poland's test (*ibid.*, p. 43) was "established usage" described as involving the exercise of sovereignty and the fact that "*no objection has been raised by other States*" ; Estonia (*ibid.*, p. 40) thought it was "*feasible to recognize* historic bays" ; finally, the Netherlands (*ibid.*, p. 43) saw no objection to "the recognition of historic rights in respect of certain bays" but said that such rights would have to be "precisely defined in the convention". Of the other three States, the United States (*ibid.*, p. 40), as throughout their reply, merely cited precedents which in this instance were Delaware Bay and Chesapeake Bay. Portugal's reply (*ibid.*, p. 43) was a little equivocal on the question of international recognition : "This exception is founded on the domestic legislation of the various States, their higher interests and necessities, *and long-established usages and customs*. Moreover, the special position of these bays has been *recognized both in judgments of the Courts and in certain treaties.*" Norway's reply alone appeared to contemplate the establishment of historic claims by national usage unaccompanied by international recognition (*ibid.*, p. 42). In addition to the seven States mentioned as referring to the international recognition of historic bays, Belgium, in the part of her reply dealing with the extent of the maritime belt, said (*ibid.*, p. 25) : "Any claim by a State to a breadth of territorial waters greater than that agreed upon in an international convention *could only be accepted if justified by an undisputed international usage based on a special geographical configuration.*" These replies of governments, therefore, read as a whole do nothing to diminish the importance attached both in the precedents and in the opinions of jurists to international recognition of historic claims.

458. Following upon the replies of governments, Basis of Discussion No. 8 was formulated as follows (*ibid.*, p. 45 ; the French text of the Basis is given in paragraph 540 of the Counter-Memorial) :

> "The belt of territorial waters shall be measured from a straight line drawn across the entrance of a bay, whatever its breadth may be, *if by usage* the bay is subject to the exclusive authority of the coastal State ; the onus of proving such usage is upon the coastal State."

The Norwegian Government, in paragraph 540 of the Counter-Memorial, draws particular attention to an amendment proposed by the United States delegation to Basis No. 8, and in paragraphs 549-552 cites passages from the debate on historic waters at the eleventh meeting of the Second Committee in support of its contentions concerning the delimitation of maritime territory. It is, therefore, necessary to examine in some detail the proceedings of the conference itself in regard to historic waters, although nothing in the way of a text resulted from them.

Discussion of Basis No. 8 was opened by the Japanese delegate, Viscount Mushakoji, who explained an amendment that he had already circulated (*Minutes of the Second Committee*, p. 103) :

> "In our opinion, a mere claim on the part of the State concerned—which seems to be the sole condition according to the present text, to judge from the words 'by usage'—is not enough. For that reason, the Japanese delegation proposes that the words *'long established and universally recognized'* should be inserted before the word 'usage'....
>
> In brief, the Japanese delegation cannot agree that the sole condition should be the proof furnished by the coastal State."

Then followed the intervention of the British delegate, Sir Maurice Gwyer, the import of whose words is misrepresented in paragraph 549 of the Counter-Memorial. The British delegate, after agreeing with the Japanese delegate that the wording of Basis No. 8 was not precise enough, called attention to an amendment proposed by the British delegation, the French text of which is given in the Counter-Memorial [1]. According to the British proposal, Basis No. 8 would read (*ibid.*, p. 188) :

> " '1. The belt of territorial waters shall be measured from a straight line drawn across the entrance of a bay, whatever its breadth may be, if, subject to the provisions of this article, the coastal State is able *to establish a claim by usage, prescription or otherwise*, that the waters of the bay are part of its national waters.
>
> '2. For the purpose of determining whether the waters of any particular bay are or are not part of the national waters of the coastal State, regard shall always be had to the configuration of the bay, that is to say, the shape and degree of enclosure of the area of

[1] The reference is there given as p. 196 of the record of the plenary meetings. The correct page appears to be p. 188.

water therein, with special reference to the extent to which it penetrates into the land.' "

Sir Maurice Gwyer first explained the second paragraph, which said in effect that even an historic bay must really be a "bay". He commented (*ibid.*, p. 104) :

> "To define a bay more exactly would be extremely difficult, because pieces of water which are commonly known as bays vary infinitely. A bay may be a very small enclosure of water or it may run to an enclosure of hundreds of square miles. The view of the British delegation is that there must be some kind of configuration involving an inlet into the land, an indentation into the land, and a definite entrance into this piece of water."

The Norwegian Government observes that Sir Maurice Gwyer's comment supports its own contentions in paragraphs 331-335 of the Counter-Memorial in regard to the régime of bays. It does nothing of the kind. What it really shows is the consistency of the British view that the essence of the definition of a bay is to be found in the relation between the width of the mouth and the penetration inland.

More relevant to the present issue are the first paragraph of the amendment and Sir Maurice Gwyer's comment upon it. The Norwegian Government maintains that according to the British text "prescription" is not the only ground on which a coastal State can justify a claim to a bay of greater width than is generally recognized to be territorial. The United Kingdom certainly holds that an exceptional title to maritime territory may be established without proof of long international usage where proof can be brought of the *express* acquiescence of States either in a treaty or in unilateral acts of recognition. That may have been in the mind of Sir Maurice Gwyer when he used the words "or otherwise" (*ibid.*, p. 188—see quotation earlier in this paragraph). The United Kingdom does not agree that the British delegation intended, by the wording of its text, to convey that mere acts of State authority by themselves suffice to constitute a good international title to an exceptional area of maritime territory. Sir Maurice Gwyer's comments on the first paragraph of the amendment show that the British delegation did not so intend. He said at one point (*ibid.*, p. 104) :

> "My delegation *agrees with the Japanese delegation* that something more than mere usage is required—*that some definite acts, if you like, of dominion* exercised over this piece of water are necessary."

And, later in the same speech, he amplified this statement :

> "The claim has to be proved by usage, prescription or otherwise ; the coastal State has to prove that it has exercised *exclusive dominion* over this piece of water."

Three points require to be noticed in these explanations of the British text. First, the phrase "dominion" and even more the phrase "exclusive dominion", used with reference to acts effective in international law do not refer simply to "actes d'autorité" as they are translated by the Norwegian Government. The exercise of exclusive dominion refers to acts of State authority effective in *international relations*. Secondly, the word "usage" was intended to mean more than mere national usage; it meant an exercise of exclusive dominion, and was, in other words, to be an *international* usage. Thirdly, Sir Maurice Gwyer expressed no dissent whatever from the Japanese proposition that it is inadmissible that the sole condition should be the proof furnished by the coastal State.

459. The Norwegian Government nevertheless insists that neither the British amendment nor the oral explanations of Sir Maurice Gwyer mention the recognition of the usage by other States as a necessary condition to the establishment of an historic title. The wording of the British text might certainly have been improved, but what meaning can the *establishment* of a claim *internationally* by usage have except securing the acquiescence of other States through international usage? However, Sir Maurice Gwyer in his oral explanations said a good deal more which is not noticed in the Counter-Memorial to show that he considered the establishment of an historic title to be a matter of agreement. Thus, he concluded the speech which is cited in the Counter-Memorial as follows (*ibid.*, pp. 104-105):

> "May I add one other thing? It is quite clear that neither this conference nor any committee nor sub-committee of it could possibly undertake to draw up a list of historic bays. *Yet the matter is one of great importance, and some machinery ought to be devised by which the various nations of the world can exchange views on this point, with the object ultimately of obtaining a list of historic bays agreed internationally.*
>
> At a later stage, I shall propose that the conference should suggest, before its work is completed, the setting up of some small body which might examine the claims of the various nations to historic bays with a view to making a report and possibly recommendations on the subject at a later date, to Geneva or elsewhere. The subject is one which has caused much friction and much dispute in the past and this seems to be a golden opportunity first of all to settle the principles on which the classification is to be based, and then, having settled the principles, to agree upon some list which will be binding for the future."

And in a second speech in the same debate he said (*ibid.*, p. 111):

> "If once it is accepted as international law that there is a belt of territorial waters which belongs to a State, and that anything outside that belt is part of the high seas, then it is clear that every State which claims jurisdiction over an historic bay, an historic

strait, an historic estuary or an historic fjord—or whatever you like to call it—is claiming jurisdiction over a part of the high seas, and that, in my view, *is a claim which must necessarily be regulated by some recognized rules of international law. Otherwise, we return to the old state of affairs in which every State claimed the right to annex as part of its own territory some part of the high seas.* My own country did so in centuries past when it claimed that what were known as the King's Chambers were part of the interior waters of the United Kingdom. That claim was abandoned many centuries ago. There are other nations represented here to-day whose ancestors equally long ago made even wider claims over the high seas, and those claims have disappeared too."

460. Truth to tell, the text of the British amendment was inadequate to give expression to the views voiced by Sir Maurice Gwyer in the oral discussion and it is right to recall that the text was circulated with the caveat (*ibid.*, p. 187) :

"These amendments are submitted in response to the desire expressed by the Bureau that delegations should formulate their views as early as possible. They should not be taken as representing an attempt to submit a text in the form of final draft, and the delegation wishes to reserve the liberty of amending or withdrawing any of the amendments proposed during the course of the discussion."

461. In fact, as the Norwegian Government well knows, the British delegation at the 1930 Conference was very far from agreeing that a unilateral assertion of authority unsupported by some proof of international recognition would constitute a good historic title. At the conclusion of the discussion in the Plenary Committee the question of historic waters was referred to Sub-Committee No. I and in that sub-committee the British delegation drafted three separate texts for discussion in all of which the acquiescence of other States was explicitly mentioned as an element in the establishment of an historic title. These texts are not included in the records of the proceedings. Two, however, are set out in full by Gidel in his book [1] (*op. cit.*, Vol. III, p. 635, note 1). The relevant paragraph of the first text reads :

"The whole area of water substantially enclosed by land or lands forming part of the territory of a State over which the coastal State, or the State of which it is a successor, exercises or has exercised exclusive authority in virtue of long usage *and with the general acquiescence of other States,* shall be deemed to be inland waters of the State."

The second text reads :

"Where a coastal State has by usage, prescription or otherwise, exercised exclusive authority over an area of water substantially

[1] Gidel was a French delegate at the conference and he has clearly used his own contemporary notes as authority for this statement.

enclosed by land or lands forming part of the territory of the State, that area shall, *if the jurisdiction of the State has been generally acquiesced in by other States*, be conclusively deemed to be part of the national waters of that State.

In any other case, it is incumbent upon the State to prove that the claim to treat such an area as part of the national waters of the State is justified by long usage and special geographical configuration, regard being also had to the economic needs of the population or the requirements of national defence."

The third text [1], which is not cited by Gidel, was prepared for at a later meeting of the drafting committee and was presumably framed in the light of the discussions that had already taken place. It reads :

"If, in virtue of uninterrupted usage, a coastal State has exercised exclusive authority over an area of water, surrounded to a very large extent by land or lands belonging to the territory of that State, the area in question shall, *if the authority of the State has been generally recognized and admitted by other States*, be deemed to form part of the inland waters of the State.

If a tacit or express consent, though very general, is not unanimous, the rights of the non-consenting States continue to be reserved."

The conference then broke up and no formula was produced by the sub-committee. But the abortive texts given above make it perfectly plain that the British delegation took the orthodox view that in the international legal system the validity of an exceptional, historic title depends essentially on recognition by other States.

The Norwegian Government in the same paragraph (para. 559) also mentions the intervention in the debate of Sir Ewart Greaves, the delegate for India. It cites his statements that "we do not want too wide a definition but we want it reasonably wide to enable certain claims to be put forward. I venture to think that it may be necessary to take the question of configuration into account and whether a claim on historic grounds can be based on the necessities of defence." The delegate for India then indicated that he had in mind a possible claim to the waters lying between India and Ceylon. It may, however, be observed that Sir Ewart Greaves was only asking that the definition should not be so framed as to shut out *any consideration* of such a *claim*. He visualized all claims being submitted for consideration by an international committee and appears to have assumed that no claim would be valid unless falling within a category recognized by the conference and subsequently endorsed by the committee. Here, again, there is no question of a unilateral claim being valid apart from its recognition by other States.

462. In paragraph 550 of the Counter-Memorial the Norwegian Government draws particular attention to the attitude of the

[1] This text has been found in a contemporary report of the United Kingdom delegation to the Admiralty.

Portuguese delegation at the 1930 Conference. It first cites extracts from the Portuguese reply to the *questionnaire*, the equivocal nature of which, in regard to the question of recognition by other States, has already been remarked (para. 457 above). Certainly, the Portuguese reply emphasizes security and economic considerations as grounds for justifying a claim, but there is a difference between considerations justifying a State in putting forward a claim from the point of view of its own interests and the recognition of that claim in the light also of the interests of other States. The Norwegian Government further relies on the terms of a Portuguese amendment to Basis of Discussion No. 8 and on the language used by M. de Magalhães speaking in the debate as the Portuguese delegate. The amendment would have added to Basis No. 8 precisely the same clause as that which M. de Magalhães had proposed in the Committee of Experts. Of this proposal it will be recalled that Mr. Wickersham, the United States expert, said "it would meet with great opposition" and that Schücking said "it would be, to some extent, dangerous". (See para. 456 above.) The language used by M. de Magalhães in debate (*Minutes of the Second Committee*, pp. 106-107) was also an amplification of the language which had been used by him in support of his proposal in the Committee of Experts and which had entirely failed to persuade his colleagues that his proposal was acceptable. So far as legal authority was concerned, M. de Magalhães relied almost entirely on the views expressed by Judge Drago in the 1910 Arbitration and on observations of Captain Storni at the International Law Association in 1922 which are set out in the Counter-Memorial (para. 550). Captain Storni had also drawn his inspiration from Judge Drago and his remarks and those of M. de Magalhães, so far as they concern the legal basis of historic waters, are vitiated by the fact that neither of the speakers appears to have been aware of the emphasis placed by Judge Drago on the acquiescence of States as a condition of the establishment of an historic title when explaining his point of view in a subsequent article in the *Revue générale de Droit international*. (See para. 443 above.) If Portugal really thought that a unilateral claim is enough it is curious that the language of the Portuguese amendment was in fact expressed in terms of the recognition of claims by other States (*ibid.*, p. 192):

> "or if it is *recognized* as being absolutely necessary for the State in question to guarantee its defence, etc.",

and that M. de Magalhães was strongly in favour of the establishment of an international committee to consider each claim.

463. It has already been mentioned that the Norwegian Government at the beginning of its account of historic waters (para. 540 of the Counter-Memorial) invoked the terms of a United States amendment and the views expressed by the United States delegate,

Mr. Miller, in support of its contention that the acquiescence of other States is not necessary to the establishment of an historic title. These observations were made immediately after the speech of M. de Magalhães and in explanation of the formula proposed by the United States for historic waters, the French text of which is given in paragraph 540 of the Counter-Memorial. In understanding the United States formula it is important to appreciate that it was not intended to provide a general rule of international law in regard to historic waters but simply to save the *status quo* existing at the date of the conference. It was circulating on 25th March as one of five such saving clauses (*ibid.*, p. 197) and its language clearly indicates its purpose :

> "*(c)* Waters, whether called bays, sounds, straits or by some other name, which have been under the jurisdiction of the coastal State as part of its interior waters, are deemed to continue a part thereof.
>
> Charts indicating the line drawn in such cases shall be communicated to the other parties hereto."

The United States amendment thus did not contemplate the creation of any further historic titles after the conclusion of the convention. Mr. Miller first criticized the word "bays" in the phrase "historic bays" as being too narrow and then said of the word "historic" (*ibid.*, p. 107) :

> "*Furthermore, the word 'historic' is an inaccurate word, because it is not only a question of history, it is also a question of the national jurisdiction of the coastal State.* That, I submit, is the question involved in regard to these waters, and the continual use of the expression 'historic bays', with mention of one or two bays here and there in different parts of the world, has led to a great deal of confusion of thought as to the principles which are involved."

Mr. Miller's objection to the word historic was well-founded enough, if a little pedantic. For, where there is other evidence of acquiescence, a title to exceptional maritime territory is good without reference to long usage. What precisely he meant by "a question of national jurisdiction" he never explained. The Norwegian Government contends that the American amendment would have absolved a coastal State from affirmatively proving a "usage" recognizing its exclusive authority over the waters in question. But Mr. Miller does not seem to have contemplated a general validation of unilateral claims. He objected to the proposal for a special committee with power to decide the admissibility of claims on the ground that discussions and disputes concerning claims were matters for governments (*ibid.*, p. 107) :

> "Any question in regard to these matters is, in my opinion, a question which could only arise between governments and could only be discussed by them. Nothing can be done until that discussion has taken place. The point cannot be settled in this convention.

> We have agreed that all these meticulous questions of detail, cannot be settled by this convention or by any committee of this conference. *So far, therefore, as there may be a difference of view between the governments, they must exchange opinions on the subject.* The point cannot be settled by any tribunal to be set up by the convention we are to prepare here.
>
> Accordingly, the second sentence of *(c)* of the United States proposal provides that 'charts indicating the line drawn in such cases shall be communicated to the other parties hereto'."

464. The Greek delegate, the jurist Spiropoulos, strongly objected to the Portuguese proposal and, in general, defended the Basis of Discussion and the proposal for an international office (*ibid.*, p. 108). The Swedish delegate disputed the existence of a general rule for bays and therefore the need for any rule for historic waters. He incidentally stated—quite untruly—that the tribunal in the 1910 Arbitration had refused to admit the principle of historic bays (*ibid.*, p. 109). The tribunal in fact admitted the existence of claims by historic usage but, owing to its decision that the word "bay" in the 1818 Treaty had been used in its purely geographical sense, found it unnecessary to examine the principle. The Swedish delegation then advocated the joint Norwegian-Swedish proposal concerning bays which Gidel condemns as being the negation of all law. This proposal has already been criticized by the United Kingdom in paragraphs 138-139 of its Memorial and in paragraphs 139-142 of this Reply.

465. The Norwegian jurist, Ræstad, as delegate for Norway, naturally supported the Norwegian-Swedish proposal concerning bays. He also, however, had something to say about historic bays (*ibid.*, p. 110) :

> "It has been said that there are historic bays. Let us take the starting-point, I will not say of the British contention, *because it is a very common one, but the contention found in the books. Let us admit that there is an international usage as regards bays.* What principle of existing international law is there to determine that this *international usage*, worthy as it is of being recognized, may be limited to bays ?"

He proceeded to argue that the principle of historic claims must cover intervals between archipelagos and even principles of drawing base-lines. Next he referred to the United States attitude *(ibid.)* :

> "If I understand the arguments of our United States colleague aright, he denies that 'bays' can be historic, but he also wishes to get rid altogether of the conception of an 'historic' claim. *He abides by the* status quo, *and there I agree with him.* I do not think that the codification of international law should have the effect of upsetting the *status quo*, but I will say that all the ground we can wish to cover in the provisions we draw up is contained in the Swedish-Norwegian amendment."

Then, he claimed that the Norwegian-Swedish proposal was more moderate than that of the United States. The gist of the Norwegian-Swedish proposal, it may be remembered, was that the coastal State should be free to fix its own base-lines subject to certain restrictions which, on examination, proved to be illusory. One of these pretended restrictions was the "practice of the State concerned" without regard to acquiescence of other States. In determining whether the Norwegian-Swedish proposal at the 1930 Conference was an expression of existing principles or was something entirely novel, it is useful to recall what Ræstad said in 1913 when he spoke, not as a delegate, but as an independent jurist (*La Mer territoriale*, p. 167 ; see para. above) :

> *"L'important, c'est de savoir quand et comment a eu lieu le consentement exprès ou tacite des nations qui donne à l'occupation ou à l'usurpation la qualité d'un titre de droit."*

And again (*ibid.*, p. 174) :

> ".... un état de choses qui existe depuis longtemps *n'est sanctionné par le droit des gens que si l'existence prolongée de cet état de choses prouve le consentement tacite des nations*".

We may therefore leave aside the Norwegian-Swedish proposal, which referred to base-lines generally and did not really contemplate any law for maritime territory at all. It is, however, worth observing that Ræstad, in the debates, took the line that what the conference was concerned with was simply preserving the *status quo* and that "usage" must relate to *international* usage.

466. One or two delegates, having reiterated their point of view and Schücking having said, on behalf of Germany, that he agreed with the opinion as expressed by Japan, the United Kingdom and Greece, the preceding debate was reviewed with a somewhat caustic humour by the Italian delegate, Giannini. He indicated, with justice, that the whole debate had been very confused and he complained with even more justice that the meeting had not kept in mind the existing international law which they knew (*Minutes of the Second Committee*, p. 112) :

> "We have all studied manuals of international law, but we seem to have forgotten some of our knowledge when we entered this conference. *In the present case, that of very historic bays, we had in mind the legal sense of the word, good or bad, adopted by international lawyers.*"

He then referred to the British, United States and Norwegian-Swedish proposals, being particularly severe on the United States proposal, which, he said, would not only dispose of historic bays but of the whole convention, since the terms of the proposal were so widely framed as to settle nothing. After suggesting that the Communications and Transit Committee of the League of Nations should be asked to study the problem, he continued (*ibid.*, p. 113) :

"As the British delegate said the other day, we must come down to earth a little. Are we prepared to consider the problem of the *historic bays which we already know; that is to say, those to which international custom applies?* If so, then, as the Italian Government stated in its reply, we can face the problem, provided we start from a fundamental principle, namely, *that the number of historic bays must not be increased.*"

467. The outcome of this confused discussion was that the whole matter was simply referred to Sub-Committee No. I with power to consult the technical experts in Sub-Committee No. II. No text resulted, but the form taken by one of the last texts prepared for discussion in Sub-Committee No. I (the text is given in para. 461 above) by no means suggests that the general opinion at the conference was in favour of allowing exceptional claims to maritime territory to be established regardless of their recognition by other States. On the contrary, general opinion in the sub-committee as in the replies of governments seems to have gone in the opposite direction, for a new clause appeared in the last text :

"If a tacit or express consent, though very general, is not unanimous, the rights of the non-consenting States continue to be reserved."

Some may think, with M. Giannini, that the whole discussion of historic waters in the Plenary Committee was far from scientific. Whatever view is taken of the quality of the discussion, it was without any tangible result and did not alter the theory of historic waters as it had been previously applied in international practice and interpreted in the writings of the leading jurists. In point of fact, general opinion at the 1930 Conference, as has been seen, confirmed the traditional concept of historic waters. Even the Norwegian Government concedes, in paragraph 552 of the Counter-Memorial, that an historic title has no meaning without some historic element.

468. The paragraph in the final report of the Committee on Territorial Waters in 1930, which is set out in paragraph 551 of the Counter-Memorial, merely referred to the existence of historic waters as one problem to be solved in connection with the establishment of general rules, emphasizing that no concrete results could be obtained without determining and defining historic rights. The Norwegian Government comments on this paragraph: "La conférence a donc été d'accord pour reconnaître que les *situations acquises* devaient être respectées." This is not, of course, quite the case. The conference did not make its reservation in favour of "*les situations acquises*", but in favour of "*droits* que des États pourraient posséder sur certaines portions de la mer adjacente". It was *existing international rights*—rights already valid internationally through the acquiescence of States—that the conference agreed must continue to be recognized.

Rôle and scope of the theory of historic waters

(Paras. 553-560 of the Counter-Memorial)

Norwegian argument that the theory of historic waters is a supplementary rather than an independent theory

469. The Norwegian Government, in paragraphs 553 and 554 of the Counter-Memorial, outlines its own idea of the rôle played by the theory of historic waters in the law of maritime territory. Time is said to act as a consolidating force in law, but to do so in different ways. It may either operate by itself in isolation, transforming a situation of fact into a situation of law, or it may operate together with other factors. In the latter case the "historic title" is only one of the titles invoked ; it is then merely a supplementary ground confirming conclusions already reached on other grounds. The Norwegian Government illustrates this thesis by saying that, when the territorial character of a given maritime area seems as if it ought to be admitted on various grounds such as geographical configuration, the security of the coastal State or the economic needs of its people, the fact that the coastal State has for a long time effectively acted as a sovereign in regard to that area serves as a practical demonstration of the validity of its pretensions to the area. The long and peaceable exercise of exclusive authority is said then to operate as proof of the State's rights, raising a presumption that this exercise of authority corresponds to a real need and is not an abuse. The Norwegian Government further declares that, although theoretically the passage of time may operate either in isolation or in conjunction with other factors, in practice the latter is much the more common and in regard to maritime territory is probably the only form of historic title that is worth retaining. Thus, according to the Norwegian Government, the theory of historic waters in practice appears more often as a supplementary than as an independent theory.

The United Kingdom Government finds nothing in paragraph 553 of the Counter-Memorial with which it is in fundamental disagreement, although it might express itself slightly differently. No doubt where a claim is supported by cogent factors—in addition to the fact that jurisdiction is claimed and exercised—it is more likely to receive acquiescence and the historic title will be acquired in a shorter time. However, the Norwegian thesis concerning the rôle of the historic element in titles to maritime territory, as set out in paragraph 553 of the Counter-Memorial, is hardly consistent with its general theory that every State may fix the extent of its own maritime territory according to its own view of its legitimate pretensions and without regard to the interests of the community of States. If a State is to be the arbiter of the legitimacy of its

own maritime claims, there is indeed no legal rôle for the passage of time to play at all in this sphere. What can it matter whether a claim is new or old if there is no *external* test by which it has to be judged ? It is, therefore, somewhat strange that both States and jurists should devote so much attention to the theory of historic waters *as a legal ground of title.* If, however, the extent of a State's maritime territory is regarded as a matter of international concern and dependent on recognition either in general rules or by particular consent by reason of the rights of each State in the high seas, then the passage of time has a perfectly intelligible rôle to play in the legitimation of claims and the attention given by States and writers to the subject requires no explanation. The mere existence in international law of historic titles to waters is really inconsistent with Norway's main theory of the law relating to sovereignty over the littoral sea, and that is why Norway, in the paragraphs of the Counter-Memorial preceding paragraph 553, is enforced to endeavour to exclude from historic titles the vital element of acquiescence.

470. The United Kingdom in this Reply has already given its reasons for believing, first, that Norway's general theory of maritime territory is without any basis in law and that under the most fundamental norm of international law the rules governing the extent of maritime territory are grounded in the consent of States (paras. 117-120 above) ; secondly, that the rôle of the theory of historic waters, according both to the precedents and the opinions of leading jurists, is to supply evidence of the implied consent of States where evidence of express formal consent is lacking (paras. 432-436 above) ; and, thirdly, that Norway's distinction between the application of the theory of historic waters in isolation and in conjunction with other factors is without any real meaning (para. 469 above). The United Kingdom Government, for all the reasons which it has previously given, submits that the theory of historic waters plays a distinct and particular rôle in the establishment of maritime territory. Certainly, the rôle played by the historic factor in the law of maritime territory is to set the seal of legality upon exceptional claims. But its rôle is to legitimate not claims which intrinsically are already valid in law but claims which otherwise are intrinsically invalid as exceeding the generally recognized limits of maritime territory.

In consequence the United Kingdom Government cannot see any significance in the fact that, as mentioned in paragraph 554 of the Counter-Memorial, the Norwegian Decree of 1935 purports to be based on geographical considerations and on the alleged "vital interests" of Norway as well as on what are said to be "well-established national titles". The United Kingdom Government submits that the questions at issue in the present case are whether the limits of Norway's internal waters prescribed in the

1935 Decree exceed the generally recognized limits of internal waters and, if so, whether Norway has an international title to such exceptional internal waters. The recitals of the 1935 Decree throw no light on the question whether Norway's title to exceptional base-lines is *well established in international practice and under international law by the express or tacit consent of States.*

Norwegian argument that the theory of historic waters is not limited to bays, with which the United Kingdom agrees

471. In paragraphs 555 to 560 of the Counter-Memorial the Norwegian Government contends that the theory of historic waters is not limited in its scope to historic bays but applies generally to all forms of maritime territory. It invokes in support of its contention, first, the fact that an historic title is not an exceptional juridical concept but is a general principle—and, secondly, extracts from the work of the learned societies and of the 1930 Conference and of Gidel and Hyde. The Hague Codification Conference having failed to produce special conventional provisions by which historic claims to areas of sea are to be determined, the United Kingdom Government agrees with the Norwegian Government that such historic claims continue to be governed by the general rules of international law in which prescription is admitted as a principle of general application. It is in accordance with this view that the United Kingdom has recognized Norway's claim to a 4-mile belt of territorial waters as an exception to the generally recognized rule of a 3-mile belt. The United Kingdom Government therefore admits that historic titles to maritime territory are not confined to historic bays but extend to any waters in regard to which proof can be adduced of an historic title.

Nevertheless, in the view of the United Kingdom Government, geographical considerations are far from being irrelevant in the establishment of a title to historic waters. The legal foundation of any title to maritime territory in excess of the generally recognized limits is, in its view, the consent of States, which may be proved, where there is no formal express assent, by inference from the circumstances of the case and particularly from the exercise of jurisdiction applied internationally for a long period. The geographical circumstances, as has previously been indicated (para. 446 above), may have an important bearing in securing acquiescence and on the reasonableness of inferring in the particular case that other States have acquiesced in the exceptional claim. Maritime States attach the highest importance to their individual rights in the high seas which are expressed in the principle of the freedom of the seas and particularly to their rights of navigation and fishery. It is not, therefore, normally to be expected that States will even contemplate the possibility of a derogation from their rights by an extension of the maritime territory of another State, except where the geographical configuration of the latter's

land territory tends substantially to enclose the waters. It is no accident that the classical precedents concerned bays or that the traditional doctrine was denominated "historic *bays*". It was not until shortly before the Codification Conference that suggestions were made for widening the formulation of the traditional doctrine and even then the Preparatory Committee in its report, in its *questionnaire* and in the text of its Basis for Discussion, only concerned itself with historic bays.

The United Kingdom Government, as has been said, does not dispute that the theory of an historic title to maritime territory has a wider scope than historic claims to bays. It does, however, contend that the consent of States to an exceptional claim may more readily be inferred from purely circumstantial evidence in the case of the enclosed waters of a bay than in other cases. This contention is confirmed by the emphasis placed on the enclosed nature of the waters in the precedents relating to Delaware, Chesapeake and Conception Bays, and to the Gulf of Fonseca. (See paras. 438 and 440-441 above.) It was this consideration which the United Kingdom Government had in mind when in paragraph 142 of its Memorial it raised doubts as to international law recognizing the possibility of establishing a title by usage to treat as internal waters such open waters as are claimed by the Norwegian Government in the 1935 Decree. In this Reply the United Kingdom Government agrees that the theory of historic waters is in principle a theory of general application but it adheres to its opinion that an historic claim to open waters has to be regarded somewhat differently in point of proof from an historic claim to an enclosed bay. In the latter case the existence and extent of the claim, when made, is readily appreciated by other States which, if they do not object over a prolonged period, may reasonably be understood to have given their assent to the claim. But, in the case of open waters the existence and nature of the claim will not readily occur to other States so that in this case it is essential, in the view of the United Kingdom, to establish *both that the existence of the claim has long been notorious and that its extent has long been unequivocally made known to other States.*

472. Since the United Kingdom Government on general grounds agrees that the theory of historic waters is not confined in its scope to historic bays, there is no need for it to discuss the extracts from the work of the learned societies or the 1930 Conference which are cited in the Counter-Memorial to establish this proposition. It is, however, necessary to say a brief word concerning the extracts from Gidel and Hyde in paragraphs 559 and 560 of the Counter-Memorial respectively because of the misleading nature of the comments made upon these extracts by the Norwegian Government.

The Norwegian Government recalls that Gidel, when speaking of coastal archipelagos, said that the theory of historic waters should

have a wide application and drew attention to the wide diversity of situations in coastal archipelagos. It might perhaps have explained that the diversity emphasized by Gidel was between archipelagos where the waters serve "la grande navigation internationale" and those "dont les pertuis constituent de véritables infiltrations vers l'intérieur du pays riverain". It was with reference to this difference between channels leading to inland waters and channels serving international navigation that Gidel used the following words which the Norwegian cites in paragraph 559 :

> "Vouloir donner par un texte général unique la solution de problèmes dont les conditions sont si différentes, c'est poursuivre une tâche irréalisable ; il appartient à l'usage international de procurer, sur la base de la théorie des eaux historiques, la conciliation des différents intérêts en présence" (*op. cit.*, Vol. III, p. 270).

The Norwegian Government claims that in this passage Gidel attributes to usage precisely the same rôle as that attributed to it in the Norwegian Government's thesis in paragraph 553 of the Counter-Memorial. It implies that Gidel considered long usage merely to operate as a confirmation of a state of thing already legally valid. This complete misrepresentations of Gidel's views is achieved only by paying no attention to what he said when he was dealing specifically with historic waters. Gidel's views concerning historic waters have been explained earlier (paras. 432-433 above) and here it is enough to recall a brief extract from his chapter on historic waters (*op. cit.*, Vol. III, p. 651) :

> "La consécration de ces prétentions ne peut dériver—en l'absence d'organes ayant reçu formellement qualité à cet effet et investis expressément par chacun des États intéressés d'un pouvoir de décision — *que de l'acquiescement international ; c'est l'usage prolongé qui, généralement, en fournira la manifestation ; et telle est la part de vérité que contient le mot « historiques »....*"

The passage from Hyde which is set out in paragraph 560 of the Counter-Memorial merely emphasizes, as the report of the Committee on Territorial Waters in 1930 emphasized, that the existence of larger historic claims is one of the major difficulties in codifying the general rules of international law concerning maritime territory in a convention. It may, however, be observed that Hyde in the passage cited only regarded larger claims *which have previously met with no opposition* as constituting an obstacle to codification.

Proof of an historic title

(Paras. 561-570 of the Counter-Memorial)

The burden of proof is on Norway

473. The Norwegian Government, in paragraph 561 of the Counter-Memorial, while disputing the contentions of the United

Kingdom Government in regard to the conditions and nature of the proof of an historic title, agrees that the burden of proof lies upon the State which invokes the historic title. This admission that the burden of proof lies upon the claimant State was only to be expected in view of the abundant authority to that effect. The rôle of the historic element being to validate what is an exception to general rules and therefore intrinsically invalid, it is natural that the burden of proof should so emphatically be placed upon the coastal State. Just as the very existence of the theory of historic waters imperatively demonstrates the existence of general limits upon maritime territory, so also it demonstrates that the rôle of the historic element is to validate a claim that otherwise would be invalid.

474. In paragraph 562 of the Counter-Memorial the Norwegian Government refers to the fact that the United Kingdom in paragraph 143 of the Memorial contended that the principle of the freedom of the seas places a strict burden of proof on the coastal State to establish an historic title to exceptional maritime territory and cited a passage from Gidel in support of its contention. The Norwegian Government claims that it has demonstrated the error of this contention and that the passage from Gidel concerning the dominance of the freedom of the seas does not bear the meaning attributed to Gidel's words. The United Kingdom Government, in paragraphs 220-221 of this Reply, has refuted this claim and has shown that the meaning of the passage in Gidel is precisely that which is attributed to it in the Memorial. But in any case the passage from Gidel, the meaning of which the Norwegian Government had previously sought in paragraph 285 of the Counter-Memorial to say had been misrepresented by the United Kingdom Government, did not concern historic waters but was the following statement made with reference to denying territorial waters to permanently dry rocks that are incapable of use :

> "L'idée qui domine le droit de mer est l'idée de la liberté de l'utilisation licite et normale des espaces maritimes ; toute restriction inutile à cette liberté doit être évitée." (*Op. cit.*, Vol. III, p. 674.)

The passage cited in paragraph 143 of the Memorial by the United Kingdom was a different passage, taken from Gidel's chapter dealing specifically with historic waters (*op. cit.*, Vol. III, p. 632):

> "En ce qui concerne le fardeau de la preuve, il pèse sur l'État qui prétend attribuer à des espaces maritimes proches de ces côtes le caractère, qu'ils n'auraient pas normalement, d'eaux intérieures. C'est l'État riverain qui est le demandeur dans cette sorte de procès. *Ses prétentions tendent à un empiétement sur la haute mer ; le principe de la liberté de la haute mer, qui demeure la base essentielle de tout le droit international public maritime*, ne permet pas de faire peser le fardeau de la preuve sur les États au détriment desquels la haute mer sera réduite par l'attribution de certaines eaux en propre à l'État qui les réclame comme telles."

This passage is quite explicit both as to the burden of proof lying on the coastal State and as to the freedom of the seas being the essential basis of all the public international law of the sea. It is, therefore, astonishing that the Norwegian Government in paragraph 562 of its Counter-Memorial should say not one word about this passage which is addressed to the matter immediately under consideration but should seek to dispose of the support given by Gidel to the United Kingdom's contentions by an oblique reference to quite another passage addressed to a different subject-matter. In fact, as already said, even this other passage fully supports the United Kingdom's contention in regard to the dominance of the principle of the freedom of the seas.

475. The Norwegian Government, while agreeing in paragraph 563 of the Counter-Memorial that a State cannot excuse its breaches of applicable rules of international law by merely invoking the provisions of its own municipal law, contends that this well-known rule is without any relevance in the present case. It insists that the case before the Court does not concern the execution of Norway's international obligations but their existence. This contention over-simplifies the issue before the Court. Certainly, if the Norwegian Government is entitled, as it maintains, to fix the boundaries of the high seas opposite the coasts of Norway by its own sole, unilateral decision, the rule invoked by the United Kingdom in paragraph 145 of the Memorial has no relevance in the present case. If, however, the determination of the boundaries of the high seas is a matter controlled by international law, as the United Kingdom Government insists that it must be, then the execution of Norway's obligations under international law is the question raised by the pleadings in this case. When Norway arrests a foreign trawler outside the generally recognized limits of maritime territory and, therefore, apparently on the high seas, she cannot properly say that no question is raised of the performance of Norway's international obligations. She is called upon, if she can, to show that she has a particular title to exercise jurisdiction in the area in question. Otherwise, the freedom of the seas is an empty principle devoid of legal content.

The submission of the United Kingdom Government is that, in justifying such an arrest and in establishing a title to exceptional maritime territory, Norway is not permitted simply to plead the provisions of her own municipal laws but must adduce evidence of acts *effective in international law* to give her a title to exceptional maritime territory. Municipal decrees and other acts of municipal authority have no higher significance in an international tribunal than as relevant *facts* which show an exercise of State authority *but which may or may not be sufficient to establish an international right* to exercise the State authority. Whether or not municipal decrees and other acts of State authority in fact provide evidence

of a title valid in international law necessarily depends not only upon the nature of the municipal acts *but upon the rules of international law*. In an international tribunal the question in each case must always be : What interpretation is placed upon the municipal acts by international law ?

The question whether assertion of authority by one State is sufficient to establish an historic claim or whether proof of acquiescence by other States is also required

476. The difference of view between the United Kingdom Government and the Norwegian Government concerning the application to this case of the maxim that provisions of municipal law are not a sufficient excuse for breaches of international obligations is merely one aspect of the fundamental difference between them concerning the whole nature of the restrictions imposed by international law on claims to maritime territory. The Norwegian Government, in effect, maintains that the assertion of State authority in regard to a given area of sea is both essential and sufficient to establish a title to maritime territory. The United Kingdom Government in effect maintains that the assertion of State authority, though essential to the establishment of a claim to maritime territory, is not sufficient and that, the rights of other States being affected, their acquiescence is required. The remarks of the Norwegian Government in paragraph 564 of the Counter-Memorial concerning the rôle played by acts under municipal law in the formation of an historic title and its remarks in subsequent paragraphs concerning the acquiescence of other States in an historic claim are really addressed simply to this fundamental divergence of view between the two Governments.

An historic title to an area of sea is acquired by prescription, not by occupation

476 A. In paragraph 564 of the Counter-Memorial the Norwegian Government says that the exercise of authority by a coastal State under municipal law occupies an essential place in the theory of historic waters. It also says that the peaceful and continuous exercise of authority by a coastal State through acts under internal law in time acquires international validity, becoming part of the international juridical order. These statements, in the view of the United Kingdom Government, contain only half the truth.

Where the claim of title is to land which is a *res nullius* and in which, therefore, other States possess no legal interest, the mere peaceful exercise of State authority in regard to the land suffices to establish the occupation. The *res nullius* is in law susceptible of occupation by the first comer and the exercise of State authority in regard to the land will be an exercise of exclusive State authority creating an appropriation binding on other States. In these cases, the sole question is whether the claimant State can establish, to use

the words of the Permanent Court in the *Eastern Greenland case* (A/B 53, p. 46), "l'intention ét la volonté d'agir en qualité de souverain, et quelque manifestation ou exercice effectif de cette autorité". The long period of the exercise of State authority in these cases merely serves as confirmatory evidence of an occupation, which is equally valid without the long period, provided that the occupation already exists at the "critical date", namely, the date when another State seeks to assert a rival authority. (See the *Eastern Greenland case* (A/B 53, p. 45).) No doubt the position will be much the same in a case where the dispute concerns a boundary the facts of which are confused or in a case where, as in the *Island of Palmas Arbitration*, the earlier status of the territory is obscure. In these classes of case the acquiescence of other States in the exercise of State authority upon which the claim of title is founded is irrelevant. The acts of State authority do not touch the rights of other States and the title is valid *ab initio*. The acts of State authority are thus *both essential and sufficient* to establish the title.

477. Where, on the other hand, the claim is to waters of the sea which are not *res nullius*, the position is quite different. It matters not whether the legal status of the high seas be considered to be a *res communis*, as is the opinion of Sir Cecil Hurst, or whether it be considered to be a *res sui generis*, as is the opinion of Gidel. The legal incidents of the régime of the high seas are well understood. No one disputes that each and every State has both a right to claim for its nationals rights of navigation and fishing in the high seas and a competence to exercise exclusive jurisdiction over all vessels of its flag on the high seas. Hence, a claim to exclusive sovereignty over areas of sea beyond the generally recognized limits of maritime territory directly touches and derogates from the existing rights of other States. Such a claim is not like a claim to a *res nullius* (occupation) because it interferes with established rights. It is a case of prescription and is open to the challenge that in origin it is "illegal and invalid", as the Permanent Court said of the attempted Norwegian occupation of Eastern Greenland (A/B 53, p. 64), because at the critical date Eastern Greenland was not *res nullius*. Where prescription is involved, it is not sufficient to prove the exercise of State authority by acts under municipal law. It is necessary to show both a long and continuous exercise of State authority and also acquiescence in that exercise by other States.

The Norwegian Government, in paragraph 564 of the Counter-Memorial, while acknowledging that an historic title and a title by occupation are in some respects different, draws attention to the opinion expressed by Sir Eric Beckett in 1934 (*Recueil des Cours*, 1934, Vol. IV, p. 221) that it is sometimes difficult to distinguish clearly between prescription and occupation in the jurisprudence of international tribunals. Sir Eric Beckett was dealing particularly with the judgments in the *Eastern Greenland* and *Island of Palmas*

cases and pointed out that the tribunals concerned did not specify to what extent the doctrine of prescription was applicable in these cases. However, he stressed that the essential difference between occupation and prescription is that the former concerns territory which is *res nullius*, but the latter concerns territory which is already under the sovereignty of another State [1].

As has been explained, where the territorial claim is to the sea and is in opposition to existing rights of the community of States and, therefore, not legal in its origin, the case is one of prescription and not of occupation. The well-known passage from Judge Huber's award in the *Island of Palmas case*, which is cited in paragraph 564 of the Counter-Memorial, was directed to territorial claims to *land* and lays down no more than that the peaceful display of State activity is essential both to the establishment and maintenance of a territorial title. The Norwegian Government, by omitting significant passages and inverting the order of some of the sentences, gives a somewhat misleading impression of what Judge Huber said. This distinguished judge, in emphasizing that continuity in the exercise of State activity is requisite for the *maintenance* of a title even after it has once been established, used the following language (*American Journal of International Law*, Vol. XXII (1928), p. 876) :

> "It seems, therefore, natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty *(peaceful in relation to other States)* is as good as a title. The growing insistence with which international law, ever since the middle of the eighteenth century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right. If the effectiveness has, above all, been insisted on in regard to occupation, this is because the question rarely arises in connection with territories in which there is already an established order of things. Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them, so, too, under the reign of international law, the fact of peaceful and continuous display is still *one* of the most important considerations in establishing boundaries between States."

Certainly, Judge Huber said display of State authority is one of the most important considerations in establishing the boundaries of

[1] See *Recueil des Cours* (1934), IV, p. 248 :

"La « prescription » ressemble à l'« occupation » en ce qu'elle est une manière d'acquérir un titre originaire à la souveraineté territoriale (par opposition aux titres dérivés), et aussi en ce qu'elle comporte les deux éléments de l'*animus* (intention de s'approprier) et du *factum* (possession et administration effective). Elle diffère de l'occupation en ce qu'elle est un moyen d'acquérir un territoire qui n'est pas *res nullius*, mais qui est placé sous la pleine souveraineté d'un autre État."

States, but he did not say that it was the *only* consideration. Moreover, he spoke only of a display of sovereignty *peaceful in relation to other States*. But it is unnecessary to expatiate on the views of Judge Huber because on the previous page of his award (*op. cit.*, p. 875) he indicated clearly that he had not got maritime territory in mind:

> "Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. The special cases of the composite State, of collective sovereignty, etc., do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated. Under this reservation it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances, to several States, to the exclusion of all others. The fact that the functions of a State can be performed by *any* State within a given zone is, on the other hand, *precisely the characteristic feature of the legal situation pertaining in those parts of the globe which, like the high seas* or lands without a master, *cannot* or do not yet *form the territory of a State.*"

Indeed, he seems, in the last sentence, to have thought that attempts to appropriate areas of the high seas are *illegal and wholly invalid*, for he said that they cannot form the territory of a State.

478. The Norwegian Government, in paragraphs 565-568 of the Counter-Memorial, repeats in summarized form its account of the precedents of State practice, the work of the learned societies and the work of the Codification Conference relating to historic waters and again claims that this evidence does not indicate that the acquiescence of other States is a necessary condition of the validity of an historic title to maritime territory. The Norwegian arguments on this matter have already been examined at length in paragraphs 438-468 above, to which the attention of the Court is invited here in connection with the Norwegian thesis that State activity is alone essential to an historic title. It was there shown that, on the contrary, the precedents, the opinions of jurists and the work of the Codification Conference strongly confirm that the relevance of an historic title is to raise an inference of the acquiescence of States in a claim which is exceptional and which, apart from such acquiescence, would be illegal and invalid. At the same time, the United Kingdom Government emphasizes that it does not rely only on this evidence to establish its contentions, but maintains that its contentions follow inevitably from the most fundamental principles of international law, under which the international legal order is essentially derived from the consent of States.

Extent to which acquiescense must be general; effect of mere protests

479. The Norwegian Government, in paragraph 569 of the Counter-Memorial, cites a passage from Gidel's chapter on historic waters, in which he says that it is particularly difficult to lay down by any general formula the conditions which a usage must satisfy in order for it to qualify as an established usage. That is perfectly true for the very reason that an historic claim depends on the proof of two essential elements of which one is the acquiescence of States in the claim—the other, of course, is the exercise by the claimant State of State authority over the area. Being a matter of evidence each case largely depends on its own facts but, as Gidel himself insisted, the ultimate criterion of a valid title is its acceptance by other States. That this is his view appears clearly in the two points to which he draws particular attention, namely, whether the *recognition* of the usage need be absolutely universal and whether it need be express. These two points will now be examined.

Gidel says that it is impossible to require that recognition of the usage should be absolutely universal and that a single protest emanating from a single State will not invalidate the usage. The United Kingdom Government does not in general dissent from this proposition so long as it is kept in mind that it relates strictly to the acquisition of title not by mere usage but by *prescriptive* usage. In other words, Gidel's proposition relates to the validation in the international legal order of a usage which is intrinsically invalid by the continuance of the usage over a long period of time. Gidel's standpoint in regard to the effect of the passage of time is perfectly clear as has been explained above (paras. 432-434). He regards the long continuance of the usage as relevant to prove the acquiescence of States and thereby the establishment of the usage as part of the international legal order. The reason is that what is involved in the prescriptive establishment of an otherwise invalid usage is essentially the abandonment by other States of their rights. This abandonment may either be proved by express assent or may be inferred from long inaction. It is in the light of these basic considerations that the effect of protests by individual States has to be estimated.

Thus, in the view of the United Kingdom Government, it is only true to say that the protest of a single State will not prevent an exceptional usage from becoming lawful by prescription *indefinitely*. States are entitled up to a point to place their reliance on the general rules of international law by which the usage is unlawful and are not bound always to register their immediate objection to unlawful acts of State authority when these do not directly touch their own interests. They are entitled up to a point to put their trust in their right to invoke the general rules of international law when the occasion arises. Nor can States be called upon to maintain a vigilant watch on the statute books of other States to detect at

once usurpations of their own rights under general international law. This point was strongly emphasized in 1863 by Secretary Seward in the same note to the Spanish Minister concerning the territorial waters of Cuba, from which passages have previously been cited in other connections (paras. 117 and 321 above). Speaking of the Spanish claim to a 6-mile maritime belt, he said (Moore, *Digest*, Vol. I, p. 710):

> "The statutes which Mr. Tassara has recited are therefore regarded as showing what certainly is by no means unimportant, that Spain at an early day asserted, and has on different occasions since that time reasserted, in her domestic legislation, a claim to an exceptional jurisdiction of 3 miles in addition to the 3 miles of jurisdiction conceded by the law of nations.
>
> A claim thus asserted and urged must necessarily be now respected and conceded by the United States, *if it could be shown that on its being brought to their notice they had acquiesced in it, or that on its being brought to the notice of other Powers it had been so widely conceded by them as to imply a general recognition of it by the maritime Powers of the world. It is just here, however, that the claim of Spain seems to need support. Nations do not equally study each other's statute books, and are not chargeable with notice of national pretensions resting upon foreign legislation.*"

In short, it is only when an exceptional usage has acquired a certain international character through long continuance that other States will be presumed to have knowledge of the usage and to have abandoned their right to object to its continuance. And it is only then when the usage has not merely continued a long time, but has also been expressly or by inference acquiesced in by most States, that a State, which has indeed objected but has confined its objection to a mere protest, may be held precluded from continuing to object to what has become part of the established international order.

480. Gidel also expressed the opinion that all protests should not be treated as being on the same plane but that they should be distinguished according to their nature and to the geographical situation of the protesting State in relation to the waters claimed. This proposition has equally to be read in the light of the conditions under which a prescriptive usage may be established. The words used by Gidel are "geographical situation" but equally legitimate maritime interests of a protesting State would be material in assessing the weight to be attached to the protest. Moreover, all States are affected by the establishment of a precedent contrary to the generally recognized rules of international law. Consequently, although the geographical propinquity of a protesting State to the area affected by the usage may have a certain significance and its maritime interests a still greater significance, neither of these factors can be regarded as being decisive of the weight to be attached to the protest. Far more important is the *nature* of the protest and the

action taken by the protesting State to safeguard the rights which it conceives to have been infringed. The essence of the prescriptive effect of the passage of time is to show that States by their inaction over a long period have acquiesced in an infringement of their rights which they were entitled to resist. The protest of a single State, in the view of the United Kingdom Government, is effective to prevent the establishment of a prescriptive title precisely to the extent that the State takes all necessary and reasonable steps to prosecute the available means of redressing the infringement of its rights.

481. There is all the difference in this connection between a mere paper protest by a State through the diplomatic channel and the active prosecution of its objection through diplomatic negotiations, the arrangement of a *modus vivendi* and ultimately the bringing of the matter—or the willingness to bring it—to contestation before an international tribunal. A diplomatic protest is by itself effective to manifest the objection of the protesting State and for a certain period reserve its rights. But, if the usage which is protested against is repeated and is acquiesced in by other States, then the question may ultimately be asked why the protesting State, if it attaches importance to its rights, has not taken further steps to bring the matter to contestation and settlement. In other words, a State which contents itself with paper protests and does not use the available means of pressing its objections may after a certain lapse of time be debarred from further questioning what has become part of the established legal order. The principle by which the protesting State's rights become barred by lapse of time may be said to rest either on a presumption that by its continued inaction it has in fact acquiesced in the changed situation or, more simply, on the maxim *quieta non movere* as appears to be the opinion expressed by Professor H. Lauterpacht in the passage cited in paragraph 570 of the Counter-Memorial.

482. The United Kingdom Government submits that it is in the above sense that the protest of a single State is ineffective to keep alive its right to object to the assertion of authority by another State over areas of sea which under the general rules of international law form part of the high seas. Having regard to Gidel's view that the theory of historic waters is founded upon the acquiescence of other States, it is in that sense that he also must be understood as disallowing the protest of a single State from constituting an indefinite bar to the establishment of an historic title. Indeed, just as prescription itself is a general principle of law found in most municipal systems of law, so too it is a general principle in these systems that prescription does not operate against a claimant who is taking active steps to enforce his rights. The reason is the obvious one that, while a claimant

is actively seeking to put an end to the infringement of his rights, it is impossible and unjust to raise a presumption of his acquiescence.

483. The United Kingdom Government is thus at one with the Norwegian Government in accepting the application in international law of the principle *quieta non movere* or, as it was expressed in the *Grisbadarna case*, the principle that "a state of things which actually exists and has existed for a long time should be changed as little as possible". It would, however, do no service to the stability of the international legal order if international law were to permit a state of things unlawful in origin to be validated by the principle of prescription before a reasonable period had elapsed after the claimant had ceased to employ the available means to redress the unlawful act. A few writers, such as Hyde (*International Law*, Vol. I, p. 387), even consider that a diplomatic protest may be enough indefinitely to interrupt the running of time against a claimant. The United Kingdom Government, like Gidel and the Norwegian Government, thinks this view to be unreal and it considers the application of prescription in international law to have been correctly stated by Verykios in the following sentences in his book *La Prescription en Droit international public* (1934, p. 101):

> "Mais une protestation pure et simple par voie diplomatique suffit-elle à interrompre la prescription? En principe oui, mais il faut pour cela que la protestation soit suivie d'une contestation et d'un règlement de la question; sinon on a vu qu'un État pourra protester indéfiniment, s'il le fait sans résultat il ne pourra pas interrompre l'effet du temps."

484. In the present dispute, the United Kingdom maintains that at the date when the Norwegian Government began in the present century to assert authority over foreign trawlers beyond the generally recognized limits of maritime territory, she protested and has since actively sought by diplomatic negotiations and otherwise to put an end to Norway's encroachment upon the high seas. Moreover, when those negotiations failed, she has with promptness brought her complaint before the International Court for contestation and settlement. This matter will be further discussed later in examining the extent to which Norway, on the evidence submitted by her in the Counter-Memorial, has, in fact, established a claim to an historic title.

Further considerations relative to the acquisition of a title to areas of sea by prescription

484 A. The Norwegian Government does not discuss, as Gidel does not discuss, the length of the time which must pass before a usage can be said in international law to have created an historic title to maritime territory. Different views have been expressed by jurists, but the United Kingdom Government in the circum-

stances of this case considers it unnecessary to examine the question. The United Kingdom Government, for the reasons given in Part I of this Reply, denies that—apart from a claim to fjords and sunds—there was in existence any special Norwegian claim or usage concerning enclosed waters or base-lines, which was applied in the area covered by the Royal Decree of 1935, before that very year. It further denies that, even if there were such a Norwegian claim affecting this area, it was ever sufficiently published, defined or applied to provide the basis of a prescriptive title against other States. During the present century, from the first moment that the Norwegian Government sought to assert exceptional rights against foreign fishing vessels, the United Kingdom Government has not only protested but has actively sought to bring the dispute to settlement and finally to contestation before the Court. Consequently, in the submission of the United Kingdom Government, there can be no question in this case of lapse of time prejudicing its right to challenge the claim of the Norwegian Government to assert the base-lines of the 1935 Decree against other States.

485. Another point, which is touched on by Gidel in the passage cited in paragraph 569 of the Counter-Memorial, requires to be mentioned. Gidel there says: "Du fait qu'une baie déterminée a été reconnue comme propre à l'État riverain qui la réclame comme « historique » il ne résulte pas *a contrario* que d'autres baies appartenant au même État ne puissent bénéficier du même statut en l'absence de manifestations spéciales de la part des autres États quant à l'usage les concernant." The United Kingdom Government agrees that the express recognition of an historic title to one bay—as, for example, in connection with the occurrence of an incident in the bay—does not necessarily mean that other bays of the same State which have not been expressly recognized are not also the subject of an historic title. The United Kingdom Government, as already explained (para. 436 above), does not maintain that express recognition is a necessary condition of the establishment of an historic title. It maintains rather that in every case the question is whether the acquiescence of other States may properly be deduced from their action or from their inaction in face of the exercise of exclusive State authority by the coastal State in regard to the particular waters concerned.

At the same time, it is equally true that the fact that a particular bay, or a particular part of coastal waters has been expressly or impliedly recognized as subject to an exceptional title does not mean that an exceptional title is also recognized to other maritime areas belonging to the same State. Indeed, the presumption, if there is one, is rather the other way. The very fact that there is evidence in regard to a particular defined area from which it is reasonable to infer the acquiescence of States in a claim to

that area, strongly suggests that they understand the exceptional claim to be limited to the defined area, and that their acquiescence in the exceptional claim is also so limited. When a State specifically defines its claims in particular areas, as did Norway in the 1869 and 1889 Decrees, the most that can be inferred from the subsequent inaction of other States is that they acquiesce in the claims to those particular areas. Consequently the onus is upon Norway when it seeks to interpret the acquiescence of other States in its claims of 1869 and 1889 as being an acquiescence in certain principles which Norway was then free to extend to other areas. In paragraphs 33-39 above the United Kingdom has given reasons for holding that such an interpretation of these decrees is precluded. However, Norway does appear to argue for this interpretation and that is no doubt why, in the present case, the Norwegian Government has sought to establish a Norwegian system of drawing base-lines in accordance with the 1869 and 1889 Decrees. It has already been demonstrated in Part I of this Reply (paras. 33-39), that the alleged establishment of a Norwegian system of drawing base-lines by the 1869 and 1889 Decrees is in fact a myth. But the United Kingdom Government also submits that, as a matter of law, it is impossible for Norway to establish a prescriptive title to such an alleged system unless she can show not only that the 1869 and 1889 Decrees were in fact the application to the coasts off Søndmøre and Romsdal of an exceptional system which, in fact, was applied everywhere on the Norwegian coast, but that other States ought also to be held as to have so understood the decrees and to have acquiesced in them on that basis. States cannot be said to have acquiesced in claims of whose existence they could not reasonably be expected to have any understanding.

Acts of private individuals are not sufficient to give a title by occupation to the State whose nationals they are

486. The United Kingdom Government, in Part I of this Reply (para. 17), has already drawn attention to the fact that the activities of private individuals are not sufficient to give a title by occupation to the State whose nationals they are. In the *Island of Palmas case* (*American Journal of International Law* (1928), Vol. 22, p. 867) Judge Huber in one passage spoke of the principle that "continuous and peaceful *display of the functions of State* within a given region" isa constituent element in territorial sovereignty (p. 876). In another passage he spoke of the Netherlands' claim to sovereignty as being founded "essentially on the title of peaceful and continuous display of *State authority* over the island" (pp. 907-908). The latter passage was mentioned with approval by the Permanent Court of International Justice in the *Eastern Greenland case* (A/B 53) and the Court, in a passage referred to in paragraph 564 of the Counter-Memorial, went on to say :

> "it may be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to *act as sovereign, and some actual exercise or display of such authority*" (pp. 45-46).

It is thus clear that it is acts of State sovereignty, not acts of private individuals, which may provide the foundation for a title to territorial sovereignty. If this is true of the acquisition of sovereignty over land which, as *res nullius*, is open to occupation by any State, *a fortiori* is it true of the acquisition of sovereignty by prescription over the sea whose waters are not susceptible of simple occupation because they are not *res nullius* but are subject to rights exercisable by each and every State. International law cannot permit the acts of private individuals to create a title to sovereignty in derogation of the existing rights of States. In other words, fishing by Norwegian fishermen in waters outside the generally recognized limits of maritime territory, even if proved from prehistoric times, is no evidence of, or basis for, Norwegian sovereignty over the waters concerned. As was pointed out in Part I (para. 35), the Norwegian Minister of the Interior, in his Exposé des Motifs for the 1869 and 1889 Decrees, fully recognized that immemorial user of fishing grounds did not permit the extension of maritime territory beyond the limits allowed by international law.

487. The distinction between land, which is *res nullius*, and the sea, which is subject to the rights of other States, affects claims to sovereignty in another way. Acts of State authority manifested in regard to an area of land will always be held to constitute an assertion of *exclusive* State authority over the land because in the case of land it is of the essence of sovereignty that it should be exclusive of the sovereignty of other States (apart from special cases such as a condominium). The position is, however, quite different in the case of acts of State authority manifested in regard to areas of sea. Each State under international law has a competence to regulate the conduct of its nationals on the seas whether within its own waters or upon the high seas. Accordingly, the mere fact that a State exercises authority over its own nationals beyond the generally accepted limits of maritime territory does not indicate that it claims exclusive sovereignty as against other States. It is to be presumed that a State intends to act within the limits of its recognized competence rather than outside them. Consequently, the exercise of authority by a State over its own nationals beyond the generally accepted limits of maritime territory does not by itself form the basis for an historic, prescriptive claim. It is common for States to regulate national fisheries beyond the limits of their maritime territory without any encroachment upon the rights of other States. Legislation regulating methods of fishing in a given area thus does not provide

evidence of an historic title unless it indicates an exercise of general sovereignty in the area to the exclusion of the authority of other States. Consequently, Norwegian fishery regulations, if they are to constitute evidence of an historic title, must be shown to be an exercise of a general and exclusive sovereignty over the areas concerned.

The extent of Norway's historic title

(Paras. 571-575 of the Counter-Memorial)

Geographical, economic and security considerations

488. The Norwegian Government, in paragraphs 571-573 of the Counter-Memorial, outlines the reasons why, according to its view, the theory of historic waters applies to the waters delimited as Norwegian maritime territory in the Royal Decree of 1935. Referring to the material contained in Part I of the Counter-Memorial and in Annex 3 *(The Principal Facts)*, the Norwegian Government argues that (1) geographical, (2) economic, and (3) security considerations justify the alleged Norwegian system of maritime territory and that in addition historical considerations lend every support to the system.

The United Kingdom Government, in the first place, maintains that the presentation in Part I of the Counter-Memorial of the relevant geographical and economic facts, upon which Norway especially relies to justify her exceptional claim, requires to be corrected in important particulars as has been shown in paragraphs 5-10 of Part I of this Reply. In the second place, it maintains that the geographical, economic and security considerations invoked by Norway do not in any case lead to the conclusion that all the maritime territory delimited by the Royal Decree of 1935 should naturally be regarded as Norwegian waters and it denies that other States are called upon to acquiesce in the whole of Norway's exceptional claim.

The United Kingdom Government cannot accept the contention in paragraph 571 of the Counter-Memorial that the intricate configurations of the Norwegian coast with its fringing islands, islets and reefs gives to *all* the waters delimited by the 1935 Decree "une unité qu'on ne pourrait juridiquement briser qu'en fermant les yeux à la réalité". Nor does it accept the statement in the same paragraph that geography makes *all* these waters an accessory of the land and subjects them *all* to the sovereignty of Norway. Geographical facts are, of course, relevant in determining what area of maritime territory is, in law, accessory to the land. They are the facts upon which the general rules of international law governing the delimitation of territorial waters operate. But the legal relevance of geographical facts is not established merely by using a picturesque phrase such as "le dessin tourmenté de la bordure continentale" or by referring to the "skjærgaard" as "la multitude des îles, des îlots, des récifs qui

parsèment la mer adjacente". It is not the simple existence of curvatures in a coast or of islands off a coast that influences the delimitation of its maritime territory. It is the configuration of the land, whether a continuous line of land or consisting of broken island fringes, that may bring areas of sea within the territory of a State. In law it is the tendency of the land or lands to enclose the sea that gives relevance to the geographical facts.

489. The United Kingdom Government does not dispute that the particular configurations of the Norwegian coast entitle Norway even under the general rules of international law to treat substantial areas of sea as internal waters. Nor does it dispute that these particular configurations are relevant in determining whether or not a Norwegian title to areas beyond the limits allowed under the general rules has been established as an exceptional historic title. For such an exceptional title can only be founded on the acquiescence of other States and it is where the configuration of the land tends to enclose areas of sea that the acquiescence of other States in a larger claim may more readily be inferred from the absence of any reaction to the claim. What the United Kingdom Government is disputing in the present case is the attempt of the Norwegian Government in the Royal Decree of 1935 to delimit Norwegian maritime territory without any regard to the configuration of Norway's land territory and without any regard to the closed or open character of the waters concerned.

The Royal Decree of 1935 is not a natural consequence of the geography of Norway

490. The United Kingdom Government does not contest that Norway is entitled in determining the configuration of the Norwegian coast to take into account not only the land of the main coast but the islands, islets and reefs [1] off the main coast. Such is its understanding of the claim made in the 1812 Rescript and it accepts the fact that the islands, islets and reefs [1] are part of Norway. What the United Kingdom Government does contest is that, when the totality of Norway's land territory has thus been determined, the Norwegian Government should attempt to delimit Norwegian maritime territory without any regard to the resulting configurations. The Norwegian Government in paragraphs 442 to 453 of the Counter-Memorial argued at length in favour of an "outer coast line" theory and in paragraphs 454 to 470 in favour of a theory of the unity of archipelagos. The United Kingdom Government in paragraphs 305-364 of this Reply has given its reasons for rejecting these arguments. But the importance of these arguments is not in any case very great for the purpose of the present case, since, *even if these arguments were accepted*, the Norwegian Government would still have

[1] Reefs which submerge at high tide may only be taken into account if they lie within 4 miles of dry land. (See paras. 101-108 of the Memorial.)

no title to disregard altogether the configuration of its territory; and that is exactly what the Royal Decree of 1935 does. There is no obvious reason why the configuration of a mainland shore should be of great importance in determining the extent of maritime territory attaching to it under international law, but the configuration of an "outer coast line" be of no importance at all. In fact, as can be seen from the charts, the base-lines of the Royal Decree of 1935 take no account of the configuration of Norway's "outer coast line".

491. The essence of the United Kingdom Government's complaint against the base-lines drawn in the 1935 Decree is in fact that the Norwegian Government has used the physical peculiarities of the Norwegian coast as a mere pretext for attempting to appropriate the maximum possible area of maritime territory and has paid no attention to the configuration of the land, not even to that of the "skjærgaard" or to the enclosure of the waters by the land, whether mainland or islands. Thus, even if it be granted, as the United Kingdom Government does grant, that Norway has an historic title to fjords, the Norwegian Government has not drawn the base-lines of the 1935 Decree across the actual headlands of the fjords. In many cases it has drawn the enclosing lines to seaward of the geographical entrances to the fjords. Examples of this treatment of fjords eastward of North Cape are given in paragraph 124 (iii) of the Memorial, but it is equally true westward of North Cape, where the indentations result from island fringes. The 1935 Decree does not draw the base-lines across the natural arms of the indentations formed by the islands. A conspicuous example is between points 20 and 21 of the blue line which are shown in chart 5 of Annex 2 to the United Kingdom's Memorial, where the base-line is 44 miles long and passes far to seaward of numerous indentations. The matter is there made worse by the fact that point 21 is a rock which submerges at high tide, *is awash at low tide* and stands not less than 8 miles from any permanently dry island. States are familiar with the notion of an historic bay where the waters are claimed to be enclosed by the headlands. They are not familiar with, and cannot be presumed to acquiesce in, claims, such as those advanced in 1935 by the Norwegian Government, which purport to enclose areas of sea by imaginary lines not drawn by reference to the enclosing arms of any land, even fringes of islands, but by arbitrary selection of extreme points.

492. The United Kingdom Government therefore rejects the assertion of the Norwegian Government in paragraph 571 of the Counter-Memorial that the alleged "Norwegian traditional system" of drawing base-lines is a natural consequence of the geography of Norway. The system, which is not traditional but first found expression in the 1935 Decree, is far from being a natural consequence of the geographical facts. It may well be a natural consequence of the heavy indentation of Norway's land territory that the base-line of her maritime territory frequently departs from the tide mark and

becomes a straight line closing each particular indentation. But it is by no means a natural consequence of the geography of Norway's land territory that the base-line of her maritime territory should cease to have any real relation to her land territory. The United Kingdom Government does not complain of the adoption of straight base-lines as an arbitrary invention by Norway, because this is an established system in the case of indentations qualifying as bays. It complains of the straight base-lines of the 1935 Decree because they are an arbitrary and totally unwarranted *departure from* the established system under which straight base-lines may only be drawn under certain conditions.

The United Kingdom Government equally and for the same reasons rejects the assertion in the same paragraph that geography makes all the waters covered by the 1935 Decree an accessory of the land and logically subjects them to Norwegian sovereignty. It also rejects the idea that these waters are all comprehended together in some form of special unity. The Norwegian Government's disregard of the configurations of the land in delimiting the base-lines of the 1935 Decree necessarily destroys any semblance of unity between the land and the maritime territory claimed by the Norwegian Government.

Economic considerations do not justify the extension of the maritime territory of Norway beyond the normal limits of historic waters

493. In paragraph 572 of the Counter-Memorial the Norwegian Government emphasizes the economic interest of the coastal population of northern Norway in the maintenance of the coastal fisheries. The importance of this economic interest is not disputed but it does not at all follow that the Norwegian Government is on that account entitled to extend the maritime territory of Norway *beyond the normal limits even of historic waters*. As has frequently been pointed out, the Norwegian Minister for the Interior in 1869 and 1889 did not regard the fishing interests of the coastal population as a justification for extending Norway's maritime territory even beyond the normal limits allowed by general international law. (See para. 502 below—even where the Minister went beyond international law, he did not excuse his action on this ground.) The area of exclusive fishery which is reserved to Norwegian fishermen under an historic title to a 4-mile maritime belt and to all the waters of the fjords, is very extensive for the very reason that the territory is so heavily indented. How large this area is can be seen by looking at the pecked green lines on the charts in Annex 35 of this Reply. No evidence has in fact been adduced that these large and valuable areas are inadequate to meet Norway's legitimate demands for exclusive fishery. Norwegian fishermen are in addition fully entitled to engage in the high seas fisheries off the coast in common with other fishermen and in fact do so. The preservation of stocks of fish is a matter of regulation, not of monopoly, and, as has been previously emphasized (see

paras. 135-137 above), the United Kingdom Government has always been ready and anxious to join with Norway in effective regulation of high seas fisheries. In point of fact there is no evidence that the stocks of fish in the waters off the coasts of Finnmark were in the least affected by foreign fishing during the period between 1906 and 1935. Accordingly, the United Kingdom Government does not admit that the fishery interests of the coastal population provides any justification for the pretensions of the Norwegian Government to limits of maritime territory enlarged beyond even the generally recognized limits of historic waters.

Security considerations do not justify the extension of the maritime territory of Norway beyond her 4-mile limit and her fjords and sunds

494. The Norwegian Government does not, in paragraphs 571 or 572 of the Counter-Memorial, make any particular point of its security interest but merely mentions it in paragraph 573 as one of three justifications of its pretensions. Its security interests certainly cannot be said to justify any larger territorial limits than it already obtains by the recognition of an historic title to a 4-mile maritime belt and to all the waters of the fjords and sunds. Reference to the pecked green lines on the charts in Annex 35 may again be made in this connection.

Geographical, economic and security considerations may influence other States in deciding to acquiesce in exceptional claims; but it is the acquiescence of other States, rather than the geographical, economic and security considerations themselves, that is significant from the point of view of giving validity to an historic claim

495. The United Kingdom Government, in any event, rejects the contention that the geographical, economic and security considerations advanced by Norway in Part I of the Counter-Memorial are, or can be sufficient by themselves in law to establish an historic title to exceptional maritime territory. Such considerations, no doubt, may influence other States in deciding whether, or how far, to acquiesce in an exceptional claim. But it is the acquiescence of other States, not the considerations inducing the acquiescence, that give the seal of legal validity to the claim. And the interest of each State in the freedom of the open seas is also a consideration to which it is entitled to give the greatest weight in deciding upon its attitude in the face of pretensions to maritime territory going beyond what is allowed under the general rules of international law. *A fortiori* are the considerations advanced by Norway in justification of her contentions insufficient to establish, without the acquiescence of other States, the validity of pretensions which extend beyond any accepted limits even of historic waters as these are recognized in State practice in the twentieth century.

496. The Norwegian Government, however, contends in paragraph 573 of the Counter-Memorial that history lends its support to geography, national security and economic interest as justifications of Norway's pretensions in the Royal Decree of 1935. As has been explained in paragraphs 432-436 of this Reply, this method of stating the Norwegian claim to historic waters misconceives the whole nature of an historic title to maritime territory, which rests on the express or implied acquiescence of other States. The relevance of the historic element is not, as Norway contends, to confirm the actuality of the geographical, economic or security considerations on which it is sought to justify the exceptional claim. The relevance of the historic assertion of State authority in regard to the area in dispute is to prove the acquiescence of other States either directly or by implication from their conduct. It is, on the other hand, true that, while putting forward its case for an historic title to the waters enclosed by the 1935 Decree on this insufficient basis, the Norwegian Government does in fact discuss the attitude of other States towards its exceptional claim in paragraph 574 and in Part I of the Counter-Memorial. It will, therefore, be necessary to revert to this question again later.

Critical analysis of Norway's historic claims

497. The Norwegian Government in paragraph 573 of the Counter-Memorial refers to its exposition of the historical evidence in Part I of the Counter-Memorial (paras. 29-91) and claims that the evidence shows the disputed waters to have been uninterruptedly subject to the exclusive sovereignty of Norway. It says that the fishing banks in the disputed waters have uninterruptedly been reserved to the coastal population either in the form of private or communal property or else by reason of the prohibition of fishing by foreigners under legislative decrees issued by the competent Norwegian authorities. It represents that the maritime territory delimited by the 1935 Decree, so far from being an extension of its former rights, only covers a portion of its former dominions. It then contends that the 1935 Decree does not constitute an encroachment on the high seas but a release of maritime territory in favour of the high seas and that, therefore, it is impossible to show that Norway would at any time have agreed to renounce a greater extent of her territory.

The United Kingdom Government recognizes that, in addition to her 4-mile maritime belt, Norway possesses an historic title to her fjords and sunds, the implications of which will be examined below in paragraphs 507-509. In all other respects the United Kingdom Government entirely rejects the above contentions of the Norwegian Government by which it seeks on historical grounds to justify its claim to maritime territory extending far beyond what Norway already obtains by appropriating the waters of fjords and sounds and by establishing a 4-mile limit of territorial waters. The historical arguments advanced by the Norwegian Government in an

attempt to justify the extreme base-lines prescribed in the 1935 Decree have been examined at length in Part I of this Reply and it is only necessary here to recall briefly the main objections to these arguments.

First, the Norwegian Government relies on the activities of Norwegian fishermen in the areas concerned which is said to go back to prehistoric times. But the activity of individual fishermen, as was explained in paragraph 486 above, has no significance in international law. Coastal fishermen may fish anywhere whether within their own State's territorial waters or outside them upon the high seas and to-day Norwegian fishermen not only fish on the high seas off Norwegian coasts but off the coasts of other countries. Fishing by Norwegians back to prehistoric times proves nothing except the existence of human beings and of fish in Norway. Every country whose nationals engage in fishing can prove as much without being entitled to claim monopolies beyond the legal limits of its maritime territory. Fishing by Norwegians is not in itself any evidence of State activity and is no proof of Norwegian sovereignty.

Secondly, the Norwegian Government relies on the alleged reservation of fishing areas to private individuals or to certain localities under Norwegian customary law and on the enactment of regulations for the control of coastal fishing. But, as has been pointed out in Part I of this Reply, this evidence contains little information concerning either the precise areas allotted or controlled by these local laws or the extent of the areas to seaward. It does not establish that all or any part of the disputed waters were allotted or controlled by these laws. In any event the laws appear to have been altogether of a local character and to have been directed only to preventing disputes among the inhabitants. They do not provide any evidence of an assertion of Norwegian jurisdiction against foreigners. Moreover, so far as concerns the part of Norway covered by the 1935 Decree; the eighteenth-century documents and the Law of 1830 relating to Russian fisheries off Finnmark and the subsequent legislation of 1897 and 1911 dealing generally with foreign fishing off Finnmark show conclusively that the prohibition of foreign fishing off Finnmark was confined to a distance of one league from the shore itself (Part I, paras. 25-31 of this Reply).

Thirdly, the Norwegian Government relies on the fact that, once upon a time, in the long past days of the *mare clausum*, Norway, or rather Denmark/Norway, maintained pretensions to much larger maritime dominions. This argument is advanced in the vaguest possible way and largely ignores the drastic reduction of Norway's maritime territory in the eighteenth century under the impact of the freedom of the seas and in common with the reduction of the maritime claims of other States during the same period. It has been pointed out in Part I of this Reply (paras. 13-14) that even Denmark/Norway's earlier pretensions did not pass unchallenged or

prove effective to exclude foreigners. But in any event, as has been indicated in paragraphs 107-113 above, the change from the philosophy of *mare clausum* to that of *mare liberum* completely altered Norway's position. Her pretensions to maritime territory were reduced to the limits which found expression in the Rescripts of 1745 and 1812, namely, to a distance of one Scandinavian league from shore, measured from the outermost island or islet not run over by the sea. Her pretensions were so reduced not by any act of grace on her part but under the compulsion of events which left a profound mark on the whole of maritime law. Norway's pretensions became totally inconsistent with international law and were abandoned for that reason. The 4-mile limit was not in reality a survival of Norway's larger pretensions to maritime territory. It was a declaration of Norwegian practice in regard to maritime territory under the international law of the *mare liberum* period and bears no relation to the old pretensions. No other confirmation is needed of the complete separation of Norwegian practice in the nineteenth century concerning the extent of Norway's maritime territory from its former pretensions than the language of the Norwegian Minister for the Interior in his Exposé des Motifs submitting to the King the 1869 Decree dealing with the Søndmøre fisheries. Having recited the various considerations which had led to the decree being proposed, he said (Annexes to the Counter-Memorial, No. 16, Vol. II, p. 60) :

> "En raison des circonstances, mon ministère a pensé devoir se munir de la gracieuse décision de Votre Majesté dans la question qu'il faut trancher en premier lieu : la détermination de la limite en deçà de laquelle il doit être interdit aux ressortissants des autres pays de pratiquer la pêche sur le secteur de côte en cause.
>
> *L'étendue de haute mer pour laquelle un État peut exiger que le monopole de la pêche soit exclusivement réservé à ses sujets coïncide, lorsque des traités n'en décident pas autrement, avec le territoire maritime sur lequel il a, suivant le droit international, le droit d'exercer sa souveraineté. Les limites de ce territoire ont été fixées en partie d'après le pouvoir de dominer, de la terre, l'étendue de mer adjacente, en d'autres termes d'après la plus longue portée de canon, ce qui est sans doute la base de détermination qui concorde le mieux avec la nature de la question ; et en partie à la distance d'une lieue géographique du territoire terrestre.* Cette dernière mesure doit probablement pouvoir être employée, sans hésitation, pour la délimitation de la frontière — comme cela a aussi eu lieu antérieurement pour notre pays (voir la lettre patente du 25 février 1812) — d'autant plus qu'elle ne correspond même pas complètement à la distance à laquelle les progrès de la science de l'artillerie, qui, en général et avec raison, est censée devoir exercer son influence sur l'étendue des eaux territoriales, permettent dès maintenant de tirer aux pièces de la côte."

Thus, in 1869, the Minister for the Interior regarded Norway's maritime territory as being entirely a matter of nineteenth-century

international law and of the interpretation of the 1812 Rescript. In his exposition of the legal considerations there is not the slightest trace of any survival of Norway's ancient pretensions. The United Kingdom accordingly submits that to-day these pretensions do not, and could not in any circumstances, give any vestige of support to the Norwegian claims which are made in the Royal Decree of 1935. What has long been abandoned as contrary to international law has long had no legal value whatever. In consequence, the oft-repeated expression in the Counter-Memorial that Norway in the 1935 Decree did not extend but cut down her maritime territory is both historically and legally untrue.

498. It follows that any historical title possessed by Norway, which may enable her to justify her claim to the maritime territory delimited under the 1935 Decree, must be established exclusively by evidence of Norway's assertions of maritime jurisdiction in the period after the abandonment of the ancient pretensions of Denmark/Norway. The Norwegian Government itself does not seriously contend in Part I of the Counter-Memorial that its claim to invoke the theory of historic waters rests upon any other basis than Norway's legislation and State activity in the nineteenth and twentieth centuries. No doubt, the eighteenth-century rescripts form part of the roots of Norway's historic title, but the effective starting point of the Norwegian Government's attempt to justify the 1935 Decree is the Rescript of 1812. This decree is described in paragraph 45 of the Counter-Memorial as "la stipulation fondamentale concernant la mer territoriale dans le droit norvégien en vigueur".

499. The United Kingdom Government does not contest that the 1812 Rescript came to be regarded as the fundamental declaration of the extent of Norway's maritime territory. The Exposé des Motifs of the Minister of the Interior in recommending the 1869 and 1889 Decrees to the King for delimiting Norwegian territorial waters of Søndmøre, Romsdal and Nordmøre contains clear evidence that this is the case. The United Kingdom Government, however, has shown in Part I of this Reply (paras. 22-23) that the 1812 Rescript, when it was introduced, was not regarded as a fundamental piece of legislation laying down complete principles for delimiting Norway's maritime territory. Its connection is with the *previous* eighteenth-century neutrality decrees which had already provided that the limit was to be one league but had adopted varying policies on the question whether rocks were to be considered as part of the Norwegian coast. (See paras. 22-24 above.) Its object was simply to reaffirm the 1-league limit and to explain that it was islands and islets *not run over by the sea* which were to be considered as part of the coast. In consequence, the principles declared in the 1812 Rescript are far from sufficient to provide an historical justification for the principles, if principles they can be called, which are to be found in the 1935 Decree. In fact the 1812

Rescript is incomplete precisely with regard to every point on which the 1935 Decree is open to challenge and is challenged by the United Kingdom Government. The 1812 Rescript says not a word about fjords and sunds, is silent about joining lines between extreme points or between island and island and is at least ambiguous concerning the status of rocks which are submerged at high tide.

500. The Norwegian Government seeks to fill the obvious deficiencies in the 1812 Rescript by the unconvincing method of a dogmatic assertion without any supporting evidence. It simply states in paragraph 48 of the Counter-Memorial that the rule of the 1812 Rescript, whereby the outermost islands and islets not run over by the sea are to serve as base-points, accords with the traditional legal concept in Norway that the line of the coastal archipelago is considered as the coast line and that the waters between and inside the islands and rocks are considered to be Norwegian. No evidence is adduced by this alleged tradition and without such evidence the statement cannot be accepted. But, *even if some such tradition could be established, it would still leave unresolved the points which are in dispute in the present case.* For, even if the islands and rocks be regarded as part of the coast line of Norway itself, the question still remains where and how it is legitimate to draw the closing line of Norway's inland waters. Nor does the alleged tradition touch the question of joining by long, straight base-lines extreme points of the fringe (which is, of course, the *main* issue in this case) or even clarify the status of rocks submerging at high tide. These are the very questions in dispute in this case and it is certain that the language of the 1812 Rescript provides no support whatever for the contention of the Norwegian Government that there is an historic Norwegian tradition which justifies these questions being resolved in the manner found in the 1935 Decree.

501. The Norwegian Government, for this very reason, is driven in paragraphs 177-181 of the Counter-Memorial to try and establish a traditional Norwegian system of interpreting the language of the 1812 Rescript in a sense which might provide a precedent for the 1935 Decree. It seeks in this way to represent that the Rescript of 1812, and the Decrees of 1869, 1889 and 1935 form a single and consistent line of precedents applying a clear Norwegian practice in regard to the delimitation of Norway's maritime territory. The Norwegian argument necessarily hinges upon two separate points. The Norwegian Government has to establish, *first*, that the 1869 and 1889 Decrees show a definite system of interpreting and applying the 1812 Rescript and, *secondly*, that this supposed system is in fact the same as that which is said to have been applied in the 1935 Decree. Neither of these points are made good in the Counter-Memorial. The first of these points is considered in paragraphs 502 and 503 below and the second in paragraph 504 below.

502. The United Kingdom Government has demonstrated in paragraphs 33-39 of this Reply that the Norwegian case on these points does not square with the facts at all. The 1869 and 1889 Decrees did not, according to the Minister of the Interior's Exposé des Motifs, purport to apply to any Norwegian system of drawing base-lines but to apply modern rules of international law. Moreover, the Minister gave no sign at all that he regarded the 1812 Rescript as having formulated any principles for drawing base-lines between islands. He regarded it as having laid down a 4-mile limit and as having provided for the inclusion of islands and rocks as Norwegian territory. Nor, in drawing up the base-lines of the 1869 and 1889 Decrees, did the Minister proceed upon any system of delimiting straight base-lines by reference to definite principles. On the contrary, the base-line in each case was drawn *ad hoc* with reference to the particular facts and subject to what were conceived to be the rules of international law. The Minister recognized that the proposed base-lines departed to some extent from the limits allowed by international law and sought to justify these departures *not* by reference to any Norwegian tradition or historic claims but by reference to the individual geographical features of the particular sections of the coast. Indeed, he declined to entertain the idea that immemorial user of the fishing grounds could provide a justification for departing from the limits allowed by international law. *In any event, the Minister deliberately abstained in each decree from using rocks as base-points which were not permanently visible. Nor is there a word in the Exposé des Motifs to suggest that all waters, however extensive, lying inside lines drawn between the outermost islands, rocks and reefs belong to Norway, which is the effect of the 1935 Decree.*

503. The United Kingdom Government has further shown (para. 39 above) from the correspondence between the Ministry of Interior and the Faculty of Law and from that between the Ministry of Commerce and the Geodesic Institute in 1903-1905 that official Norwegian opinion did not at that date regard the 1869 and 1889 Decrees as doing anything except provide an *ad hoc* solution of the base-line for two particular sections of the coast. It has also drawn attention (paras. 53-56) to the fact that important jurists, like M. Aubert and M. Kleen, and the fishery expert, M. Hroar Olsen, by no means regarded the 1869 Decrees as having established a special Norwegian interpretation of the 1812 Rescript which entitled Norway to draw base-lines between any selected points at whatever distance apart. On the contrary, these authorities regarded the choice of base-points as a matter strictly regulated by international law, which had also been the view of the Minister of the Interior in 1869 and 1889. In addition, the United Kingdom Government has proved from official Norwegian documents, which were issued in connection with the 1924-1925 conversations in Oslo

and London, that Norwegian official circles still at that late date did not consider there to be any settled Norwegian system for drawing base-lines (para. 58 A and paras. 74-78 above). It has also shown that in 1927 the same view was taken by Dr. Ræstad in his opinion submitted to the Court in the *Deutschland* case (para. 83 above).

504. On the second point which it is necessary for Norway to establish (*vide* para. 501 above) the United Kingdom Government has demonstrated that the 1869 and 1889 Decrees in fact contain no indications at all of any Norwegian traditional principles concerning any of the questions in regard to which it has challenged the validity of the 1935 Decree. This, by itself, would be enough to destroy the thesis that the 1935 Decree is only the latest example of the application of a traditional system laid down in 1812 and thenceforward consistently followed. There is no intervening link which can make a single consistent system of the 1812 Rescript and 1935 Decree. But the weight of the evidence against the contention that the system of the 1935 Decree is the same as the supposed system of the 1812 Rescript and the 1869 and 1889 Decrees is even more formidable. The above-mentioned Norwegian official documents issued in connection with the 1924-1925 conversations prove that *at that date* the red line represented what official Norwegian opinion considered to be the proper limits of Norway's maritime territory *according to the "principles and indications" of the 1869 and 1889 Decrees*. This is expressly stated in the report of the Ministry for Foreign Affairs to the Storting of 1926 (para. 75 *(c)* above). And, as the red line was drawn with the object of beginning negotiations for reaching an agreement between the United Kingdom and Norwegian Governments, we may be certain that these "principles and indications" of the 1869 and 1889 Decrees were not conservatively applied by Fishery Adviser Iversen and Commander Askim of the Royal Norwegian Navy in fixing the line.

505. The United Kingdom Government accordingly maintains that the Norwegian Government has entirely failed to establish both the two points which it must establish in order to provide an historic justification for the base-lines of the 1935 Decree. The 1869 and 1889 Decrees, according to the most conclusive evidence, do not represent a traditional Norwegian system on any definite principle of drawing base-lines. Nor do the practical delimitations of the particular sections of the Norwegian coast covered by those two decrees provide any principles or even indications of principle which might lead logically to the method of delimitation found in the 1935 Decree. In consequence, no foundation exists at all, in the submission of the United Kingdom Government, for an historic title to an exceptional Norwegian method of delimiting base-lines of the kind found in the 1935 Decree.

506. Thus, the evidence for any title to historic waters that Norway may possess north of latitude 66° 28.8′ north must, in the view of the United Kingdom Government, be looked for elsewhere than in the 1869 and 1889 Decrees, which fix the limits of Norwegian maritime territory in different areas and on particular grounds. The Norwegian Government, in paragraphs 70-77 of the Counter-Memorial, has cited certain Norwegian legislation dealing directly with fishing by foreign vessels but, as pointed out in paragraph 49 of this Reply, this legislation provides no evidence of the exercise of Norwegian sovereignty in any particular area or within any exceptional limits. The legislation is expressed to apply simply to Norwegian "territorial waters" or Norwegian "maritime territory", without any attempt to define the extent of Norwegian waters. It does not, therefore, afford any basis for an historic title to waters within the exceptional limits claimed in the 1935 Decree.

507. The Norwegian Government, in the Counter-Memorial, has not focused its argument upon the evidence which was cited in the 1912 Rapport (e.g. on p. 19) in support of Norway's claim to sovereignty over her fjords and sunds. Nevertheless, the United Kingdom Government, in the light of all the available evidence, is not disposed to contest the claim that Norway possesses sovereignty over the fjords and sunds in the area covered by the 1935 Decree. It recognizes that, in the case of sunds, which are straits connecting two parts of the open sea, Norway has a valid title to the waters as historic *territorial* waters and that, in the case both of fjords and of sunds which are inland straits, she has a valid title to the waters as historic *internal* waters. Norway, of course, possesses a right of exclusive fishery in all the waters which she is entitled to treat as historic waters. But, the question whether a particular indentation has the character of an historic strait or of an historic bay may affect the precise limits of Norwegian waters at the entrance to the indentation. This point will be reverted to in summing up the United Kingdom Government's contentions in regard to the actual limits of Norway's maritime territory to-day (para. 514 below).

Doubtless, the reason why the Norwegian Government refrained from focusing its argument upon the question of its title to fjords and sunds was because it appreciated that the establishment of an historic title to the waters of the fjords and sunds would not be sufficient to validate the claims advanced by Norway in the 1935 Decree. Where an historic title is established to the waters of a bay or strait the width of whose entrances exceeds the generally recognized limits (10 miles in the case of a bay, twice the radius of territorial waters in the case of a strait), the limits of the historic waters are universally understood to be determined by reference to the points on each shore which mark the actual entrances of the particular bay or strait. The great objection which the United Kingdom Government makes to the terms of the 1935 Decree is, not that in

this decree the Norwegian Government has appropriated all the waters of the fjords and sunds as Norwegian, but that it has fixed the limits of its maritime territory without reference to the physical limits of the actual fjords and sunds. The limits prescribed in the 1935 Decree not only extend far beyond what are the normally understood limits of territorial waters *but equally beyond any limits that can be understood to be covered by the evidence of Norway's historic assertion of jurisdiction within the fjords and sunds.* Therefore, the United Kingdom Government, while placing on record its recognition of Norway's title to treat the fjords and sunds as historic waters, strenuously denies that the waters, which accrue to Norway under this title, extend to the limits claimed in the 1935 Decree. It maintains that the extent of Norway's historic title in the fjords and sunds is necessarily co-extensive with the actual waters of the fjords and sunds, and that the limits of the historic waters of fjords and sunds are necessarily determined by the physical limits of the shores of the fjords and sunds. Such is the natural interpretation of the evidence of Norway's exercise of State authority over the waters of the fjords and sunds and, if the Norwegian Government contends that the evidence ought to be interpreted in some different sense, then it is for the Norwegian Government to make good that contention.

508. The United Kingdom Government accordingly maintains that none of the evidence presented in the Counter-Memorial provides any basis for an historic right to delimit Norway's maritime territory by reference to base-lines drawn outside the physical limits of the indentations in the Norwegian coast. Indeed, the case presented to the Court in the Counter-Memorial for the purpose of establishing an historic title to the maritime territory claimed under the 1935 Decree, is not really based at all on evidence of the exercise of authority in the disputed area. The principal case developed by the Norwegian Government in support of its claim to an historic title is the argument that Norway has an historic system of drawing base-lines. This argument depends upon an incorrect representation both of the scope of the 1869 and 1889 Decrees and of their relation to the 1935 Decree and has been demonstrated from official Norwegian documents to be totally unfounded. The United Kingdom Government, therefore, submits that, quite apart from the question of the acquiescence of other States in the extreme claim made in the 1935 Decree, the Norwegian Government has not established in the Counter-Memorial any basis for an historic title to the waters now in dispute between the two Governments.

509. It is, therefore, scarcely necessary to examine the arguments of the Norwegian Government in regard to the question of acquiescence which are contained in paragraph 574 of theCounter-Memorial. The Norwegian Government there refers to its previous contentions in paragraphs 533-535 of the Counter-Memorial concerning the

attitude of other States towards Norway's claims, which contentions were themselves based on an exposition of the alleged facts in Part I of the Counter-Memorial (paras. 50-63 and 80-89). It then advances two main propositions concerning the acquiescence of States in Norway's claims :

The first proposition is that the Norwegian system, as established by a long tradition, already possessed international validity in 1906 before British trawlers appeared off Finnmark in virtue of the acquiescence of the international community in the system. This proposition is founded upon the contentions that before that time the United Kingdom had not lodged any protest or reservation against the Norwegian system and that other States had either made no objection or had given their acquiescence after discussion. The proposition and the contentions on which it is founded have been dealt with in detail and the Norwegian Government's exposition and interpretation of the facts in Part I of the Counter-Memorial have been shown in Part I of this Reply to be incorrect in important particulars (see paras. 40-45 above). The short answer to the Norwegian Government's first proposition is that the evidence proves conclusively that no such system as is found in the 1935 Decree had been established at all even in Norwegian internal law before 1935. Consequently, it is impossible to deduce the acquiescence of States in such a system whether from their action or their inaction. Another answer is that France objected to the 1869 Decree as being in conflict with international law and *expressly declined to give her acquiescence to whatever theories the decree might be based upon* even though she did not maintain her objection to the particular area then claimed. A third answer is that, there being no defined system indicating a wholesale claim to exceptional base-lines, it is impossible to deduce from the absence of any protest by the United Kingdom against the claims made in respect of the area covered by the 1869 and 1889 Decrees that she acquiesced in much larger claims in quite different areas. A fourth answer is that the alleged Norwegian system, being a quite exceptional claim, it was essential that the claim should have been formulated with precision and it is impossible to infer the acquiescence of States in a claim, the extent of which they did not and could not know.

510. The Norwegian Government's second proposition in paragraph 574 of the Counter-Memorial is that the claim of the Norwegian system to be valid by reason of the acquiescence given to it by the international community is not affected by the opposition of the United Kingdom in the course of the present dispute. It contends that, in considering whether a usage meets with opposition, regard must necessarily be had to the situation existing before the dispute arose which is the subject of the litigation. Otherwise, a tribunal could never hold valid a usage that is contested in a case being litigated before it. On this basis, the Norwegian Government argues

that British protests concerning the limits of Norwegian maritime territory since the present controversy began have to be left out of account together with the German protest against the 1935 Decree.

The Norwegian Government in its second proposition appears in effect to be arguing that in this case the "critical date" for proving the existence of an historic title to the waters in dispute is on the eve of the arrival of British trawlers in the waters concerned. The United Kingdom Government agrees that this is the critical date for the establishment of Norway's historic title because, since this date, the United Kingdom has persistently opposed any attempt by Norway to exclude British vessels from the disputed areas. *If Norway did not then already possess an historic title, she cannot have acquired one afterwards.* It is impossible, as has been pointed out in paragraphs 473-476 above, for an invalid claim to be converted by the passage of time into an historic title in the face of the opposition of another State which energetically pursues its objections to the title and brings the matter to contestation and settlement with all reasonable expedition. The question whether Germany did or did not press its objections to the 1935 Decree is, therefore, immaterial in the present case. The United Kingdom Government, however, has the greatest reserves concerning the assertions of the Norwegian Government in regard to Germany's attitude towards the 1935 Decree.

It follows that British protests during the present century concerning the attempts of the Norwegian Government to exclude British fishing vessels from the disputed areas would be of no account only if the Norwegian Government had succeeded in proving the existence of an historic title before these protests were made. But the Norwegian Government has entirely failed in the Counter-Memorial to prove the existence of any traditional Norwegian system which could provide a basis for an historic title to the disputed waters. As the Norwegian Government has, therefore, failed to establish that Norway possessed an historic title to the disputed waters at the date when British trawlers began to fish in them, the subsequent British protests, diplomatic action and resort to the Court are extremely relevant as precluding any question of an historic title becoming vested in Norway during the present century.

Summary and conclusions of Chapter III

(Counter-Memorial, para. 576)

511. The Norwegian Government, in paragraph 576 of the Counter-Memorial, has summarized the points which it claims to have established in Chapter III of the Counter-Memorial in its attempt to justify the so-called Norwegian system of delimiting maritime territory, of which the 1935 Decree is alleged to be an application. It may therefore be useful to summarize here the contentions of the United Kingdom in reply to the Norwegian arguments :

(1) The Norwegian thesis (paras. 511-525 of the Counter-Memorial) that, owing to the diversity of the factual situations, the legal principles determining the extent of a State's maritime territory must be expressed in very broad terms, namely, in the Norwegian formula of "legitimate interests", is inadmissible. First, the evidence adduced in support of the thesis relates only to the impossibility of achieving *absolute* uniformity in the application of the detailed rules of international law concerning the delimitation of maritime territory. Secondly, the thesis is in complete conflict with the traditional system and with existing State practice. Thirdly, the Norwegian criticism of the traditional system on the score of its rigidity is unfounded. The traditional system has been worked out in State practice over a long period and represents a compromise between the interests of individual States and those of the community of States, and has sufficient flexibility to take account of legitimate interests. The Norwegian formula, on the other hand, has no legal content and amounts to substituting unilateral pretensions for the agreement of States as the basis of the law of the sea (paras. 395-405 above).

(2) The Norwegian thesis (paras. 525-538 of the Counter-Memorial) that Norway's case is so exceptional as to relieve her from observing any general rules of international law in delimiting her maritime territory is inadmissible. The exceptional features of Norway's coast line are to be regarded as material essentially in connection with her claim to historic waters. The extent of this claim is precisely what is in issue in the present case (paras. 405-411 above).

(3) The Norwegian thesis (paras. 529-531 of the Counter-Memorial) that Norway's alleged system of delimiting her maritime territory has shown a complete consistency throughout history and is simply applied by the 1935 Decree to a particular area is inadmissible. It is disproved by the evidence of Norwegian official opinion in the nineteenth and twentieth centuries and is directly contradicted in the report to the Storting concerning the Oslo-London conversations in 1924-1925. Nor, in fact, is the 1935 Decree consistent with the alleged principles of the Norwegian system as they are described in paragraph 62 of the Counter-Memorial (paras. 412-425 above).

(4) The Norwegian thesis (para. 532 of the Counter-Memorial) that Norway's alleged system of delimiting her maritime territory was widely known is inadmissible so far as concerns the matters which are in dispute in the present case. It is disproved by the complete uncertainty of the Norwegian Government itself until 1935 both as to the principles determining the limits of Norway's maritime territory in the area under dispute and as to the actual limits. It is disproved by the fact that, despite constant requests from the United Kingdom, the Norwegian Government was quite unable to

supply the necessary information concerning the limits of Norwegian waters in the area under dispute (paras. 426-428 above).

(5) The Norwegian thesis (paras. 533-535 of the Counter-Memorial), that Norway's alleged system can claim wide international recognition is inadmissible. First, it is not supported by the historical evidence, which has been examined in Part I of this Reply (paras. 40-45). This evidence shows that France objected to the principles put forward by Norway in support of the 1869 Decree and that other States had no cause to be aware that any principles of the kind now contended for by Norway were involved in the 1869 and 1889 Decrees. Secondly, the alleged "principles" which are in dispute in the present case did not have any existence before the critical date, 1906, and were not in fact adopted and made public until 1935 (Part I of this Reply, paras. 58-59).

(6) The Norwegian thesis (para. 536 of the Counter-Memorial) that Norway did not bind herself by any undertaking prejudicial to her claim during the preliminaries to the present case is not contested by the United Kingdom Government.

(7) The Norwegian thesis (paras. 537-539 of the Counter-Memorial) that Norway's alleged system is justifiable on its own merits and does not require the support of the theory of historic waters is inadmissible. The system is totally in conflict with the generally accepted rules of international law and, therefore, depends for its validity on the acquiescence of other States. In the absence of express acquiescence it is only by proof of an historic title that Norway can justify her exceptional claim (paras. 432-438 above).

(8) The Norwegian thesis (para. 540 of the Counter-Memorial) that the scope of the theory of historic waters is still somewhat undefined with regard to the significance of usage is inadmissible. In accordance with the fundamental principles of international law, the relevance of usage in the theory of historic waters is to establish the acquiescence of other States in the claim (paras. 432-437 above).

(9) Contrary to the opinion expressed in the Counter-Memorial (paras. 541-552), the evidence of State practice, of the opinions of writers and of the work of the 1930 Codification Conference, confirms the conclusion, drawn from fundamental principles, that the relevance of usage in the theory of historic waters is to establish the acquiescence of other States (paras. 438-468 above).

(10) The Norwegian thesis (paras. 553-554 of the Counter-Memorial) that in the theory of historic waters the passage of time more usually operates in conjunction with other factors (e.g. geographical, economic or defence considerations) is not disputed. However, the further Norwegian thesis (para. 553 of the Counter-Memorial) that the passage of time is only an additional, not a necessary, element in an historic title is inadmissible. Unless the express acquiescence of the State against which the title is invoked can be shown, the passage of time—that is, the long duration of the usage—is a vital element in the title as supplying evidence of

the implied acquiescence of other States in the claim (paras. 469-476 above).

(11) The Norwegian thesis (paras. 555-560 of the Counter-Memorial) that the theory of historic waters is not limited to bays but is of general application is not contested. The United Kingdom Government, however, contends that the extent to which the waters are enclosed by land has an important bearing on the question of inferring the acquiescence of other States in an exceptional claim. The traditional doctrine concerns "bays" and the consent of States may more readily be inferred in the case of the enclosed waters of a bay than in other cases (para 471 above).

(12)—*(a)* The Norwegian thesis (paras. 561-570 of the Counter-Memorial) that Norway is not called upon in these proceedings to prove by evidence that she has an historic title to the areas in dispute is inadmissible. This thesis depends upon Norway's unfounded contention that the promulgation of the limits of its maritime territory by a coastal State, being an exercise of sovereignty, must be presumed valid *even when it goes beyond the generally accepted rules of international law*. The Norwegian thesis could only be tenable, if there were no general rules of international law concerning the delimitation of maritime territory, if each State was entitled to fix its maritime limits according to its own conception of its legitimate interests, and if all other States were obliged to accept limits so fixed. The United Kingdom Government, however, has shown that (i) the delimitation of maritime territory is governed by general rules of international law which the Royal Decree of 1935 violates ; (ii) the burden of proof, therefore, lies upon Norway to establish the acquiescence of the United Kingdom in her exceptional claim either by express evidence or by proof of historic usage *relating to the disputed waters ;* (iii) the dominant principle of international maritime law is the freedom of the seas and, therefore, *a fortiori* is the burden on Norway to demonstrate the validity of her pretensions to areas which, under the general rules of international law, are part of the high seas. (Paras. 473-474 above.)

(b) The Norwegian thesis (para. 563 of the Counter-Memorial) that national usage by itself is enough to justify Norway's claim is thus equally inadmissible. Norway cannot plead her own municipal decrees to justify the violation of generally accepted rules of *international* law. She is called upon to prove an international usage as providing evidence of the acquiescence of other States. (Para. 475 above.)

(c) The United Kingdom Government has further shown that, as the sea is not *res nullius* but is subject to the rights of the community of States, it is not susceptible of simple "occupation" by the exercise of State authority. It is by the principle of prescription, not of occupation, that claims to exceptional maritime territory have to be justified. Accordingly, by this reasoning also, it is not

enough for Norway to plead her own acts alone. The acquiescence of other States in Norway's claims has to be established and the burden is upon Norway to establish that acquiescence either by express evidence or by historic usage relating to the disputed waters. (Paras. 476-478 above.)

(d) In regard to the conditions under which the opposition of an objecting State may prevent the establishment of a prescriptive title, the United Kingdom Government has demonstrated that such opposition is effective to safeguard its rights, provided that it uses all available means to put an end to the infringement of its rights, first by negotiation and ultimately by bringing the matter to contestation. In the present case, the United Kingdom Government has by all available means prosecuted its objections to the Norwegian claims ever since the critical date in 1906 when the dispute first arose. Norway is accordingly obliged to establish that her historic title to the waters now in issue was already perfect as against the United Kingdom before that date. (Paras. 479-484 above.)

(e) The United Kingdom Government denies that the acquiescence of other States in a Norwegian title to the waters covered by the 1935 Decree ought to be inferred from their inaction in face of the 1869 and 1889 Decrees which dealt on particular grounds with two quite different areas. The United Kingdom Government contends that the natural inference is the other way, namely, that the assertion of particular claims to particular areas excludes a general claim to all areas. It further maintains that the inference of acquiescence could only be properly drawn if Norway were able to prove both that a general system applicable to the whole Norwegian coast was applied in promulgating the 1869 and 1889 Decrees and also that other States so understood the decrees. (Para. 485 above.)

(f) In regard to the Norwegian activity which may be adduced as evidence of a prescriptive title, the United Kingdom Government has shown that the private activity of Norwegian fishermen is of no significance and that only acts of *exclusive* State authority by Norway can provide the basis of a title acquired by *international* usage. (Para. 487 above.)

(13) The Norwegian thesis (paras. 571-575 of the Counter-Memorial) that Norway's case contains every element required for the application of the theory of historic waters is inadmissible so far as concerns the areas which are in dispute in the present case, that is, the areas lying between the pecked blue and the pecked green lines on the charts at Annex 35 of this Reply. The Norwegian thesis is inadmissible for the following reasons :

(a) The United Kingdom Government concedes that Norway possesses an historic title to her fjords and sunds in addition to her historic title to a maritime belt 4 miles in width. Her historic title to fjords and sunds is, however, confined to the actual waters of

these indentations and does not extend to the base-lines of the Royal Decree of 1935 which in many cases extend far outside the entrances of the fjords and sunds. (Paras. 507-508 above.)

(b) The geographical circumstances of the Norwegian coast provide no warrant for saying that *the open waters lying outside the entrances of the fjords and sunds*, which are formed by the configurations of the mainland with its island fringes, are a natural part of Norway's inland waters. Norway has advanced no good reason why, in delimiting her maritime territory, she alone of all States should be permitted to disregard the configurations of her land territory. (Paras. 488-492 above.)

(c) The economic and security interests of Norway also provide no warrant for her pretensions to claim as inland waters the open waters lying outside her fjords and sunds. The area of sea reserved to Norway under an historic title to a 4-mile maritime belt and to all the waters of fjords and sunds is very extensive and no evidence has been adduced that it is inadequate for Norway's legitimate interests. (Paras. 493-494 above.)

(d) Geographical, economic and security considerations are in any event not sufficient in law to establish a title to exceptional maritime territory. Norway, to establish a title to the waters now in dispute, has to show, first, the exercise of exclusive State authority in regard to those waters, and secondly, the acquiescence of other States in the exercise of such authority. (Para. 495 above.)

(e) The historic evidence adduced by Norway concerning fishing by Norwegians and the local regulation of fishing does not show the exercise of exclusive State authority by Norway over the disputed waters. Nor are Norway's ancient pretensions in the *mare clausum* period to extensive maritime territory of any relevance to-day. (Paras. 496-498 above.)

(f) Norway's historic title depends essentially on her showing that the 1812 Rescript, which defined her maritime claims in the modern *mare liberum* period, constituted an assumption of sovereignty over the disputed waters. Norway has, however, adduced no evidence to show that the 1812 Rescript asserted Norwegian sovereignty over waters within and between islands and rocks. Nor has she adduced any evidence to show that, if this was in fact the case, the 1812 Rescript justifies the extreme closing lines of Norwegian island waters which are prescribed in the 1935 Decree. (Paras. 499-501 above.)

(g) Norway is, therefore, driven to try to justify the base-lines of the 1935 Decree by proving that a system of interpreting the 1812 Rescript was established in the 1869 and 1889 Decrees and that this system has simply applied in the 1935 Decree. The evidence does not, however, establish either that the 1869 and 1889 Decrees represented a definite system of interpreting the 1812 Rescript or that the 1935 Decree was formulated on the same principles as the 1869 and 1889 Decrees. (Paras. 502-505 above.)

(h) The Norwegian official documents issued in connection with the 1924-1925 conversations show that, if any line is to be regarded as an application of what Norwegians consider to be "the principles and indications of the 1869 and 1889 Decrees", *it is the red line of 1924 not the blue line of 1935.* (Para. 504 above.)

(i) As Norway has not shown any exercise of exclusive State authority in regard to the disputed areas lying between the pecked blue and the pecked green lines (see Annex 35 of this Reply) before the critical date, 1906, she has not established the first of the two elements essential to an historic title. (Paras. 506-508 above.)

(j) Norway has necessarily failed also to establish the second essential element, namely, the acquiescence of other States in the assumption of Norwegian sovereignty over the disputed areas before 1906. (Para. 509 above.)

(k) Since 1906 the United Kingdom Government has actively maintained its objections to the assumption of Norwegian authority over the disputed areas and has with due promptness brought the dispute before the International Court of Justice. Consequently, as Norway did not possess an historic title to these waters before the critical date in 1906, she cannot have acquired one afterwards. (Para. 510 above.)

Article by Professor Bingham

512. The Norwegian Government concludes Part II of the Counter-Memorial by citing at the end of paragraph 576 a passage from an article by Professor Bingham of the University of California, in which he represents England as having forced upon oppressed small States a policy inspired by the Grimsby trawling interests and designed to permit them to undertake aggressive invasions of the coastal fisheries of other countries. Professor Bingham has never disguised the fact that his whole approach to the law of the sea has been coloured by his desire to urge upon his own Government a particular policy in regard to the fisheries on the Pacific Coast of the United States. Professor Bingham's views are in fact very far from being objective. Dr. Jessup, a no less eminent authority on coastal waters, having listened to a paper read by Professor Bingham to the American Society of International Law in 1940, in which almost identical remarks were made about England's fisheries policy, commented (*Proceedings of 34th Annual Meeting, 1940*, p. 64) :

> "*In some instances I think that he confuses the general interests of the international community with the particular interests of particular districts in the United States.* I disagree with him on his basic conclusions regarding the 3-mile limit, to which he answers that I am doctrinaire and that he is correct. I cannot quite accept that characterization...."

The extract from Professor Bingham's article is in fact full of inaccuracies. The existing rules of international law governing the limits of exclusive coastal fisheries were developed in the nineteenth century on the initiative not primarily of the United Kingdom, but of France, Germany, Denmark, and other States (see para. 237 of this Reply). The United Kingdom, so far from favouring in her fisheries policy "destructive invasions" of coastal fisheries, has been most prominent in seeking a greater measure of international co-operation in the regulation and conservation of fisheries. The true policy of the United Kingdom Government is expressed in the preamble of the International Convention for the North-West Atlantic Fisheries which was concluded in 1949 (Annex 41 of this Reply) and to which Norway, Portugal and other States were parties. That policy is "the investigation, protection and conservation" of fisheries "in order to make possible the maintenance of a maximum sustained catch" and the means for making the policy effective are international agreements and international co-operation. Justice for small States—Norway and Portugal are the States mentioned by Professor Bingham—does not demand that they should both be free to fish off the coasts of other States and free unilaterally to extend their own fishing monopolies. The United Kingdom Government, like the Danish and Swedish Governments in their recent diplomatic notes concerning fisheries in the Baltic (para. 120 above), is opposed to unilateral extensions of fishing monopolies. On the other hand, it favours the solution of fishery problems by international agreement and has always been ready and anxious to discuss fishery regulation and conservation measures with the Norwegian Government (para. 136 above).

CHAPTER IV

The United Kingdom Government's submissions in regard to the actual limits of Norway's maritime territory in the area covered by the 1935 Decree

Recognition by United Kingdom of Norway's historic right to a 4-mile maritime belt and to the waters within her fjords and sunds

513. The United Kingdom Government in this Reply has recognized that the Norwegian Government has established an historic title to a maritime belt 4 sea miles in extent. It has also recognized that the Norwegian Government has established an historic title to the waters of the fjords and sunds as historic bays or historic straits according to the nature of each individual inlet. On the other hand, it denies that the Norwegian Government has established any historic right to delimit its maritime territory under a supposed

special Norwegian system of drawing base-lines without any reference to the physical configuration of the *terra firma* of Norway. Consequently, in the view of the United Kingdom Government, the base-lines from which Norway's 4-mile zone of territorial sea extends have to be delimited in accordance with the general principles of international law (see para. 122 of the Memorial) subject only to Norway's historic right to the waters within her fjords and sunds.

In other words, the primary test of the base-line, from which Norway's zone of territorial sea is to be delimited, is the tide mark on Norway's land territory, whether mainland, islands or rocks. Imaginary straight lines drawn between two points of Norwegian territory are only permissible as base-lines when they represent the natural line marking the entrance to an indentation which is Norwegian internal waters. It is true that the very heavy indentation of the Norwegian coast causes the base-line to depart frequently from the tide mark and then to take the form of an imaginary line at the entrance of a bay. But this is no justification for the Norwegian Government drawing a wholly artificial and imaginary base-line *altogether outside the natural limits both of its land and sea territory*. The Norwegian Government in the Counter-Memorial (paras. 550-551) represents that its system of straight base-lines is natural and logical. But, as has been pointed out in paragraph 129 of the Memorial, whatever æsthetic merit straight base-lines may possess when seen on a chart, their practical merits are not superior to lines drawn in accordance with the general rules of international law. Moreover, straight base-lines are not permissible in general international law except in the case of bays whose entrances are of moderate width (10 miles is the generally accepted width) and of historic bays. The whole concept of a polygonal coast line formed by a series of long straight lines, such as are found in the 1935 Decree, is both unreal and in conflict with existing international law, which fixes the political coast line primarily by reference to the tide mark. International law does not expect or warrant that a "political coast" should be composed entirely of polygonal lines and Norway has failed to establish any historic title which might justify a wholly exceptional method such as is followed in the 1935 Decree.

Apart from the recognized exceptions of fjords and sunds, the primary rule of the tide mark should apply

514. It follows that, in the submission of the United Kingdom Government, the base-line of the Norwegian coast, as of any other coast, consists in part of the actual shore line of the territory at low tide (including elevations of the sea bed entitled to be taken into account as territory ; see paragraph 122 (4) and (5) of the Memorial) and in part of straight lines closing indentations. Where the indentation consists of a bay or of an inland strait (which in law is on the same footing as a bay ; see para. 367 above and para. 111 of the Memorial), the closing line is simply a straight line drawn between

the natural headlands on each shore of the indentation. Therefore, in the case of fjords and sunds having the legal status of bays, the only relevant question in the view of the United Kingdom Government, is what points of land are properly to be regarded as the natural headlands or entrances to the bay. The determination of this question depends essentially on geographical considerations.

Where, however, the indentation forms part of a strait connecting two parts of the open sea, as do the Indreleia channels, then Norway possesses the waters as historic *territorial*, not *internal* waters. The waters being those of a strait, there is no question of the base-line departing from the tide mark of the two shores and of the waters being enclosed as internal waters by a line between the headlands. The effect of Norway's historic title is simply that all the waters of the strait have to be treated as *territorial* waters, even although the entrances to the strait may be wider than twice the width of the territorial sea, i.e. wider than 8 miles. The relevant question, again, in the case of these indentations is the geographical one of determining what points are properly to be regarded as the natural headlands or entrances to the straits. But when these have been determined, a straight line is not drawn between the headlands themselves as would be done to close a bay. Instead, the 4-mile zone of territorial sea is drawn from each headland and then a straight line is drawn to link up the two zones of territorial sea and to mark the seaward limit of territorial waters in the centre of the strait. If the distance between the headlands does not exceed 8 miles, then the seaward limit of territorial waters is formed simply by the intersection of the two arcs of territorial waters delimited from the headlands. In any event, the resulting line across the entrance of the strait marks the outer limit of the territorial sea, not of internal waters, and there is no right to a further 4-mile zone to seaward of this line.

The charts at Annex 35

515. The United Kingdom Government has attached to this Reply at Annex 35 charts which show, in the area under dispute, the limits of Norwegian maritime territory drawn in accordance with the views of the United Kingdom Government as to what are its proper limits, taking into account Norway's historic title to a 4-mile zone and to the waters of fjords and sunds. It will be observed that these charts, whereas they show the continuous line of the outer limit of the territorial sea, do not mark a continuous base-line along the whole extent of the coast. One reason, as has been explained, is that, apart from closing lines across the entrances to bays, the base-line is simply the tide mark on any piece of territory so situated as to affect the delimitation of the exterior limit of the territorial sea. Another reason is that not each piece of territory nor each point on the coast of any particular piece of territory has significance in delimiting the exterior limit of the territorial sea. If 4-mile arcs

are drawn from every point, many will fall inside the outermost limit and it is only the arcs which affect the line of the exterior limit that are significant. Similarly, it is only the base-points, from which these governing arcs are drawn, that are significant as base-points for delimiting the territorial sea. In principle, the tidemark constitutes a continuous base-line on any given piece of coast, but wherever there are any concavities or there are islands or rocks close off the coast, the 4-mile arcs will overlap and it is then the material base-points, rather than the continuous base-line, which in practice determine the exterior limit of maritime territory. The same can be seen if the matter is viewed from the position of the mariner at sea. The relevant point for the mariner, having plotted his position on his chart, is whether, if he swings a 4-mile arc with his compasses centred on this position, the arc touches land anywhere around him or the limit of internal waters. If it does, he is within territorial waters, and it is irrelevant that in another direction he is more than 4 miles from shore.

The base-line, being simply the tide mark of all relevant parts of the mainland, island and rocks which count as Norwegian territory, there is no object in showing on the charts at Annex 35 the base-lines from which the outer limit of the territorial sea has been delimited, except where these consist of imaginary lines across the entrances to internal waters. It is the outer limit of the territorial sea which is the actual limit of Norway's exclusive fisheries and the base-line is relevant in the present dispute only to the extent that it affects the determination of that limit. Consequently, apart from the line of the outer limit of the territorial sea, only the base-lines across bays are marked, since these are invisible and require to be depicted so far as is necessary to indicate the principles upon which the outer limit of the territorial sea has been arrived at. In order to assist the Court to compare the method by which the limits of Norwegian maritime territory have been drawn on the charts according to the British point of view with the method of the 1935 Decree, the base-lines and the outer limit of the territorial sea resulting from that decree have also been placed upon the charts.

In addition, in order to assist the Court to study in detail the differences between the Norwegian and British views of the limits of Norway's maritime territory on the various sections of the coast now in dispute, a commentary has been prepared comparing the line delimited under the 1935 Decree with the line delimited according to the British point of view. This commentary follows in Chapter V below. It will be seen from this commentary, and from the charts at Annex 35, what is the essential difference between the Norwegian and British points of view. The United Kingdom Government has drawn the limits of Norway's maritime territory by reference to the actual territory possessed by Norway. The Norwegian Government, on the other hand, has drawn those limits by reference to a wholly imaginary conception of Norwegian territory. The United Kingdom

Government, taking all possible account of Norway's historic rights in her fjords and sunds, has drawn the limits of Norway's maritime territory by reference to her actual coasts and to the actual limits of her fjords and sunds. The Norwegian Government, on the other hand, has drawn those limits without reference to Norway's actual coasts and without reference to the actual limits of her historic waters in her fjords and sunds. In the submission of the United Kingdom Government, no sufficient evidence has been adduced and no sufficient argument has been advanced in the Counter-Memorial to justify the Norwegian Government being absolved at once from observing all the rules of international law and the limitations of her own physical geography. The United Kingdom Government acknowledges that the Norwegian Government has an historic title to a 4-mile maritime belt and to the waters within Norway's fjords and sunds; but it asks the Court in the present proceedings to declare that in all other respects the Norwegian Government is bound to observe both the rules of international law and the limitations of Norway's physical geography.

CHAPTER V

Detailed description of the charts in Annex 35 of this Reply

Introductory

Section A below contains a detailed description of the pecked green line shown on the charts in Annex 35 of this Reply. This is the line which forms the outer limit of Norwegian territorial waters according to the contentions of the United Kingdom Government. It is essential not to confuse this pecked green line with the firm green line shown on the Norwegian charts in Annex 2 of the Counter-Memorial, which represents a 3-mile limit according to the views of the British representatives in 1924.

Section B below contains a detailed description of the pecked blue line shown on the charts in Annex 35 of this Reply. This is the line which forms the outer limit of Norwegian territorial waters claimed by Norway in the Royal Decree of 12th July, 1935, as amended by the Royal Decree of 10th December, 1937.

For convenience, detailed descriptions of the lines on the charts, numbered 2 to 9 and covering in sequence the whole area under dispute, starting with the Varangerfjord and finishing at Trænen, are set out below on opposite pages. Section A (relating to the pecked green line) appears on the left-hand page, and Section B (relating to the pecked blue line) on the right-hand page.

General explanation of the system followed in drawing the pecked green line on the charts in Annex 35

The belt of Norwegian territorial waters is 4 miles wide and the outer limit of this belt is shown on the charts in Annex 35 by a pecked green line.

Where the base-line is land, it is taken as the low-water mark on the land. Where, on the other hand, the base-line runs across internal waters, it is formed by straight lines between the natural features by which such waters may be considered to be enclosed, i.e. between headlands, islands or rocks.

Where the base-line is land, it is not marked on the charts by any coloured line, although significant base-points are indicated by green dots (see below). Where, however, the base-line runs across internal waters, it is shown on the charts by a firm green line.

Certain internal waters are shown on the charts "hatched" in green, but not all Norwegian internal waters are so "hatched". Norwegian internal waters are "hatched" in *all* cases where these waters have base-lines running across them from which the belt of territorial waters is delimited, but they are also "hatched" in *some* cases where this is not so but where it was thought that this "hatching" would be helpful as a visual means of illustrating the system.

Elevations of the sea bed, which dry at low water and which lie within 4 miles of the low-water mark of the mainland or of other land permanently above high water, extend the belt of territorial waters to a distance of 4 miles from the seaward edges of such elevations.

Except in certain instances where historic claims have been conceded, straits which are not inland straits follow the normal rule by which territorial waters are delimited from the low-water mark, are not enclosed by straight base-lines and are not internal waters. Inland straits are assimilated to bays and, like bays, are internal waters [1].

The outer limit of Norwegian territorial waters consists, therefore, of the envelopes of a series of intersecting arcs of circles with radii of 4 miles. These arcs are centred on the base-line, which consists of the low-water mark of the mainland or of islands, the seaward edges of certain low-tide elevations (see above) or of straight lines enclosing internal waters. (For a description of the arcs of circles method see Annex 42 of this Reply.)

[1] For a classification of straits see para. 367 above.

In practice, in delineating the outer limit of territorial waters, it is unnecessary to draw arcs of circles centred on all parts of the low-water line on land, as it will be found that arcs centred on points within small indentations of the coast line fall inside the limit of those centred on the more salient points of the coast line. *The centres of those arcs which affect the outer limit of territorial waters and which are, therefore, significant are shown on the charts in Annex 35 by green dots.*

Arcs hereinafter referred to are arcs of circles of 4 miles radii

SECTION A

The pecked green line

CHART NO. 2

The outer limit of territorial waters is drawn at a distance of 4 miles and parallel to the base-line joining Jakobselv (the frontier between Norway and the U.S.S.R.) to Kibergsneset, which is the natural northern entrance point to Varangerfjord. This inlet is conceded as historic between these points. (See also Memorial, Vol. I, p. 146.)

From Kibergsneset to Blodskytodden the outer limit of territorial waters is formed by the arcs centred on Kibergsneset and the point 2 miles northward on the mainland, on the salient points of the islands of Vardøy, Hornøy, Reinøy and Reinøyskjær, thence on salient points on the mainland coast south-eastward of Blodskytodden.

Persfjord.—The outer limit of territorial waters is drawn 4 miles seaward of a base-line joining Blodskytodden to Segelodden, which are the natural entrance points of the fjord and were shown as such on the 1924 Oslo charts.

Between Segelodden and the north-western point of Haabrandneset the outer limit of territorial waters is governed by arcs drawn from Spiren, an outlying rock and the salient points of Haabrandneset.

Syltefjord.—The limit of territorial waters is drawn 4 miles seaward of and parallel to a base-line joining the north-west point of Haabrandneset and Klubbespiret. These points would seem to be the natural entrance points of the fjord, and appear to have been agreed in 1925 (Memorial, Vol. I, p. 146). Storskjær, one of the points mentioned, cannot be identified with certainty now.

Between Klubbespiret and Storsteinneset the limit of territorial waters is formed by the arc centred on the point close northward of Klubbespiret.

Makur-Sandfjord.—The limit of territorial waters is drawn 4 miles seaward of and parallel to the base-line joining Storsteinneset and Korsneset, the natural entrance points of the fjord.

Between Korsneset and the eastern natural entrance point of Baasfjord, situated about ¾ mile east of Rosmolen, territorial waters are limited by arcs centred on the salient points of the coast and on Molvikskjær, an outlying rock.

Baasfjord.—Outside this fjord the limit of territorial waters is drawn 4 miles seaward of and parallel to a base-line joining the eastern entrance point (see above) and Seiboneset, the western natural entrance point; this line was drawn on the 1924 Oslo charts.

Between Seiboneset and Vesterneset, the natural eastern entrance point of Kongsfjord, the outer limit of territorial waters is formed

SECTION B

The pecked blue line

(The fishing limit claimed by Norway), as compared with the green line shown on the charts in Annex 35

CHART NO. 2

The pecked blue line or fishing limit claimed by Norway is drawn 4 miles seaward of and parallel to the base-line joining Point 1, the Norwegian frontier at Jakobselv, to Point 2, a headland forming the eastern outer point of Kibergnes. *This line is 30 miles long and agrees with the historic territorial limit of Varangerfjord which is conceded by the Government of the United Kingdom.*

Thence the limit continues along a line 4 miles seaward of and parallel to a base-line joining Point 2 to Point 3, the outer point on the east side of Hornøy, *a distance of 6 1/4 miles. This limit passes seaward of the pecked green line at a maximum distance of 3/4 mile.*

Seaward of Points 3, 4 and 5, all headlands on islands, the limit follows the arcs with 4 miles radii centred on these points and the tangents joining adjacent arcs. Due to the near proximity of these points the limit is *a close approximation to the pecked green line which is formed by intersecting arcs centred on these points.*

The limit continues as a straight line 4 miles seaward of and parallel to a base-line joining Point 5 to Point 6, a headland on the mainland named Korsnes. *This base-line is 25 miles long and the limit passes at a maximum distance of 2 1/4 miles seaward of the pecked green line and there is a point on it 6 miles from the nearest land. No account is taken of the natural limits of either Persfjord, or Syltefjord, or Makur-Sandfjord.*

From the arc with 4 miles radius centred on Point 6 the limit runs parallel to and 4 miles seaward of a base-line joining this point to Point 7 Molvikskjær, an above-water rock about *1 1/2* cables off shore. *This line is 3 miles long and the limit is close to the pecked green line which is formed by intersecting arcs based on the coast.*

The limit continues as an arc of 4 miles radius centred on Point 7, thence as a line 4 miles seaward of and parallel to a base-line *19 miles long* joining this point to Point 8, a cape on the mainland named Kjølnes. *The limit passes at a maximum distance of 2 1/4 miles seaward of the pecked green line and there is a position on it over 6 miles from the nearest land. No account is taken of the natural limits of Baasfjord or Kongsfjord (including Straumsfjord and Risfjord).*

The limit then follows a line 4 miles seaward of and parallel to a base-line *25 miles in length* joining Point 8 to Point 9, the skjær

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 2 *(cont.)*

by the arcs centred on the former point and on an outlying rock close eastward of the latter point.

Kongsfjord consists of Straumsfjord and Risfjord. The natural entrance points to the inlet are Vesterneset and Naalneset and the limit of territorial waters is drawn 4 miles seaward of the base-line joining these points. The 1924 Oslo charts show the base-line Vesterneset to Naalneset.

Between Naalneset and Tanahorn, the natural south-eastern entrance point to Tanafjord, the outer limit of territorial waters is formed by the arcs centred on the salient points of the coast and on Tollefsnesskjær, on Rundskjær, and on Ø. Skarvenes, three offlying drying rocks.

Tanafjord.—The limit of territorial waters is drawn 4 miles seaward of and parallel to the base-line joining Tanahorn to the north-eastern point of Omgangs Klubben, the natural entrance points of the fjord. This base-line is that shown on the 1924 Oslo charts and was agreed to in 1925. (Memorial, Vol. I, p. 146.)

From the north-east point of Omgangs Klubben the territorial water limit westward is formed by arcs drawn from Omgangs Boen, a drying rock situated close off shore, Lille Omgang, a similar rock, and from salient points on the coast.

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 2 *(cont.)*

with a perch east of the skjær on which Tørrba beacon is situated (chart No. 3). *The limit passes at a maximum distance of 3 miles seaward of the pecked green line and there is a position on it 7 miles seaward of the line joining the natural entrance points of Tanafjord as well as of the coast.*

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 3

Tanafjord.—(See for chart No. 2.)

Between the north-east point of Omgangs Klubben and Bispen the outer limit of territorial waters is formed by intersecting arcs centred on Omgangs Boen, Lille Omgang, two off-lying rocks, the outlying drying rocks off Gamvik and Korsmerket and the outer drying rocks of Tørbøerne.

Kamøyfjord.—The outer limit of territorial waters is drawn 4 miles seaward of and parallel to a base-line joining Bispen to the outer point of Store Kamøy which form the natural entrance points of this fjord. The base-line joining these points was shown on the 1924 Oslo charts.

Makeilfjord.—Store Kamøy and Magtop are the natural entrance points to this fjord and the base-line joining them was shown on the 1924 Oslo charts. The outer limit of territorial waters is drawn 4 miles seaward of and parallel to this base-line.

Between Magtop and the north-eastern entrance point of Oksefjord the outer limit of territorial waters is governed by arcs centred on the salient points of the coast, for a very short distance off Sandfjord by a line 4 miles seaward of and parallel to a base-line joining the natural entrance points of that fjord, and on an arc centred on an off-lying rock southward of Sandfjord.

Oksefjord.—Off this fjord the outer territorial limit is drawn 4 miles seaward of and parallel to a base-line joining the headland about ¾ mile northward of Nyhamn to Kjelen which are the natural entrance points of the fjord. This base-line was shown on the 1924 Oslo charts.

Between Kjelen and an off-lying above-water rock close northward of the northern entrance point of Kjøllefjord the outer limit of territorial waters is formed by arcs centred on the salient points of the coast.

Laksefjord.—The outer territorial water limit continues by passing 4 miles seaward of and parallel to a base-line joining Store Finnkjerka, the eastern natural entrance point of the fjord, and the north-eastern point of Svaerholt Klubben, the western entrance point ; this base-line was shown on the 1924 Oslo charts and was agreed to in 1925 (Memorial, Vol. I, p. 146).

Porsangerfjord and the eastern entrance to Magerøy Sund.—These waters are conceded as historic *internal* waters. The outer limit of territorial waters is drawn 4 miles seaward of and parallel to a base-line joining the north-western point of Svaerholt Klubben, the natural eastern entrance point of this inlet, to Helnes, the natural

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 3

For the pecked blue line or fishing limit claimed by Norway to seaward of Point 8, Kjølnes (chart No. 2) and Point 9, the skjær with the perch east of the skjær on which Tørrba beacon is situated, see for chart No. 2.

From the arc with 4 miles radius centred on Point 9 the limit runs along a line 4 miles seaward of and parallel to a base-line, *4 cables long*, between Point 9 and Point 10, the skjær outside the skjær on which Tørrba beacon is situated. *The limit is a close approximation to the pecked green line which is formed by intersecting arcs centred on Points 9 and 10.*

From the arc with 4 miles radius centred on Point 10 the limit continues along a line 4 miles seaward of and parallel to a base-line *10.2 miles long* joining Point 10 to Point 11, the outer point Avløysa at Nordkyn. *The limit passes at a maximum distance of nearly 1 1/2 miles seaward of the pecked green line and there is a position on it about 5 1/4 miles seaward of the coast at Store Kamøy, the nearest land. No account is taken of the natural limits of Sandfjord, Kamøyfjord or Makeilfjord.*

From an arc with 4 miles radius centred on Point 11 the outer limit runs 4 miles seaward of and parallel to a *base-line 39 miles long* joining Point 11 to Point 12, the headland of Knivskjærodde. *The limit here passes right across Svaerholthavet at a maximum distance of 11 1/4 miles from the pecked green line and there is a position on it 14 miles from the nearest land and the closing line, conceded by the Government of the United Kingdom, of Porsangerfjord. No account is taken of the natural limits of Sandfjord, Oksefjord, Kjøllefjord, Laksefjord, Porsangerfjord and Magerøysund, Kamøyfjord, the inlet including Koldfjord, Risfjord and Vestfjord or Knivskjærbugta.*

The limit then continues as an arc of 4 miles radius centred on Point 12.

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 3 *(cont.)*

western entrance point. This base-line approximates to that shown on the 1924 Oslo charts. In 1925 it was agreed that the eastern limit of the inlet should be the north point of Svaerholt Klubben (Memorial, Vol. I, p. 146); the 4-mile arc from this point does not in fact extend the limit of territorial waters.

Kamøyfjord.—The outer limit of territorial waters lies 4 miles seaward of and parallel to the base-line joining the natural entrance points of the fjord which are Helnes on the south-east and Fuglenaeringen about ¾ mile northward of the village of Opnan. This base-line was shown on the 1924 Oslo charts.

Between Fuglenaeringen and Skinnstakknaeringen, the natural eastern entrance point of the inlet comprising Koldfjord, Risfjord, and Vestfjord, the outer limit of territorial waters is delineated by the intersecting arcs from these points.

Koldfjord, Risfjord and Vestfjord.—The outer limit of territorial waters passes seaward of this inlet parallel to and 4 miles seaward of a base-line joining Skinnstakknaeringen to the northern point of Store Stikka, an islet, thence along an arc centred on this point and then 4 miles seaward and parallel to the base-line joining Store Stikka to the north-eastern extremity of Nordkapp. These base-lines were those shown on the 1924 Oslo charts.

Nordkapp.—The outer territorial water limit is formed by the intersecting arcs from the extremes of this peninsula.

Knivskjærbugta.—The outer territorial water limit lies 4 miles seaward of a base-line joining the north-western extremity of Nordkapp to Knivskjærodden, the natural entrance points to this inlet. This base-line was that shown on the 1924 Oslo charts.

Knivskjærodden.—The territorial water limit follows the arc centred on this point.

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 4

Knivskjærbukta.—(See for chart No. 3.)

Knivskjærodden.—The outer limit of territorial waters follows the arc centred on this point until it cuts the arc centred on Langskjær in the eastern approach to Tufjord.

Tufjord.—The outer limit of territorial waters crosses the northern approach to Tufjord, 4 miles seaward of and parallel to a base-line joining Langskjær and an above-water rock close westward of Store Stappen. Langskjær is an above-water rock about ½ mile north-westward of the point forming the natural eastern entrance point of the fjord situated close northward of the village of Tunoes. The western approach to this fjord is considered closed by islands and above-water rocks, that westward of Store Stappen is the most north-westerly.

Thence the outer limit of territorial waters follows the arc centred on the above-water rock west of Store Stappen until it crosses the approach to Maasøyfjord. (The base-line joining Langskjær to the rock westward of Store Stappen was shown on the 1924 Oslo charts.)

Maasøyfjord and the western approach to Magerøy Sund.—These waters are conceded as historic *internal* waters. The outer limit of territorial waters passes 4 miles seaward of and parallel to a base-line joining Gjesvaernaeringen the natural eastern entrance point of the inlet (and the south-western entrance point of Tufjord) to Neringskjæret, an above-water rock, 3 cables off the north-eastern point of Hjelmsøy, the western natural entrance point of the inlet. In 1925 a base-line joining Gjesvaernaeringen to Sortvignaering, the north-eastern point of Hjelmsøy, was agreed (Memorial, Vol. I, p. 147). This latter line does not differ substantially from that now proposed which is slightly more favourable to Norway.

Between Neringskjæret and Geitingen the outer territorial limit is formed by the arcs from Neringskjæret, the northern point of the islet west of Tarevikbukta, the northern point of Hjelmsøy, Stauren, a salient point on the north-western coast of Hjelmsøy, and Geitingen, a drying rock off the western point of that island.

Waters between Hjelmsøy and the mainland on the east and Ingøy and Rolvsøy on the west.—These form a strait and are part of Indreleia and as such are *not* internal waters. The outer limits of territorial waters are therefore drawn from opposite sides of the strait according to the general rules for the tide mark.

The outer limit on the east side has been described above, the arc from Geitingen intersects the arc from Mefjordskjær, an outlying drying rock within 4 miles of the east coast of Ingøy. The outer

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 4

From the arc with 4 miles radius centred on Point 12, the headland Knivskjærodde, the pecked blue line or fishing limit claimed by Norway continues 4 miles seaward of and parallel to a base-line *19 miles in length* joining this point to Point 13, Avløysinga at the north-west point of the island named Hjelmsøy. *The limit crosses the approach to Maasøyfjord at a maximum distance of nearly 2 1/2 miles from the pecked green line and there is a position on it 6 1/4 miles from the nearest land and the closing line, conceded by the Government of the United Kingdom, for Maasøyfjord. No account is taken of the natural limits of Tuffjord or Maasøyfjord and Magerøysund (western approach).*

The outer limit thence continues along a line parallel to and 4 miles seaward of a base-line *12.8 miles long* joining Point 13 to Point 14, Stabben, an above-water rock about 8 cables northward of the island named Ingøy. *The limit passes in a straight line across the entrance to the strait between Hjelmsøy and Ingøy at a maximum distance of 4 3/4 miles from the pecked green line, and there is a position on it 6 3/4 miles from the nearest land. No account is taken of the limits of the strait between Hjelmsøy and the mainland on the east and Ingøy and Rolvsøy on the west.*

The outer limit then continues as an arc of 4 miles radius centred on Point 14, then as a line 4 miles seaward of and parallel to a *base-line 1.7 miles long* joining this point to Point 15, the northern above-water rock about a cable off Fruholmen. *The limit here approximates to the pecked green line which is formed by intersecting arcs centred on Points 14 and 15.* The outer limit seaward of Points 15 to 18 which are all above-water rocks separated by short distances and lying off Fruholmen *closely approximates to the pecked green line which is formed by intersecting arcs centred on these points.*

From the arc centred on Point 18, the limit continues as a line 4 miles seaward of and parallel to a base-line *26 1/2 miles long* joining Point 18 and Point 19, Rundskjær, an above-water rock about *1 1/2* miles south-west of Bondøy. *The limit here passes as a straight line across the approach to the strait between Ingøy and Sørøy at a maximum distance of nearly 8 miles seaward of the pecked green line and there is a position on it 10 1/4 miles from the nearest land. No account is taken of the limits of the strait between Ingøy and Rolvsøy on the east and Sørøy on the west or of Gamvikfjord.*

The limit then continues as a line 4 miles seaward of and parallel to a base-line *19.6 miles long* joining Point 19 to Point 20 (chart No. 5). Darupskjær, an above-water rock about 2½ cables off the

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 4 *(cont.)*

limit then follows arcs centred on the eastern point of Store Gaasøy, Lille Gaasøy, and Langskjær.

North coast of Ingøy.—The outer limit of territorial waters is formed by the intersecting arcs centred on Langskjær, Stabben, and the outer rocks off Fruholmen.

Waters between Ingøy and Rolvsøy on the east and Sørøy on the west.—These form a strait leading to Indreleia and so are *not* internal waters but territorial.

The outer limit of territorial waters is formed by the arc centred on the south-western rock off Fruholmen, thence 4 miles seaward of and parallel to a base-line joining this rock to Vesterskjær, the natural southern entrance point of Mafjord and situated close off the western point of Ingøy, thence the arc centred on this rock, and an arc centred on the north-west point of Rolvsøy, thence a straight line 4 miles seaward of and parallel to a base-line joining the north-western point of Rolvsøy to an unnamed point about 1¾ miles south-southwestward, both of which form the natural entrance points of the inlet comprising Trollfjord and Tufjord. The outer territorial water limit then follows arcs centred on this southern point, on a rock close off the northern point of Skipsholm on the south-western point of that island and on Tarhalsen, the northern point of Sørøy.

Between Tarhalsen and the unnamed point about 2 1/4 miles west of Sandøyfjord.—The outer territorial water limit follows the arcs centred on Tarhalsen, on two salient points on the north coast of Lille Kamøy, on a drying rock close northward of Bondøy, on Rundskjær, on salient points on the north-west coast of Sørøy situated about one and 2¼ miles west of Sandøyfjord.

Galtefjord.—The outer limit of territorial waters thence continues 4 miles seaward of and parallel to a line joining the natural entrance points of the fjord, an unnamed point about ½ mile north of Presten and Skarvnaeringen.

This was the base-line shown on the 1924 Oslo charts.

Bøtefjord.—The outer limit of territorial waters is drawn 4 miles seaward of and parallel to a base-line joining Skarvnaeringen to Steinsnaeringen, the natural entrance points of the fjord, this base-line was shown on the 1924 Oslo charts. *Thence* the outer limit of territorial waters continues as the arc centred on Steinsnaeringen.

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 4 *(cont.)*

northern point of the western extremity of Sørøy. *The limit passes at a maximum distance of over 4 miles seaward of the pecked green line and there is a position on it 7 1/2 miles from the nearest land. No account is taken of the natural limits of Galtefjord, Bøle fjord, Offord or Sandfjord.*

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 5

Bøleſjord.—(See for chart No. 4.)

Thence the outer limit of territorial waters continues as the arc centred on Steinsnaeringen.

Ofjord.—The outer limit of territorial waters is drawn parallel to and 4 miles seaward of the base-line joining Steinsnaeringen to Ofjordnaeringen, the natural entrance points of this fjord; this was the base-line also drawn on the 1924 Oslo charts.

Sandfjord.—The outer limit of territorial waters continues along a line parallel to and 4 miles seaward of the base-line joining Ofjordnaeringen to Darupskjær, the natural entrance points of the fjord. Darupskjær is an above-water rock situated close northward of the northern end of the promontory at the western extremity of Sørøy. This base-line was shown on the 1924 Oslo charts.

Between Darupskjær and Haanebben.—From the arc centred on Darupskjær the outer limit of territorial waters follows the arcs centred on the point west of Fuglen, on islets and rocks lying close off shore in the approach to Sørvaer, and on Skjaaholm. Thence it follows a line parallel to and 4 miles seaward of a base-line joining the headland east of Skjaaholm to Haanebben, the natural entrance points of Brevikfjord.

Sørøy Sund.—It is conceded that Norway has an historic claim to Sørøy Sund as territorial waters, but *not* as internal waters. It is a strait forming part of Indreleia and the outer limit of territorial waters therefore conforms to the rules governing the limits off the coast lines from both sides [1]. It is conceded however that all the waters inside the line joining Haanebben at the south-western extremity of Sørøy and Syldmylingen, the northern point of the island of Silden, are territorial.

The limit follows the arc centred on Haanebben until its intersection with the territorial limit of Sørøy Sund which it follows. On a line parallel to and 4 miles seaward of the base-line between Lørsnes and Syldmylingen the limit of territorial waters proceeds from its intersection with the limit of the sund until its junction with the arc centred on Syldmylingen.

Between Syldmylingen and Brynnilen.—The outer limit of territorial waters continues as the arcs centred on Syldmylingen until its intersection with that from Krykjeberget, the northern point of the island op Loppen, which it follows. Thence the limit is formed by arcs from the salient points on the west coasts of Loppen and

[1] Where the expression is made that the limit of territorial waters in straits is governed by the coasts, it is the "tide-mark" rule to which reference is made.

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 5

For the description of the pecked blue line or the fishing limit claimed by Norway between Points 19 and 20 see that for chart No. 4.

From seaward of Point 20 the outer limit continues as a line 4 miles seaward of and parallel to a base-line *44 miles long* joining Point 20 to Point 21, Vesterfall in Gaasan, *a rock awash about 8 miles from the nearest above-water rock or islet*, and about 8½ miles north-west of Fugløy and so *outside territorial waters in the conception of the Government of the United Kingdom. This limit passes seaward of the approaches to the following straits: Sørøysund, the waters between Loppen and Arnøy, and Fugløysund, and takes no account of the natural limits of Brevikfjord. The maximum distance between this limit and the pecked green line is 21 1/2 miles and there is a position on it over 19 miles from the nearest land.*

The limit then continues as a line 4 miles seaward of and parallel to a base-line *18 miles long* joining Point 21 to Point 22 (chart No. 6), Sannifal, a drying rock about 3½ miles north-west of the northern end of the island of Kvaløy and within 2 miles of the nearest islet off that point. *The limit here passes as a straight line, seaward of the entrances to the straits Fugløy Sveet and the waters between Vannøy and Kvaløy. It passes at a maximum distance of 9 1/2 miles seaward of the pecked green line and there is a position on it 11 miles from the nearest land.*

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 5 *(cont.)*

Loppekalven, and by arcs from rocks lying about 1½ miles off the coast and northward of Brynnilen.

Waters between Brynnilen and Arnøy.—These waters form a strait leading to, and in fact form part of, Indreleia and as such are *not* internal. The outer limit of territorial waters is therefore governed by the coasts on each side. This limit is formed by the arc from Brynnilen on the east and on the west from the salient point near Skuta and on Arnøyboan, a drying rock about 2 miles off Arnøy.

The limit then continues along the arc centred on Arnøyboan.

Fugløysund.—This is a strait leading to Indreleia and its waters are therefore *not* internal but territorial; the territorial limit is governed by the coasts on each side. On the east, the limit from the western side of the arc centred on Arnøyboan follows arcs from the salient points on the north coast of Arnøy. On the west, it is controlled by arcs from Haakjerringneset and salient points on the north-east coast of Fugløy.

Northward of Fugløy the outer territorial water limit is formed by the arc centred on Fugløykalven, an islet.

Fugløy Sveet is a strait between Fugløy and Vannøy, leading to Indreleia and as such is *not* internal waters. It is limited by an arc from Fugløykalven on the east and on the west by arcs from the salient points of Store Grimsholm, an islet lying in the strait about 2¾ miles off Vannøy, and by an arc from the north point of Vannøy.

Northward of Vannøy the outer territorial water limit is formed by arcs from the northern point of Vannøy and from the point about a mile westward.

The waters between Vannøy and Kvaløy form a strait leading to Indreleia and as such are *not* internal, the outer limit of territorial waters is governed by the coast and certain outlying rocks from both sides. On the east the outer limit of territorial waters is an arc centred on the west point at the north end of Vannøy. Thence it follows arcs centred on two rocks situated 2½ and 2¾ miles off the north-eastern end of Kvaløy. (See chart No. 6.)

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 6

Waters east of Kvaløy.—(See for chart No. 5.)

Northward of Kvaløy.—The outer territorial water limit follows the arc centred on the drying rock close eastward of Sollbaren and about 2½ miles northward of Kvaløy, and on that centred on Sannifallet, a drying rock about 3½ miles north-west of the northern end of Kvaløy.

Waters between Kvaløy and Grøtøy.—These waters form a strait leading to Indreleia and are therefore *not* internal waters; the territorial water limit is governed by the coasts on both sides.

On the east, the outer territorial water limit follows the arcs centred on Sannifallet and on a drying rock about 1½ miles west of the north-west point of Kvaløy.

On the west, the outer limit follows arcs centred on a drying rock about 1½ miles north of Grøtøy and on Bekkaren, an above-water rock nearly 3 miles north-west of the island.

Off the west coast of Grøtøy, the outer limit of territorial waters follows the arcs centred on Bekkaren, Ytre Fiskeboen, a drying rock about 4½ miles west of Grøtøy and about 1 mile from Kvitvoer, and on Kvitvoer, an above-water rock about 4¼ miles north-west of Grøtøy.

Grøtøy Sund.—This is a strait leading to Indreleia and so is *not* internal waters, the outer limit follows arcs from the coasts and outlying rocks on both its sides. It is formed on the northern side by the arcs from Kvitvoer and an above-water rock about 1¼ miles southward, and on its southern side by an arc from Kolbein, a rock about 1½ miles north of Sør Fugløy.

Off the west coast of Ribbenesøy, the outer territorial water limit follows the arcs centred on Kolbein, Juboan, a drying rock about 2 miles west of Sør Fugløy, and a drying rock close west of Burskjær, an above-water islet.

Kvalsund.—This is a strait leading to Indreleia and is therefore *not* internal waters. The territorial water limits are governed by the coasts of each side and the outlying drying rocks. The outer territorial water limit is formed by the arcs from Skogsfallan, a drying rock 1½ miles north-west of Treingan, and from the three above-water rocks about a mile north of Store Runda.

Off the west coast of Kvaløy.—The outer limit of territorial waters is formed by arcs centred on the three above-water rocks north of Store Runda, thence on an arc centred on a drying

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 6

The pecked blue line or fishing limit claimed by Norway seaward of Point 22 and Point 23 Øter Fiskebae (Ytre Fiskeboen), a drying rock about 4½ miles westward of Grøtøy and about 1 mile northward of Kvitvoer, an above-water rock, is a line 4 miles seaward of and parallel to the base-line *10 miles long joining* these two points. *The limit passes as a straight line across the approach to the strait between Kvaløy and Grøtøy at a maximum distance of 3 miles seaward of the pecked green line. There is a position on it about 7 miles from the nearest above-water rock or land.*

The outer limit continues as an arc of 4 miles radius centred on Point 23, thence as a line 4 miles seaward of and parallel to the base-line *9 miles long* joining Point 23 to Point 24, Jubae (Juboan), a drying rock about 2 miles west of Sør Fugløy and about ¾ mile westward of a small above-water rock. *The limit here passes as a straight line across the approach to Grøtøy Sund, a strait. Its maximum distance from the pecked green line is about 1 1/4 miles and there is a point on it at least 5 miles from the nearest above-water rock.*

The outer limit then follows a line 4 miles seaward of and parallel to a base-line *16.4 miles long* joining Point 24 to Point 25, Saltbae (Saltboen), a *rock awash* about 1½ miles west of the above-water rocks named Auvaer. *The limit passes as a straight line seaward of the entrance to the strait Kval Sund. Its maximum distance from the pecked green line is 4 miles and a point on it is situated about 7 miles from the nearest above-water feature.*

The outer limit continues as an arc of 4 miles radius centred on Point 25, thence as a line 4 miles seaward of and parallel to a base-line *19 1/2 miles long* joining that point to Point 26, a headland forming the north-west point of Kjølva, a cape at the northern end of the large island of Senja. *This limit crosses the approach ot Malangen, a strait, as a straight line. It is at a maximum distance of 5 1/2 miles from the pecked green line and there is a position on it situated nearly 9 miles from the nearest above-water rock. No account is taken of the natural limits of Haajafjord, or Ballestadfjord and Gyfjord.*

The outer limit then continues as a line 4 miles seaward of and parallel to a base-line *13 miles long* joining Point 26 to Point 27, Tokkeboen, *a rock awash* about 4 miles north-west of the islet named Ertnøy, and about 2½ miles north-west of Trollskjær, an above-water rock. *The maximum distance of the limit from the pecked green line is nearly 1 1/2 miles and there is a position on it about 5 1/4 miles from the nearest land. No account is taken of the natural limits of Mefjord, the inlet containing Ersfjord and Steinfjord or Bergsfjord.*

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 6 *(cont.)*

rock [1] (Havboen, on Norwegian chart 86) about 2 miles west-south-westward of Store Runda, thence on an arc centred on a drying rock [1] (Eistebotaaga, on Norwegian chart 86) about $3\frac{1}{2}$ miles south-west of Store Runda, thence on an arc centred on Dragan, an above-water rock situated about $4\frac{3}{4}$ miles south-south-west of Store Runda.

From the arc centred on Dragan, the outer limit of territorial waters follows 4 miles seaward of and parallel to the base-line joining an above-water rock about $1\frac{3}{4}$ miles west-north-west of the northern part of Bjornøy to Skulbaren, an above-water rock. (This line is part of the base-lines closing the fjords on the west side of Kvaløy.)

Malangen.—This is a strait leading to Indreleia and its waters are *not* internal. The outer limit of territorial waters is governed by the outlying rocks northward and southward of its entrance.

The outer territorial water limit following the arc centred on Skulbaren continues as a line parallel to and 4 miles seaward of the base-line joining Skulbaren to Hundungan, an above-water rock which forms part of the base-lines closing the fjords in the west coast of Kvaløy. The limit then continues along the arc centred on an above-water rock about $3\frac{1}{4}$ miles north-west of Hekkingen.

Baltestadfjord and Øifjord.—The outer territorial water limit north-westward of these fjords continues from the arc centred on the above-water rock $3\frac{1}{4}$ miles north-west of Hekkingen along a line 4 miles seaward of and parallel to the base-line joining this rock to Kjeila, the natural western entrance point of Øifjord. The outer limit of territorial waters then continues along the arc centred on Kjølva, a cape.

Mefjord.—The natural entrance points of this fjord are Kjølva and the point 5 miles south-westward and were shown as such on the 1924 Oslo charts. The outer territorial water limit follows the arc centred on Kjølva, thence along a line 4 miles seaward of and parallel to the base-line joining the entrance points of the fjord.

Between Mefjord and Maaneset, the western extreme of Senja.—The outer territorial water limit continues along the arc centred on Melø, an above-water rock $2\frac{1}{4}$ miles off shore, thence along a line parallel to and 4 miles seaward of a base-line joining an

[1] These names do not appear on the charts contained in Annex 35 and the reference to the Norwegian charts is given for convenience.

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 6 *(cont.)*

The outer limit then follows a line 4 miles seaward of and parallel to a base-line *18 miles long* joining Point 27 to Point 28, the dry skjær north-north-east of Glimmen. *The limit here crosses the outer approach to Andfjord which forms a strait. Its maximum distance from the pecked green line which here forms the closing line conceded by the Government of the United Kingdom as forming the territorial limit of historic waters is 8 miles. There is a position on the limit where the distance to the nearest land is 10 miles.*

The outer limit then continues as a line 4 miles seaward of and parallel to a base-line *3 1/4 miles long* joining Point 28 to Point 29, the northern Svebae, a drying reef about 1¾ miles off shore. *The limit here lies about 1/4 mile outside the pecked green line which is formed by the intersecting arcs centred on Glimmen and on Point 29.*

The limit continues as the arc with 4-mile radius centred on Point 29, thence as a line 4 miles seaward of and parallel to a base-line *7 1/4 miles long* joining that point to Point 30, the western Skreingan, an above-water rock. *The outer limit is at the most 1/2 mile seaward of the pecked green line which is formed by arcs centred on off-lying rocks.*

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 6 *(cont.)*

above-water rock about 2½ miles south-westward of the northern natural entrance point of Bergsfjord to Trollskjær, another above-water rock. Thence the outer limit follows the arc centred on Trollskjær and continues along a line parallel to and 4 miles seaward of a base-line joining that rock to Teistneset. Thence the outer limit follows the arcs centred on Teistneset and Maaneset, two headlands.

Northern entrance to Andfjord.—This is a strait leading to Indreleia. It is conceded that Norway has a claim to these waters as historic territorial waters but *not* as internal waters, the limit being a line joining Maaneset to the northern point of Andøy. (This limit was agreed to in 1925 (Mem., Vol. I, p. 146.) The outer limit of the eastern side follows the arc centred on Maaneset and from a drying rock about a mile north-west of Holmenvaer light. Thence the outer limit of territorial waters follows the historic limit to its intersection with the arc centred *on Glimmen*, the outermost above-water or drying rock about 2¼ miles north-north-east of Andøy. The outer limit then follows this arc.

The west coast of Andøy.—The outer limit of territorial waters follows the arc centred on Glimmen, thence the arcs centred on Sveboan, a drying rock about 1¾ miles off shore, and on two rocks about a mile off shore between it and Skreingan, the western of several above-water rocks about 1¼ miles off shore and 8 miles south-westward of Andenes, and thence along the arc centred on Skreingan.

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 7

The west coast of Andøy.—The outer limit of territorial waters between Andenes and Skreingan has been described for chart No. 6.

The outer limit continues along the arc centred on Skreingan, thence along the arcs centred on two drying rocks, $1\frac{3}{4}$ and $2\frac{1}{4}$ miles off shore between Skreingan and Skarveklakken.

Entrance to Gavlfjord.—Gavlfjord is a strait and its waters are therefore *not* internal.

The outer limit of territorial waters, following the general rules for the tide mark on each side of the fjord, continues along the arc centred on a drying rock close to Skarveklakken, thence on two rocks situated $\frac{1}{2}$ mile and $\frac{3}{4}$ mile off the west coast of Andøy on the east, and on the west centred on Brakan, an above-water rock about 2 miles eastward of Flesan, and on Flesan, a small above-water rock about 2 miles north of Anda.

North-west side of Langøy.—The outer territorial water limit continues along the arc centred on Flesan, thence along arcs centred on an above-water rock about $\frac{3}{4}$ mile south-west of the island of Anda and on Aammundskjær, an islet. Thence on arcs centred on two islets south-westward of Aammundskjær and on Fleskan, another islet.

From the arc centred on Fleskan, the outer limit follows a line 4 miles seaward of and parallel to a base-line joining an above-water rock close north-westward of Nyksund light to an islet about $1\frac{3}{4}$ miles west of Vottestad, thence along an arc centred on this islet and parallel to and 4 miles seaward of the base-line joining this rock to the southernmost above-water rock of the group named Oddskjær situated in the western entrance of Prestfjord.

Thence the outer territorial water limit follows the arc centred on Rova, an above-water rock nearly $\frac{1}{2}$ mile north of the northern coast of Skogsøy. From this arc the limit continues along a line parallel to and 4 miles seaward of a base-line joining the headland which forms the northern natural entrance point of Børøyfjord about $\frac{1}{2}$ mile northward of Vaajevika to an above-water rock about $\frac{1}{4}$ mile north of Langskjær. Thence the limit continues along the arc centred on this rock and then along the line 4 miles seaward of and parallel to the base-line joining this rock to Flesa. The outer limit then continues along the arcs centred on Flesa, on Skarvbaren, the outermost islet north-westward of Frugga, and on a drying rock [1] (Plyten on Norwegian chart 78) about $\frac{1}{4}$ mile south-westward of Skarvbaren.

Between Malnesfjord and Eidesfjord.—The outer territorial limit continues along the arc centred on Plyten, thence along an arc

[1] This name does not appear on the charts contained in Annex 35 and the reference to the Norwegian chart is given for convenience.

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 7

The pecked blue line or fishing limit claimed by Norway seaward of Points 28 to 30 (the dry skjær north-north-east of Glimmen to Skreingan) has been described for chart No. 6.

The outer limit from seaward of Point 30 follows a line 4 miles seaward of and parallel to a base-line *16 1/2 miles long* joining Point 30 to Point 31, the northern above-water rock of Flesan north of Langenes. *The limit here crosses at an acute angle the approach to Gavlfjord, which is in fact a strait. The maximum distance that the limit passes seaward of the pecked green line is 4 3/4 miles and there is a position on it 8 miles from the nearest above-water feature.*

The limit then continues along the arc with 4 miles radius centred on Point 31 and then 4 miles seaward of and parallel to the base-line *16 1/2 miles long* joining this point to Point 32, the north point of Flesa in Floholm outside Skogsøy. Flesa is an above-water rock. *The limit here passes about 1 1/2 miles outside the pecked green line and there is a point on it 5 1/2 miles from the nearest above-water rock. No account is taken of the natural limits of either Prestfjord or Borøyfjord.*

The limit then continues as a line 4 miles seaward of and parallel to the base-line *11.7 miles long* joining Point 32 to Point 33, the north point of the northern Floholm outside Aasanfjord. This Floholm is an above-water rock in a small group lying about $2\frac{3}{4}$ miles off the coast. *The limit passes at a maximum distance of nearly a mile seaward of the pecked green line which is formed here by intersecting arcs centred on rocks lying off the coast. There are positions on the Norwegian limit over 4 3/4 miles from the nearest above-water feature. No account is taken of the natural limits of Borøyfjord or Malnesfjord.*

The limit then continues as the arc with 4 miles radius centred on Point 33. From this arc the limit runs as a line 4 miles seaward of and parallel to the base-line *5 3/4 miles long* joining Point 33 to Point 34, Utfleskjær, a small above-water rock about 4 miles off the southern end of Langøy. *The limit passes at a maximum distance of a mile from the pecked green line and nearly 5 miles from the nearest above-water rock.*

Thence the limit is formed by a line 4 miles seaward of and parallel to a base-line *23 miles long* joining Point 34 to Point 35, Kverna, a small rock probably above water on which is a beacon tower nearly a mile off the north-western point of Vest Vaagøy. *The limit here passes in a straight line across the approaches to Vesteraalsfjord, Hadselfjord, Gimsøystrømmen and the waters between*

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 7 *(cont.)*

centred on an islet situated about ½ mile off shore and about 1¼ miles south-west of Frugga (see above), along an arc centred on Fuglnykoen, an islet close off shore. From this arc the outer limit follows the arc centred on Floholman, the western of a group of above-water rocks about 2¾ miles off shore. Thence the outer limit continues along the arcs centred on Skarholm, an above-water rock, on Utflesskjær, a small above-water rock, on Krasen and Sydbrakskjær, all above-water rocks.

Approach to Vesteraalsfjord and Hadselfjord.—These waters form the entrance to a strait (Hadselfjord, Sortlandsund and Gavlfjord) and to Gimsøystrømmen and Sundklakstrømmen; they are therefore *not* internal, the outer limit of territorial waters is governed by the coast lines on both sides. The limit on the northern side is formed by the arcs centred on Sydbrakskjær and on the south-western above-water rock of Kløvningerne, on the eastern side by the arc centred on Havboen, a drying rock situated about 1¾ miles from the islet of Store Ulvoholm and 4¾ miles off shore. The outer territorial water limit on the south-eastern side is formed by an arc centred on an above-water rock situated close off shore and about ½ mile northward of Laukvik on the north-western coast of Østvaagø. The limit continues on the southern side along arcs centred on a drying rock situated about 2¼ miles north of the north coast of Gimsøy, on a drying rock close northward of Hovsflesa and about 1¾ miles off shore, on Kvalnesflesa, an above-water rock about ¾ mile north of Vest Vaagøy. Thence the outer limit follows a line parallel to and 4 miles seaward of a base-line joining the drying rock close northward of the northern point of the island of Sandø to Honskjær, an above-water rock lying in the bight westward of Sandø. The limit continues as an arc centred on this rock and then parallel to and 4 miles seaward of a base-line joining Honskjær to Kverna, a small rock probably above water.

West coast of Vest Vaagøy.—The outer territorial water limit continues along the arc centred on Kverna and thence along the arc centred on a drying rock about ½ mile off shore and ¾ mile west of Eggum. Thence it continues along the arcs centred on the coast at Kleivheia lighthouse and the headland about ½ mile south-westward.

Napstrømmen is a strait leading to the historic territorial waters of Vestfjord and so to Indreleia and is therefore *not* internal waters. The outer territorial water limit is governed by the coasts on each side and by outlying rocks in the approach.

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 7 *(cont.)*

Gimsø and Vest Vaagøy. These are straits. The limit passes 12 1/2 miles seaward of the pecked green line and there is a position on it 10 1/2 miles from the nearest above-water feature. No account is taken of the natural limits of the inlet east of Eggum.

The limit thence continues as a line 4 miles seaward of and parallel to a base-line *14 1/2 miles long* joining Point 35 to Point 36 (chart No. 8), the northern dry skjær at Skarvholm, which is a small above-water rock on a bank about 3¾ miles west of Flakstadø. *This limit crosses the approach to Napstrømmen, a strait leading to Vestfjord and Indreleia, it passes 1 3/4 miles seaward of the pecked green line and there is a position on it over 5 1/2 miles from the nearest land or above-water feature.*

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 7 *(cont.)*

From the arc centred on the headland about ½ mile south-westward of Kleivheia lighthouse the outer territorial water limit continues along the arc centred on a drying rock about ¾ mile northward of the lighthouse on Haesholmerne, a group of islets in the approach to the strait, thence on the arcs centred on two above-water rocks named Myrlandsflesene about 1½ miles northward of the northern point of Flakstadø.

The outer limit thence continues westward.

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 8

Rosøystraumen, between Flakstadø and Moskenesøy, is a strait leading to the historic territorial waters of Vestfjord and to Indreleia, its waters are therefore *not* internal, the outer limit of territorial waters is governed by arcs from outlying rocks in its approach.

The outer territorial water limit follows the arcs centred on the two above-water rocks named Myrlandsflesene about 1½ miles northward of the northern point of Flakstadø, thence along the arcs centred on the northernmost small above-water rock of Skarvholm and on the westernmost of these rocks, thence along the arc centred on Strandflesa, an above-water rock or islet.

West coast of Moskenesøy.—The outer territorial limit continues along the arc centred on Strandflesa, thence along an arc centred on Kvalvikboerne, a drying rock about ¾ mile off shore, thence along an arc centred on the western extremity of Horseidmulen, the promontory west of Horseid. The outer limit then continues along the arcs centred on the islet at Skjelvsteinen, on the headland about 2¼ miles southward of this islet, on Hermansdalflesa, an islet close off shore, on the outermost drying rock of Stokvekflesa, and on Stampen, an islet about 1½ miles off shore and about 2¾ miles north-west of Lofotodden.

Waters between Lofotodden and Vaerøy.— These waters form a strait leading to the historic territorial waters of Vestfjord and so to Indreleia ; they are therefore *not* internal waters and the outer limits of territorial waters are governed by arcs from the coast and outlying rocks on both sides.

The outer territorial water limit follows the arcs centred on Stampen (see above), on Nordholm and on Sørholm, an islet close southwards.

The limit then continues on arcs centred on the western Skitenskarvholmene [1] (Norwegian chart 71), an above-water rock about a mile north-west of Mosken, on the western Skarvholmene about 2 miles south-west of Mosken, and on Flesa, an above-water rock nearly 2 miles north-west of Vaerøy.

Røsthavet, the waters between Vaerøy and Røst, forms a strait leading to the historic territorial waters of Vestfjord and so to Indreleia, they are therefore *not* internal and the territorial limit is governed by the coast and outlying rocks on both sides. This strait is more than 8 miles wide and the Government of the United Kingdom concedes the closing line for the limit of the historic

[1] These names do not appear on the charts contained in Annex 35 and the reference to the Norwegian chart is given for convenience.

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 8

The pecked blue line or fishing limit claimed by Norway seaward of Point 35 (chart No. 7) and Point 36 has been described above for chart No. 7.

Seaward of Point 36 the outer limit follows the arc with 4 miles radius centred on that point and then 4 miles seaward of and parallel to a base-line *3 cables long* joining that point to Point 37, the west point of the western Skarvholm, an above-water rock situated about 4 miles west of the northern end of Flakstadø. *The limit here closely approximates to the pecked green line which is formed by arcs of 4 miles radii centred on Points 36 and 37.*

From the arc centred on Point 37 the limit continues as a line 4 miles seaward of and parallel to a base-line *2 3/4 miles long* joining Point 37 to Point 38, the west point of Strandflesa, an above-water islet or rock about 2 miles off the north-western point of Moskenesøy. *The limit here passes less than 1/2 mile seaward of the pecked green line which is formed by arcs of 4 miles radii centred on those points, but crosses in a straight line the approach to Rosøystraumen, the strait between Flakstadø and Moskenesøy.*

Seaward of Point 38 the limit is the arc of 4 miles radius centred on that point, the limit thence runs 4 miles seaward of and parallel to the base-line *13 1/2 miles long* joining Point 38 to Point 39, Nordbøe, *a rock awash* nearly 2½ miles off the western coast of Moskenesøy. *The limit passes at a maximum distance* of *2 1/4 miles from the pecked green line and at distances varying between 5 and 5 1/2 miles from any land.*

The limit then continues along the arc of 4 miles radius centred on Point 39, then as a line 4 miles seaward of and parallel to the base-line *15.2 miles long* joining this point to Point 40, Flesa, an above-water rock nearly 2 miles north-west of Vaerøy. *This limit crosses as a straight line the approach to Moskenstraumen, the strait between Lofotodden and Vaerøy. It passes at a maximum distance of over 2 1/2 miles from the pecked green line and there is a point on it 6 1/2 miles from the nearest land or above-water feature.*

Thence the limit continues as a line 4 miles seaward of and parallel to a base-line *16 1/4 miles long* joining Point 40 to Point 41, Hombøen, a drying rock about 3 cables north of Skarvholm at Røst. The limit here crosses in a straight line the approach to Røsthavet, a strait. *Its maximum distrance from the pecked green line which here closes the historic territorial waters of Vestfjord is 6 1/4 miles and there is a point on the outer limit 8 1/4 miles from the nearest land.*

SECTION A *(cont.)*

The pecked green line (cont.)

CHART No. 8 *(cont.)*

territorial waters of Vestfjord as a line joining Elsneset [1] (Norwegian chart 71), the western extremity of Vaerøy, to Storeflesa [1] (Norwegian chart 70), an above-water rock about a mile north-east of the eastern extreme of Røstøy.

The outer territorial water limit follows the arcs centred on Flesa north-west of Vaerøy, on Elsneset, the western point of Vaerøy, on Kopskjær [1] (Norwegian chart 71), an above-water rock situated about ½ mile south of Elsneset, and on Kallen, an above-water rock about 1½ miles south of Vaerøy, to the intersection of the last arc with the closing line mentioned above of the historic waters of Vestfjord.

The limit continues along this line to its intersection with the arc centred on Storeflesa off Røst, thence along this arc.

Outside Røst, the territorial water limit continues as arcs centred on Store Flesa, on Lille Flesa, an above-water rock close westward, on the outer above-water rock of Natvikskjæran [1] (Norwegian chart 70) nearly ½ mile north of Røstøy, on Hombøen, a drying rock about a mile north-west of Røstøy and about .3 cables from the nearest islet of Skarvholman. Thence the outer limit continues as arcs centred on Tørbøen, a small drying rock about 2¼ miles west of Røstøy and about ½ mile from Svarvøy, an islet, on Nordre Skjortbaken, a small drying rock about 2 miles west-north-west of the island named Storfjell, on Havbøen, a small drying rock about 1¾ miles north-west of Skomvaer, on Vestskjærholm, an islet ¾ mile west of Skomvaer, and on Flesjan, an above-water rock ¾ mile south-west of Skomvaer.

Vestfjord.—The waters of Vestfjord are conceded by the Government of the United Kingdom as historic territorial waters but *not* as internal, the outer territorial water limit being a line joining Skomvaer lighthouse to Kalsholmen lighthouse at Tennholmerne (chart 9). This limit was agreed to in 1925 (Memorial, Vol. I, p. 146.)

The outer limit on the western side follows the arcs centred on Flesjan, on Bollen, an above-water rock about ¾ mile south-eastward of Skomvaer, on Kolbeinskjær, an above-water rock about 1¼ miles east-south-east of Skomvaer, and on Oddskjær, an above-water rock about 1¾ miles east of Skomvaer.

The outer limit then follows the line mentioned above, across the entrance to the fjord.

For a description of the south-eastern end of this limit and its continuation southward see for chart No. 9.

[1] These names do not appear on the charts contained in Annex 35 and the reference to the Norwegian charts is given for convenience.

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 8 *(cont.)*

From the arc of 4 miles radius centred on Point 41 the limit continues along a line 4 miles seaward of and parallel to the base-line *1 1/4 miles long*, joining this point to Point 42, a small drying rock about 2¼ miles west of Røstøy and about ½ mile from Svarvøy, the nearest islet. *The limit here forms a close approximation to the pecked green line which is formed by 4-mile arcs centred on Points 41 and 42.*

The limit thence continues as the arc of 4 miles radius centred on Point 42 and then as a line 4 miles seaward of and parallel to a base-line *3 1/2 miles long* joining this point to Point 43, North Skjortbaken, a small above-water or drying rock about 2 miles west-north-westward of the island of Storfjell. *The limit is at a maximum distance of 1/2 mile from the pecked green line and about 4 1/4 miles from the nearest above-water feature.*

The limit is then formed by the arc of 4 miles radius centred on Point 43, thence as a line 4 miles seaward of and parallel to a base-line *3 1/4 miles long* joining Point 43 to Point 44, Havbøen, a small drying rock about 1¼ miles west of Hernyken, an islet about ¾ mile north of Skomvaer. *The limit passes at a maximum distance of 1/2 mile from the pecked green line and there is a point on it about 4 1/2 miles from the nearest above-water feature.*

The limit thence continues as an arc with 4 miles radius centred on Point 44 and then as a line 4 miles seaward of and parallel to the base-line *1 3/4 miles long* joining this point to Point 45, Flesjan, a small above-water rock about ¾ mile south-west of the islet of Skomvaer. *The limit here approximates to the pecked green line which is formed by arcs centred on Points 44 and 45.*

The limit thence continues across the waters forming the approach to Vestfjord along a line 4 miles seaward of and parallel to a base-line *40 miles long* joining Point 45 to Point 46 (chart No. 9), the west point of the western Bremholm at Myken.

Point 46 is considered to be too far south to form the natural geographical southern entrance point of the Vestfjord. The Government of the United Kingdom concedes that the historic territorial waters of this fjord are enclosed by a line joining Skomvaer lighthouse on the north to Kalsholmen lighthouse at Tennholmerne (chart No. 9) on the south.

The pecked blue line passes at a maximum distance of 13 3/4 miles seaward of the pecked green line and there is a point on it about 20 miles from the nearest land or above-water feature.

SECTION A *(cont.)*

The pecked green line (cont.)

CHART NO. 9

The outer limit of territorial waters follows the line joining Skomvaer lighthouse (chart No. 8) to Kalsholmen lighthouse in Tennholmerne, which is the limit conceded on historic grounds by the Government of the United Kingdom as the territorial water limit of Vestfjord.

From the intersection of this line with the arc centred on an islet about a mile north-west of Kalsholmen lighthouse the limit follows this arc, thence along the arc centred on an islet about ½ mile west of the lighthouse.

Tennholmfjord and Valvaerfjord. — The entrance to these fjords lies between Tennholmerne and Valvaer, two groups of islands and rocks, and forms a strait leading to Indreleia. The waters are therefore *not* internal and the territorial water limit is governed by the coasts and outlying rocks from each side. The limit following the arc centred on the islet about ½ mile west of Kalsholmen lighthouse continues along the arc centred on an above-water rock close northward of Moholm, thence along the arcs centred on the northern above-water rock of Langbraken and on Orsbraken, an islet.

North-western side of Valvaer and Myken. — From the arc centred on Orsbraken the limit follows arcs centred on the islet about ½ mile north-eastward of Flesa, on Flesa, on an above-water rock close north-westward of Knøkjen, on Skjervøbøerne, a drying rock about ¾ mile westward of the islet named Knøkjen, and on an islet ¼ mile north of Kvalholm.

Lyngvaer and Trænfjord.—The entrance to these fjords lies between Myken and Trænen, two groups of islets and rocks, and forms a strait leading to Indreleia. The waters are therefore *not* internal and the territorial water limit is governed by the coasts and outlying rocks from both sides of the entrance. The limit from the arc centred on the islet ¼ mile north of Kvalholm continues as arcs centred on the western Bremholm, an islet, on an above-water rock nearly a mile southward of Bremholm and on the north-western islet of Indmyken. Thence the limit follows the arc centred on Store Hongskjær, an islet at the northern end of Trænen.

West side of Trænen.—From the arc centred on Store Hongskjær the limit continues as arcs centred on Lille Havsula, an islet, on the northern, on the western and on the southern islets of the Frøholmerne group in Trænen. Thence the limit follows the arcs centred on the north-western islet of the Sannavær group, on a drying rock close south-westward of that islet, thence along the arc centred on an above-water rock about ¼ mile north-east of Bøvarden and on Bøvarden, an islet near the south-western end of Trænen.

Bøvarden is at the end of the area delimited by the 1935 Decree.

SECTION B *(cont.)*

The pecked blue line (cont.)

CHART NO. 9

The pecked blue line or fishing limit claimed by Norway crosses the waters forming the approach to Vestfjord along a line 4 miles seaward of and parallel to the base-line joining Points 45 and 46 as described for chart No. 8.

From seaward of Point 46, the limit continues as a line 4 miles seaward of and parallel to the base-line *14.8 miles long* joining that point to Point 47, the west point of the western Frøholm, a small islet in the Trænen group. *This limit crosses the approach to the strait forming the entrance of Lyngvaerfjord and Trænfjord as a straight line, its maximum distance from the pecked green line is over 3 miles and there is a point on it 5 3/4 miles from the nearest above-water feature.*

Seaward of Point 47 the outer limit continues as an arc of 4 miles radius centred on that point and thence as a line 4 miles seaward of and parallel to the base-line *7 miles long* joining Point 47 to Point 48, the west side of Bøvarden, an islet near the south-western end of the Trænen group. This point is the last of those of the 1935 Decree. *The limit passes at a maximum distance of 3/4 mile from the pecked green line and there is a point on it 4 3/4 miles from the nearest above-water feature.*

PART III

Claims for damages

Claim by Norway for damage suffered by refusal of the United Kingdom to recognize the validity of the 1935 Decree

(Counter-Memorial, para. 577)

516. At the very end of paragraph 577 of the Counter-Memorial, Norway reserves the right to present to the Court at the appropriate time a claim for damages for the injury which Norway has suffered by reason of the refusal of the United Kingdom to recognize her sovereignty over the waters enclosed by the 1935 Decree. Norway reserves the right to put forward this claim for damages no doubt only in the event of the Court holding that Norway has sovereignty over the area enclosed by the 1935 Decree. This hypothetical Norwegian claim must be based on the contentions :

(a) that the United Kingdom committed some international delinquency in not at once recognizing a Norwegian claim to areas over the sea which has been found by the Court to be legitimate ;

(b) that this refusal caused damage to Norway because, if the United Kingdom had at once recognized the Norwegian claim, British fishing vessels would not have gone into waters covered by the decree in order to fish there ; whereas in fact they have gone into those waters in the cases mentioned in Part III of the United Kingdom Memorial because the United Kingdom did not recognize the validity of the 1935 Decree.

The hypothetical claim is an extremely novel one, but it would be for the Norwegian Government to support it on the basis of authority and principle, and for the United Kingdom to answer if Norway succeeded in making a *prima facie* case. A further question would arise, namely, whether it could be established that the damage Norway alleges resulted from the refusal of the United Kingdom Government to recognize the decree. It is, however, for Norway to make a *prima facie* case as regards the law and to discharge the burden of proof resting on her as regards the facts (including the damage which she alleges she has suffered) and for the United Kingdom to answer when this has been done.

Claim by United Kingdom in respect of the arrest of the Tervani

517. The following arrest of a British vessel must now be added to the list already given in paragraphs 146 to 155 of the Memorial :

Tervani.—This ship was arrested 7 miles to the westward of Nordkyn (in East Finnmark) on 4th February, 1950, by the Norwegian gunboat *Andenes* in a position agreed by the Norwegian authorities as 71° 10′ 48″ N., 27° 20′ E. This position is 1¾ miles within the decree line (between base-points 11 and 12; the interval between these points is 39 miles), but is 2 miles outside the red line.

The ship was taken to Hammerfest and a claim was made and upheld against her skipper for 15,000 kroner for illegal fishing and 20,000 kroner for part confiscation of value of catch gear and vessel.

Costs to the value of 200 kroner were also awarded against him. All these sums have been paid, but an appeal to the Supreme Court has been lodged against this conviction.

The United Kingdom Government claims the fullest compensation in respect of this vessel, as per paragraph 156 of the Memorial.

(Signed) W. E. BECKETT,
Agent for the Government of
the United Kingdom.

28th November, 1950.

PART IV

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PART V

Annexes

Annex 23

GLOSSARY OF NAMES OF FISHES AND MARINE ANIMALS MENTIONED IN THE NORWEGIAN COUNTER-MEMORIAL

French	*Latin*	*English*
Gadidés	Gadidæ	
Morue	Gadus morrhua	Cod
Cabillaud	Gadus callarias	
Alevin	...	Codling
Colin or lieu noir	Gadus virens	Saithe or coalfish
Églefin	Gadus æglefinus	Haddock
Sébaste norvégien	Sebastes marinus	Norway haddock
Flétan	Hippoglossus vulgaris	Halibut
Plie franche	Pleuronectes platesca	Plaice
Hareng	Clupea harengus	Herring
Maquereau	Scomber scombrus	Mackerel
Phoque	...	Seal
Baleine	...	Baleen whale
Cachalot	...	Sperm whale

Annex 24

CHART ILLUSTRATING MIGRATIONS OF COD

[*Not reproduced*]

Annex 25

COMPARISON OF THE QUANTITIES IN METRIC TONS (000's OMITTED) OF

(a) ARCTIC COD AND

(b) TOTAL DEMERSAL FISH

LANDED BY NORWAY AND FOREIGN SHIPS RESPECTIVELY FROM THE AREAS I, II A, II B, DURING 1935-1938. (AS SHOWN IN THE "BULLETIN STATISTIQUE")

	Total cod		*Total demersal*	
	Norway	*Foreign*	*Norway*	*Foreign*
1935	225	160	332	240
1936	254	261	376	364
1937	321	291	447	431
1938	326	275	434	432

Area I = Barents and Murman coast.
Area II A = Norwegian coast.
Area II B = Bear Island and Spitzbergen.

Annex 26

CHART SHOWING FISH STOCKS UNDERFISHED IN 1949

[*Not reproduced*]

Annex 27

THE ARCTO-NORWEGIAN STOCK OF COD

BY GUNNAR ROLLEFSEN

Experience of the effects of two periods of reduced fishing in the North Sea makes it of interest to investigate whether similar effects apply to stocks of fish in other regions.

During the first World War the toll taken of cod in the northern and Arctic waters was not reduced so much as during the recent war. During the inter-war period a number of nations had developed fairly large fleets of trawlers which fished in these remote waters. It was especially during the ten years immediately prior to the late war that large-scale trawling was carried out in addition to the fishing with other gear. All fishing in the Barents Sea ceased on the outbreak of war. A period of protection began.

Experience has shown that the catch curve of the Norwegian Lofoten fishery may serve as a guide to the evaluation of the fluctuations of the Arcto-Norwegian stock of cod. A glance at the course of this curve[1] would appear to show traces of the effects of protection.

During the war years there is a fall in the curve which might be taken as the after-effects of an earlier severe taxation of the younger fish. On the other hand we find in 1946-1947 a rise which might be taken as the effects of protection during the preceding years. A closer analysis, however, reveals a number of facts which fail to support this view.

It is well known that the Norwegian cod fishery has always displayed very strong fluctuations, and the investigations of recent years suggest that at least three different causes of these fluctuations may be distinguished. We find that annual fluctuations may be related to metereological and hydrographical conditions during the actual fishing season, and fluctuations of 3-5 years' duration can be traced back to the size of definite year-classes, while fluctuations of about 20 years' duration are probably due to the fact that the stock shrinks or expands over an extended period.

Before attempting to assess any effect of the reduced fishing in the war years it is necessary to point out that the Arcto-Norwegian stock of cod has been passing through a very rich period during the past

[1] Not reproduced.

25 years, and that the stock as a whole, despite an increased fishery, seemed to be on the increase before the war. For, simultaneously with the increasing fishing intensity and an increasing catch, the fish showed, on the whole, an increased individual size.

We must also realize, however, that the stock in former periods with a much smaller fishing intensity repeatedly seems to have declined heavily in the course of a few years, and remain small for a prolonged period, only to rise again suddenly. It is obvious that it is no easy task under such conditions to demonstrate the connection between the intensity of the fishery and the size of the stock, as has been done in the case of the North Sea stocks of fish.

The Arcto-Norwegian stock of cod in some respects, however, represents an ideal field for investigation, as the long spawning migration, which separates the sexually mature stock each year from the immature, makes possible the study of the mature and immature components in a pure state. This has facilitated the understanding of many problems which would otherwise have proved difficult.

It appears that while immature the Arcto-Norwegian stock of cod does not extend beyond the Barents Sea region. The most important fishing in our time in these waters is by trawlers. Practically all occurring age-groups, therefore, are now subjected to increased fishing, in contrast to former times when the fishing was by hook or line only.

We must assume, however, that the trawlers in their own interest, principally work the older age-groups of IV and upwards.

The sexually mature stock, which mixes with the immature during the feeding season is clearly also subjected to fishing in the Barents Sea from May to October. However, the main fishing of the mature stock takes place during its spawning migration to the Norwegian coast from November to April.

When war broke out the two good year-classes of 1929 and 1930, were the chief components of the spawning shoals [1], and they set their mark on the Lofoten fishing of 1939 and 1940 and considerably increased the catch. It must be taken into consideration that these two classes, both as immature cod "lodde torsk" in the Barents Sea, and as sexually mature cod, "skrei", on the Norwegian coast, had borne the brunt of the intensified fishing in the years 1935 to 1940. Nevertheless, they were able, despite the heavier taxation, to form a marked peak in the catch curve of the Lofoten fishery. This, too, suggests that the cod stock had considerable powers of resistance during these years.

When the two classes ebbed out, the Lofoten catch curve dropped correspondingly, remaining throughout the war years at an average level. From 1946 onwards, however, there was a sharp increase, with a record catch in 1947; this increase was due to a *single*, very strong year-class, that of 1937. It is out of the question that this class which is several times larger than the classes from the adjacent years, should alone have benefited from the protection in the Barents Sea. Its existence, and with it the increase in the Lofoten fishery, must have other causes than a reduced fishing intensity.

In my view, from this material we cannot demonstrate any effect on the stock from increased fishing before the war; also it cannot be

[1] Information about the age distribution of the sexually mature stock in the pre-war and war years is given in *Annales biologiques*, Vols. I and II.

demonstrated that the reduced fishing during the war had any effect[1]. But this is not, in my opinion, by any means a comforting statement. It is my view that the prolific period which the Arcto-Norwegian stock of cod has enjoyed during the past 25 years can be succeeded at any time by a less prolific period, perhaps of the same duration. We know that in the immediate pre-war years about 800,000 tons of this cod was fished. We know that requirements will greatly increase in the course of a few years, perhaps to 1,200,000 tons, perhaps more. It is an open question how a reduced stock will behave in the face of such requirements.

Annex 28

EXTRACTS FROM THE REPORT OF THE NORWEGIAN FISHERY COMMITTEE SET UP IN 1947

(The following extracts have been translated by Mr. Nansen.)

Title of committee

The committee appointed to report upon the question of rationalization of the fishing and fish-processing industries.

A *Report* concerning an amendment of the Act of 17th March, 1939, regarding trawling and a *Statement* concerning the situation of the Norwegian fishing fleet and its future development.

(The Committee's report was dated Bergen, 18th January-5th February, 1949.)

Page 3

"Preamble

. . . . . .

"The chief reason for the committee being appointed was that the question of trawling became urgent and topical after the war. There exists scarcely any other fishery question which has been so much in the foreground in public discussion after the war as the trawling question and the committee has, after further negotiations, agreed that the question of amending the law concerning trawling as soon as possible ought to be put before the Storting. The committee will, therefore, give a special report *inter alia* concerning this question."

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. . . . . .

"IV.—*The influence of trawling on the stock of fish*

"When the question of trawling was discussed before the war one of the arguments against it which was most in the foreground was the contention that trawling destroyed the stock of fish."

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[1] Later investigations indicate a slight decrease in the mortality rate during the war years.

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. . . . . .

"When the question of trawling was discussed in the 1930's, Norwegian deep-sea research contended that it could not be proved that human activity up to then had had any influence on the great changes in the amount of the stock of fish and Norwegian deep-sea research also to-day contends that it cannot be proved that trawling up to now has had any influence worth mentioning in this respect.

"When we remember that only after 1930 was foreign trawling of any major importance in the area for the Norwegian Arctic cod-stock, it is obvious that trawling cannot be an instrumental reason for the poor period which we had in the years 1900-1925. And when we know that after 1925, and especially from 1930 onwards, there took place an enormous expansion of foreign trawling on the Norwegian Arctic cod-stock at the same time as we ourselves with our fishing-gear had a very rich period so far as the result of the fishing is concerned from 1925 to 1947, the actual facts seem to give the best foundation for the acceptance of the statement of the deep-sea research that trawling up till now has had no influence worth mentioning on the cod-stock."

. . . . . .

"There has never been any apprehension as to the North Sea being fished out."

. . . . . .

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. . . . . .

"VII.—*Summary of Chapters I-VI*

"It cannot be proved that trawling up till now has had any influence on the great changes in the quantity of the cod-stock. We must, however, take into account the fact that an extended international trawl-fishing, in a period when the stock of fish for natural reasons is small, can have an influence on the Norwegian coast-fisheries. This is one of the reasons why it is necessary to some extent to rearrange the Norwegian fisheries so that we will be less dependent on the coast-fisheries.

"Seen in relation to the very large trawl-fishery on the Norwegian Arctic cod-stock, it must be presumed that an extended Norwegian trawl-fishery will not make much difference concerning the total influence of trawling on the stock of fish and the Norwegian coast-fisheries.

"In a period when the stock of fish is small, trawling can, even if the renewal of the stock of fish is not in danger, necessitate, in the interests both of trawling and the coast-fisheries, a further regulation, in addition to the sizes of mesh which have been established by international agreement. The question of such a regulation must, however, be solved through international negotiations."

. . . . . .

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"VIII.—*Proposal for the amendment of the law concerning trawling*

"The committee has unanimously come to the conclusion that the present law concerning trawling must be amended with a view to providing more facilities for trawling on the high seas than there are now. The committee further unanimously agrees that facilities for carrying on trawling must still be subject to licence."

. . . . . .

(*Comment by Mr. Nansen on the above proposal.*—"As to this proposal, the committee is divided into a majority and a minority, but the difference is of no importance for the case in issue. Both the majority and the minority propose that a licence could under certain conditions be given to vessels up to 300 gross registered tons.")

Annex 29

AGREEMENT

BETWEEN HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM AND THE NORWEGIAN GOVERNMENT

REGARDING CLAIMS IN RESPECT OF DAMAGE TO FISHING GEAR

LONDON, NOVEMBER 5th, 1934 [1]

[*Not reproduced*]

Annex 30

EXTRACT FROM FULTON, "THE SOVEREIGNTY OF THE SEA", PAGES 110-112

NEGOTIATIONS IN 1602 BETWEEN AMBASSADORS FROM ENGLAND AND AMBASSADORS FROM DENMARK/NORWAY

"After claiming that the Treaties of 1490 and 1523 [2] had given liberty of fishing to the English, the ambassadors were to declare that the law of nations allowed fishing in the sea everywhere, as well as the use of the ports and coasts of princes in amity for traffic and the avoiding of dangers from tempests ; so that if the English were debarred from the enjoyment of those common rights, it could only be in virtue of an agreement. But there was no such contract or agreement. On the contrary, by denying English subjects the right of fishing in the sea and despoiling them for so doing, the King of Denmark had injured them against the law of nations

[1] Printed and published by His Majesty's Stationery Office, London, Cmd. 4729, 1934.

[2] These were treatics by which English subjects were granted liberty to sail freely to Iceland for fishing or trading. (See para. 13 of the Counter-Memorial.)

and the terms of the treaty. Moreover, with respect to the licences the Queen declared that if her predecessors had 'yielded' to take them, 'it was more than by the law of nations was due'; they might have yielded for some special consideration; and in any case it could not be concluded that the right of fishing, 'due by the law of nations', failed because licences were omitted. As to the claim to the sea between Iceland and Norway on the ground that the King of Denmark possessed both coasts—the argument used by Dee and Plowden for the domination of the English Crown in the Channel—Elizabeth was emphatic. If it was supposed thereby 'that for the property of a whole sea it is sufficient to have the banks on both sides, as in rivers', the ambassadors were to declare 'that though property of sea, in some small distance from the coast, may yield some oversight and jurisdiction, yet use not princes to forbid passage or fishing, as is well seen in our seas of England and Ireland, and in the Adriatic Sea of the Venetians, where we in ours and they in theirs, have property of command: and yet neither we in ours nor they in theirs, offer to forbid fishing, much less passage to ships of merchandise; the which by law of nations cannot be forbidden ordinarily; neither is it to be allowed that property of sea in whatsoever distance is consequent to the banks, as it happeneth in small rivers. For then, by like reason, the half of every sea should be appropriated to the next bank, as it happeneth in small rivers, where the banks are proper to divers men: whereby it would follow that no sea were common, the banks on every side being in the property of one or other: wherefore there remaineth no colour that Denmark may claim any property in those seas, to forbid passage or fishing therein.'

"The ambassadors were to declare that the Queen could not agree that her subjects should be absolutely forbidden the seas, ports or coasts in question for the use of fishing, 'negotiation', and safety; she had never yielded any such right to Spain and Portugal for the Indian seas and havens. Nevertheless, if the King of Denmark for special reasons desired that she should 'yield to some renewing of licence', or that 'some special place upon some special occasion' should be reserved for his own use, they were in their discretion and for the sake of amity to agree; but the manner of obtaining the licence was to be defined in such a way that it would not be prejudicial to her subjects, nor 'to the effect of some sufficient fishing', and the licences were to be issued in the subject's name rather than in hers or the King's."

Annex 31

TRANSLATION BY MR. NANSEN OF DR. RÆSTAD'S OPINION IN THE "DEUTSCHLAND" CASE, DATED 2nd DECEMBER, 1926

[*Note.—Paragraphs of this opinion which have already been included in Mr. Nansen's translation of the* Deutschland *judgment (see Memorial, Vol. I, p. 164) are indicated by brackets—the translation being in some cases slightly amended.*]

Mr. P. A. Holm, the Public Prosecutor in the criminal case before the Supreme Court against Paul Weber and others, has, in an endorsement

dated 16th November, 1926, on a letter of the 14th of the same month from the Counsel for the Defendant, Mr. J. M. Lund, asked me to give an expert opinion on the rules regarding the determination of the territorial border with special reference to the concrete questions at issue. The Public Prosecutor has at the same time sent me a brief containing the opinion of Captain Christian Meyer to the Chief of Police in Kristiansund regarding the maritime border on the stretch Halten to Vikten, dated Oslo, 26th May, 1926, and the maps laid before the Court.

. . . . . .

The convicted persons have appealed on the grounds of faulty application of the law. Their counsel before the District Court has, in a letter dated 31st July, 1926, to the Judicial Committee, in substance maintained that the s.s. *Deutschland* was seized outside the territorial border since at the time of seizure the vessel was 4½ nautical miles from the nearest rock in the sea (Frohavet) and not in the opening of a fjord where the border is drawn "from one outermost point to another" and that the s.s. *Deutschland* was on no other occasion during the period in question within the territorial border.

According to the grounds of the judgment, the nominated experts have unanimously "established the place of arrest as lying .... at a distance of 5 nautical miles from Svarten, the most north-easterly islet of the Halten group and lying in a north-easterly direction from it". According to the positions which the experts have fixed according to the s.s. *Deutschland's* own log-book, the vessel was, in the period from 6th to 17th March, 1926, six times within a distance of 10 nautical miles from the nearest rock, which is not constantly run over by the sea. According to the positions given in the log-book, however, the vessel was at no time within a distance of 4 nautical miles from such a rock.

The District Court has presumed "that the border must be drawn parallel with the general direction of the coast, outside the skerries". Without it being possible for the Court to *decide* exactly where the border is to be drawn on the stretch in question, it is to be presumed that one is on the safe side in assuming that the base-line in the area in question cannot in any case be drawn closer in than from Utgrundsskjær (the outermost rock in the Halten group) to Kya on Folla, so that the territorial border and the customs border extend at least 4 and 10 nautical miles respectively from this line. It is on this basis that the District Court has found that the convicted persons "have been on several occasions within the Norwegian territorial border and on two occasions even within the base-line".

. . . . . .

The Act concerning the importation and sale of spirits, etc., dated 1st August, 1924, paragraph 35, has nothing special to say about the territory within which its provisions apply. In so far as the sea territory is concerned, it must, therefore, apply within the borders which can be deduced from the letters patent of 25th February, 1812, together with relevant supplementary rules of customary law, if any. The letters patent state that the "seaward border" of territorial sovereignty shall be calculated "up to the customary distance of 1 Scandinavian league from the outermost island or islet from the shore which is not run over by the

sea" [1]. Paragraph 36 of the above-mentioned Act imposes penalties when the vessel in question "is or has been inside the ordinary territorial border".

Paragraph 2 of the supplementary and amending Act to the Customs Act of 14th July, 1922, and paragraph 133 of the Customs Act, are applicable within the border specially referred to in paragraph 1 of the first-mentioned Act, i.e. "within a border of 10 nautical miles seawards from the outermost islands or islets which are not constantly run over by the sea".

The first and most essential question at issue is how the territorial border is to be drawn in accordance with the letters patent of 1812 and supplementary rules of customary law, if any.

(The Decree of 1812 and supplementary rules of customary law, if any, must be construed independently of the importance one will attach to the Act of 1922, § 1. Conversely, however, it might be said that the Act of 1922, § 1, should be construed in the light of the older rules of law. The decree and supplementary rules of customary law, if any, must also be construed independently of the fact that under the international Convention regarding the control of smuggling of alcoholic goods dated 19th August, 1925, Article 9, Norway and some other States "bind themselves not to object if any of them enforces its laws on vessels proved to be smuggling within a distance of 12 nautical miles from the coast or the extreme skerries line".

It must furthermore be remembered that we are here concerned with the question as to how general rules are to be interpreted for the purpose of supplementing provisions of criminal law. It is not absolutely necessary to assume that a general rule—especially one that in itself is very summary and which, therefore, must to a special degree be supplemented by construction—shall be construed in the same way, when it is to be applied in the field of penal law as when it is applied in other relations.)

Our Constitution declares that no-one shall be convicted except by virtue of the law, and the Courts demand that the regulations of criminal law shall clearly indicate the conditions when an action becomes criminal, so that if there is any doubt, the accused shall be acquitted.

(According to the decree there is no doubt as to the normal extent of the sea-territory measured from land to sea. It is a geographical mile or the equivalent of 7,420 metres. Doubts can, however, arise when it is to be decided from what base the geographical mile is to be drawn. And it is the answer to this question which will determine whether the District Court has been right in finding the accused guilty of infringing the legislation regarding spirits.)

It must be deemed established that the words "not run over" in the letters patent, and also when it is a question of applying penal legislation, are synonymous with "not continuously run over", so that the extent of the sea-territory in every case is calculated from the low-water line or, to be more precise, from the outermost part of the mainland, islands, islets or rocks which are above water at normal low tide (see letters from the Ministry for Foreign Affairs of 24th March and 26th May, 1908). The decision does not appear, in the case in question, to depend on whether the calculation is from the line of high water or of low water or how the low-water line is in detail determined.

[1] Ræstad, *Kongens Strømme*, p. 344.

(The question arises, however, if in the present case one should determine the extent of the sea-territory from single islands, islets or rocks or—as the District Court has done—from imaginary base-lines drawn between two islands, islets or rocks, and how in practice these base-lines are to be drawn.

It is here necessary to make a distinction. One problem is whether, according to international law, a State is entitled to determine that for particular or general purposes certain parts of the adjoining sea are under its supremacy. Another problem is whether, according to international law or according to its own laws, a State can regard its legislation in a particular case as extended to the same parts of the adjoining sea when it has not yet determined that its supremacy extends so far. A State can have a right without having made use of it.

The present question is, therefore, not answered by stating that the Norwegian State has a right to draw the border of its sea-territory in criminal cases 1 Scandinavian league from imaginary base-lines drawn between two of the outmost islands, islets or rocks. It is necessary to know if the Decree of 1812 and supplementary rules of customary law, if any, prescribed that the border of the sea-territory is to be based on such lines.

Here arises a difficulty which is serious, especially when the decree and supplementary rules of customary law, if any, are to be applied in criminal cases. Neither the decree nor such rules of customary law state how in practice—between which islands, islets or rocks—the base-lines are to be drawn. Even if it is assumed that the existing rules of law provide, as a general rule, that the sea-territory is to be reckoned from base-lines, it must be admitted that they do not give any positive guidance as to how the sea-territory is to be reckoned in any particular instance. Some foreign regulations state that the sea-territory is to be reckoned from "the coast and its bays" or from similar geographical configurations. It would then be possible to establish from historical evidence what is to be understood by "bays" or the other expression used. The decree does not contain anything similar. Furthermore, it is not very likely for historical reasons that the decree was meant to be understood in this way. The original starting point in Norway, as in several other countries, was that the extent of the sea-territory corresponds to the range of view, but this is not consistent with reckoning the sea-territory from an imaginary line. The decree was issued with the question of capture specially in mind. It is not reasonable to suppose that the Danish/Norwegian Government wanted to extend its protection of trading vessels to include undefined parts of the sea. If a construction such as that mentioned is to be applied to the decree, it must be because another solution would be unpractical, but the practical advantages—that is to say, greater certainty in the law—disappear, unless it can at the same time be stated how the base-lines are to be drawn. A rule in law, which states that the sea-territory is to be reckoned from base-lines, but not how the base-lines are to be drawn, can also not come into existence through usage ; custom must relate to something fixed by practice.

Undoubtedly the Norwegians have for many years looked upon the skerries as a unity, especially over questions of fishing, and on these questions in particular, according to their conceptions, the skerries are considered to provide the natural starting point for the calculation

of the sea-territory[1]. In my view, however, one cannot select any particular line along a part of the skerries as a basis for defining the sea-territory, unless one can find support in the positive regulations or unless in considering the region in question one can justify oneself on historical facts, i.e. customary law. The necessary historical facts will usually exist only in connection with an exclusive use, for instance for the purpose of fishing, of the part of sea in question: they will not so easily be present in cases, such as the present one, of criminal jurisdiction, and they are certainly not present in this case. The two Royal Decrees of 18th October, 1869, and 9th September, 1889, do not disprove the contention that in criminal cases the sea-territory can only be reckoned from base-lines drawn between two islands, islets and rocks, when a special provision has been issued to this effect; the base-line which was drawn by the Royal Decree of 9th September, 1889, runs at any rate in one place, if not in several places, inside rocks, which are dry at low water.

Having taken this standpoint, it is not necessary for me to decide the question whether the Norwegian authorities can determine that the Norwegian sea-territory shall be reckoned from a base line Utgrundsskjær-Kya. It is decisive for me that such a provision has not been issued, and that it also cannot be proved that such a determination of the sea-territory is based on historical facts both for the purposes of and as regards the region in question.)

It is, however, not necessary, in the present case, to take a standpoint on the question whether the outermost border of the sea-territory is to be calculated as the envelope of all circles with a radius of 1 Scandinavian league, the centres of which are situated on the low-water line, including islands or rocks which are only above sea level at low water, or whether the outermost border of the sea-territory is to be lines drawn parallel, at a distance of 1 Scandinavian league, from base-lines drawn between two points on the low-water line. For if it is concluded that the last-mentioned method of calculation is correct, then, in the present criminal case, where no special provisions exist, the base-lines must be drawn in the manner most favourable for the convicted, in other words between points which lie at the most 2 Scandinavian leagues from each other. The place where the s.s. *Deutschland* was seized—the only place which has been fixed independently of the ship's log, will in that case also lie more than 1 Scandinavian league from the base-line. The same is the case, according to the log, with the other places where the vessel was between the 6th and 17th March, 1926. As far as can be judged, it would also not make any difference in this respect, if it were considered that the convicted persons could not claim a more favourable construction than that the base-line were drawn between points lying at most 10 or 12 nautical miles from each other.

(There are fjords or arms of the sea on the Norwegian coast, which through a long historical development have received the character of Norwegian sea-territory, at any rate in some or most applications, but there is no evidence to the effect that the region of the sea in question or part of it has received such a character. Even if one takes it for granted that all parts of the sea, which can be called fjords or bays, are parts of Norwegian sea-territory—in other words that such a rule in law had been

[1] Ræstad, *Kongens Strømme*, p. 357.

formed through customary law—still in this case, where the "run" of the border has not been more clearly decided upon, one would still have to define the words "fjord" and "bay" in the most favourable way for the condemned, and limit "the fjord" and "the bay" in the way most favourable for the condemned. "The fjord" or "the bay" in question (Frohavet) would then clearly have to be limited outwards by a line not further out than between the Halten group and the Hosen Island.

The foregoing does not mean that Norwegian public authorities with full reason could not issue provisions, and, when the extent of the sea-territory is to be determined (unilateral extensions consequently excluded), could not by international agreement put forward minimum claims, representing an advance of the sea-territory far outside those borders, which must under the present legal conditions be drawn for the spatial jurisdiction of the penal codes.)

When the Hitra District Court proceeded on the assumption that the sea-territory in the present case, where there is no claim to title based on special provisions (i.e. title based on a supposed rule of customary law), can be calculated from base-lines drawn between rocks and on the further assumption "that the base-line in the area in question can in any case not be drawn further in than from Utgrundsskjær (the outermost rock in the Halten group) to Kya on Folla", the Court has, in my opinion, departed from the standpoint which a court of justice must take up when applying penal clauses, and has taken a standpoint which, if the case arises, the national authorities can adopt when they wish to establish the extent of the sea-territory by special decree or by international agreement [1].

I presume that the opinion now stated is valid for the applications of both § 35 and § 36 of the "Spirits Act". When the latter provision makes liability to punishment conditional on whether the vessel was "within the ordinary territorial border", the intention doubtless was only to emphasize that the territorial border according to § 1 of the Customs Act does not apply in this case.

. . . . . .

The question of calculating the sea-territory is of little importance where it is clear that the acts complained of cannot be punished according to the Spirits Act, but, if the case arises, come under the above-mentioned customs regulations. They must then, according to § 1 of the Act of 14th July, 1922, have been committed "within a border 10 nautical miles seawards from the outermost islands and islets which are not constantly run over by the sea". The s.s. *Deutschland*, as appears from the grounds of the judgment, was, according to the evidence of the ship's log-book, several times less than 10 nautical miles from the nearest rocks. It is then of minor importance whether the calculation of the sea-territory in accordance with the Law of 1922 is based on individual islands, islets or rocks, or on base-lines drawn between two of these. It should, however, be noted that there is nothing in the preliminaries to the Act of 1922 which suggests that, by using a somewhat different expression than in the letters patent, the intention was to establish a different starting point. In particular there is nothing to show that there was any

[1] The report, dated 20th May, 1913, of the Commission on Sea Borders of 1912 contained proposals for base-lines, *inter alia*, for this area, but this report has not been published.

intention of changing the substance by using the plural "islands or islets" instead of "island or islet" in the letters patent. Similar provisions in other countries also alternatively use plural and singular without this making any difference in substance. The above-mentioned provisions of the Smuggling Convention of 1925 can clearly of course not be used as a means of interpreting the provisions in the Norwegian Acts of 1921 and 1922, unless in the sense that the use of new expressions ("from the coast or outermost line of skerries") in the convention is a proof that the old expressions do not cover the same meaning.

As far as I am convinced, I am, however, of the opinion that the sea-territory, in the absence of special provisions, also in accordance with § 1 of the Act of 14th July, 1922, when applying the provisions concerning customs, must be calculated from the individual outermost points of the mainland, islands and islets, etc., and not from base-lines drawn between two such points.

Annex 32

TABLE SHOWING AREAS OF ARRESTS AND WARNINGS OF BRITISH VESSELS

PART I

(*Note.*—The numbers of ships correspond with the numbers in Annex 56, No. 1, of the Counter-Memorial.)

I = Inside O = Outside

No.	*Date*	*Name of ship*	*Red line*	*Blue line*	*Remarks*
1.	11.3.1911	*Lord Roberts*	I	I	In Varangerfjord.
2.	10.11.1922	*Celerina*	I	I	Also inside green line [1]
3.	4.1.1923	*Jeria*	I	I	On green line [1]
4.	8.1.1923	*Lord Lister*	I	I	Also inside green line [1]
5.	8.1.1923	*Sarpedon*	I	I	" " " "
6.	7.2.1923	*Quercia*	I	I	" " " "
7.	11.10.1923	*Our Alf*	I	I	" " " "
8.	18.10.1923	*Kanuck*	I	I	
9.	6.11.1923	*Island*	I	I	
10.	9.11.1923	*Earl Kitchener*	I	I	
11.	1.12.1923	*Carsten*	I	I	
12.	1.12.1923	*Venus*	I	I	
13.	1.1.1924	*Elf King*	I	I	
14.	8.1.1924	*James Long*	I	I	
15.	9.1.1924	*Salmonby*	I	I	
16.	31.1.1924	*Ninus*	I	I	
17.	18.3.1924	*Lord Harewood*	O	I	
18.	10.11.1924	*Dresden*	I	I	
19.	9.12.1924	*L. Rademaker*	I	I	
20.	13.1.1925	*Stanley Weyman*	I	I	
21.	14.1.1925	*Sarpedon*	I	I	

[1] I.e. the green line shown on the Norwegian charts in Annex 2 of the Counter-Memorial.

No.	Date	Name of ship	Red line	Blue line	Remarks
22.	27.1.1925	*Sheldon*	I	I	
23.	16.3.1925	*Hedesprenger*	I	I	
24.	7.12.1925	*Franc Tireur*	I	I	
25.	17.12.1925	*Seriema*	I	I	
26.	23.12.1925	*Moravia*	I	I	
27.	29.12.1925	*Elsekunkel II*	I	I	
28.	22.2.1928	*Fritz Busse*	I	I	
29.	12.9.1930	*Howe*	I	I	
30.	15.9.1930	*Lord Weir*	I	I	
31.	14.3.1931	*Deepdale Wyke*	I	I	
32.	22.9.1931	*Dairycoates*	I	I	
33.	4.6.1932	*Edgar Wallace*	I	I	
34.	24.9.1932	*Gambri*	I	I	
35.	28.10.1932	*H. Beerman*	I	I	
36.	5.11.1932	*St. Neots*	I	I	
37.	30.12.1932	*Akranes*	I	I	
38.	2.2.1933	*Hammond*	I	I	
39.	24.2.1933	*Loch Torridon*	O	I	
40.	24.2.1933	*Crestflower*	O	I	
41.	22.3.1933	*Lappland*	I	I	
42.	6.4.1933	*Loch Torridon*	O	I	
43.	13.4.1933	*H. F. Schroder*	I	I	
44.	3.11.1933	*St. Just*	I	I	
45.	1.12.1933	*Emma Richardson*	O	I	
46.	18.1.1934	*Vendora*	I	I	
47.	28.1.1934	*Preussen*	I	I	
48.	17.4.1934	*Beachflower*	I	I	
49.	23.11.1936	*Offa*	I	I	
50.	23.2.1937	*Jardine*	I	I	
51.	6.6.1937	*Vendora*	I	I	
52.	31.1.1938	*Sisapon*	I	I	
53.	6.10.1947	*Stella Dorado*	I	I	
54.	26.4.1948	*Fotherby*	I	I	
55.	26.4.1948	*Lacennia*	I	I	
56.	26.4.1948	*Equerry*	I	I	
57.	23.11.1948	*Cape Argona*	I	I	
58.	5.1.1949	*Kingston Peridot*	O	I	
59.	5.1.1949	*Arctic Ranger*	O	I	
60.	17.1.1949	*Lord Plender*	O	I	
61.	19.1.1949	*Equerry*	O	I	
62.	26.4.1949	*Barnett*	I	I	
63.	29.4.1949	*Bortind*	O	I	
64.	5.5.1949	*Lord Nuffield*	O	I	

PART II.—POSITIONS OF SHIPS WARNED

(*Note.*—Letters correspond with the letters given in Annex 56, No. 2, of the Counter-Memorial.)

Letter	Date	Name of ship	Red line	Blue line	Remarks
a.	10.3.1913	*Caulonia*	I	I	
b.	2.1.1923	*Night Hawk*	I	I	

Letter	*Date*	*Name of ship*	*Red line*	*Blue line*	*Remarks*
c.	18.2.1927	*Quercia*	—	I	Shown on the Norwegian chart as either on or barely inside the red line
d.	23.10.1930	*Lord Mountbatten*	On the line	I	
e.	21.12.1932	*Alafoss*	I	I	
f.	13.12.1933	*Veresis*	O	I	
g.	19.12.1933	*Veresis*	O	I	
h.	19.11.1935	*Syvari*	O	On the line	
i.	28.11.1935	*Moravia*	O	I	
j.	1.2.1936	*Bunsen*	O	I	Latitude should be 71° 10′ N.
k.	4.2.1936	*Bunsen*	I	I	Barely inside red line
l.	22.2.1936	*Malmata*	O	I	
m.	11.4.1936	*Edwardian*	O	I	
n.	16.5.1936	*Bunsen*	O	I	
o.	29.5.1936	*Cape Melville*	O	I	
p.	29.5.1936	*Capel*	O	I	
q.	29.5.1936	*Lord Mountbatten*	O	I	
r.	5.6.1936	*Lord Stonehaven*	O	I	
s.	28.10.1936	*Scarron*	O	I	
t.	1.2.1937	*Gregory*	O	I	
u.	14.9.1937	*Rutlandshire*	O	On the line	
v.	18.10.1937	*Alsey*	O	I	
w.	22.2.1938	*Visenda*	O	I	
x.	3.6.1938	*Cambridgeshire*	I	I	Barely inside red line
y.	10.12.1938	*Walpole*	On the line	I	

Annex 33

NOTE MADE OF CONVERSATIONS BETWEEN SIR EDWARD GREY AND Mr. IRGENS

No. 1

SIR EDWARD GREY TO Mr. FINDLAY

Foreign Office, 26th June, 1911.

Sir,

M. Irgens came to see me to-day, and explained the Norwegian view of the *Lord Roberts* case. He contended that Norway had always had a 4-mile limit, and that this and her special position as regards certain fjords would be recognized by any arbitration tribunal.

I said that, in default of a special agreement, we had never admitted the right of any country to interfere with a British ship beyond the 3-mile limit. This was the standpoint we were taking up with regard to Russia at the present time, and we could not contend for less with Norway. It was a principle on which we might be prepared to go to war with the strongest Power in the world. It was possible that our dispute with Russia would result in an international conference and, if so, the

outcome might be some agreement for the future. But even so, we should have to claim compensation for action outside the 3-mile limit taken before the agreement.

M. Irgens said that, if a satisfactory agreement was come to for the future at an international conference, the mere amount of compensation in the case of the *Lord Roberts* would not be a very serious matter; but for him to give way now on the question of principle would make it impossible for him to retain office. He asked whether the case would not come within the scope of our Arbitration Treaty with Norway, and whether we would press our claim pending the appeal, which he expected would be decided in about February next.

I said that, of course, if he put forward a request for arbitration, we would consider it on its merits; and I promised to let him know whether we would defer any claim until after the appeal had been heard.

I am, etc.

(Signed) E. GREY.

Annex 34

No. 1

TELEGRAM FROM FOREIGN OFFICE TO MR. DORMER

Foreign Office to Mr. Dormer

8th October, 1935.

(No. 21)

Your telegram No. 55 (of 7th October: Norwegian fisheries).

I am discussing with the Ministry of Agriculture and Fisheries possibility of drafting preliminary proposals as suggested by Norwegian Minister for Foreign Affairs.

Meanwhile you should make it clear, if you have not already done so, that if there is any interference at all with trawlers outside "red line", whether "serious" or not from Norwegian point of view (see paragraph 3 of your telegram), protection will be afforded up to 3-mile limit.

No. 2

REPORT BY MR. DORMER

Mr. Dormer to Foreign Office

Oslo, 17th October, 1935.

My telegram No. 56 (of 10th October).

I informed Minister for Foreign Affairs yesterday of contents of your telegram No. 21. He made no comment, but he informed me that Norwegian Legation in London had sent him a cutting from (he thought) a Liverpool newspaper in which it was stated as if on the authority of Mr. Maurice that the Norwegian Government would observe the red line until the end of the present fishing season, i.e. June 1936. He said that undue attention should not be paid to newspaper reports, but,

nevertheless, if anything was likely to provoke an incident it was a published statement of that nature. I said that I was sure that Mr. Maurice had not made the statement.

I realize that it will be difficult, if even possible, to prevent publicity on questions in the House of Commons, but the fact is that if statements are made in England which imply that the Norwegian Government regards the red line as still in force and those statements are reproduced in the press here, the risk of an incident will be increased.

No. 3

MR. COLLIER'S MINUTE RECORDING THE CONVERSATIONS OF 28th SEPTEMBER, 1935

I accordingly asked the Norwegian Minister to call on 28th September and put the position before him as above, adding (after consultation with the Ministry of Agriculture and Fisheries), that, as the first batch of trawlers was about to leave and would, in any case, insist on fishing up to the 3-mile limit if they thought the decree was now to be enforced, it was probable that we should have to send a patrol with them, if we were not in a position, by 30th September, to tell them that the "red line" arrangement would continue in practice.

No. 4

EXTRACT FROM DESPATCH OF SIR C. WINGFIELD OF 21st DECEMBER, 1933

Sir C. Wingfield to Sir John Simon, Oslo, 21st December, 1933

Sir,

In compliance with the instructions contained in your despatch No. 391 of the 15th instant, I to-day called on the Norwegian Prime Minister, whom I had been unable to see before, and, after reminding him of Mr. Fullerton-Carnegie's visit on 29th November, asked what was the explanation of the report which had now reached His Majesty's Government that the captain of the Norwegian fishery protection cruiser *Fridtjof Nansen* had marked base-lines on the chart of the British trawler *St. Brelade* which were outside the "red line" of 1925 and, in one case, showed Norwegian territorial waters as extending as much as 13 miles beyond this line.

2. Herr Mowinckel at once replied that, owing to some misunderstanding, the captain of the *Fridtjof Nansen* had indeed marked these lines, but the situation had now been explained to him. His Excellency went on to explain that he thought we were mistaken in thinking that any change in Norwegian procedure with regard to territorial waters had developed during the last eighteen months. A committee sitting in 1926 had laid down two lines : An inner one advocated by the majority, and an outer one recommended by the minority. These lines were marked

on the chart of the *Fridtjof Nansen*, and her orders were that arrests should only take place when a trawler had fished within the inner line, but that if a trawler were found fishing inside the outer line she was to be warned off. I pointed out that this was presumably what the captain of the *Fridtjof Nansen* had been doing, for which purpose he obviously had to specify where the limits in question were ; and that, if our trawlers were to be warned by an armed cruiser that they should not fish in this outer belt, in which we held that they were entitled to fish and to which Norway herself had put forward no official claim, we had cause to point out that this was a change from the *status quo*. I hoped, therefore, that the "gentlemen's agreement", recently concluded by Herr Asserson, would henceforward protect our trawlers from being warned off anything outside the inner line mentioned, to which Herr Mowinckel assented.

. . . . . .

(Signed) C. WINGFIELD.

[*Note.*—The remainder of this despatch, so far as relevant, deals with matters which the Norwegian Government asked should be regarded as confidential. It is therefore not included here. A copy of the complete despatch has been transmitted to the Norwegian Government.]

Annex 35

CHARTS SUBMITTED BY GOVERNMENT OF UNITED KINGDOM SHOWING BLUE AND GREEN LINES

[*See special volume*]

Annex 36

PROTEST BY UNITED KINGDOM GOVERNMENT AGAINST HONDURAS CONSTITUTION OF 1936

British Legation,
Tegucigalpa,
29th July, 1936.

Your Excellency,

I have the honour to refer to the new Honduranean Constitution, under Article 153 of which jurisdiction over territorial waters to a distance of 12 kilometres from the lowest tide mark is claimed by the Government of Honduras.

2. In this connection, I have the honour, on instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to inform Your Excellency that His Majesty's Government in the United Kingdom cannot recognize any general right on the part of a foreign State to exercise jurisdiction on the high seas outside the limit of 3 nautical miles from the line of mean low water.

3. I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

(Signed) D. G. RYDINGS.

His Excellency,
Señor doctor don Antonio Bermúdez M.,
Minister for Foreign Affairs, Tegucigalpa.

Annex 37

NOTES OF BRITISH, FRENCH AND GERMAN GOVERNMENTS CONCERNING THE 300-MILE SECURITY ZONE OF THE AMERICAN REPUBLICS, 1939

Extract from Hackworth, *Digest of International Law, Vol. VII, pp. 704-708*

The replies by the belligerent governments indicated their respective general attitudes toward the Declaration of Panama and the "security zone" provided for by it. The British Government stated :

> ".... The acceptance by His Majesty's Government of the suggestion that the belligerents should forego their rights in the zone must clearly be dependent upon their being assured that the adoption of the zone proposal would not provide German warships and supply ships with a vast sanctuary from which they could emerge to attack Allied and neutral shipping, to which they could return to avoid being brought to action, and in which some un-neutral service might be performed by non-German ships, for example by the use of wireless communications. It would also be necessary to ensure that German warships and supply ships would not be enabled to pass with impunity from one ocean to another through the zone, or German merchant ships to take part in inter-American trade and earn foreign exchange, which might be used in attempts to promote subversion and sabotage abroad and to procure supplies for the prolongation of the war, thus depriving the Allies of the fruits of their superiority at sea. Moreover, the acceptance of the zone proposals would have to be on the basis that it should not constitute a precedent for a far-reaching alteration in the existing laws of maritime neutrality.
>
> Unless these points are adequately safeguarded, the zone proposals might only lead to the accumulation of belligerent ships in the zone. This in turn might well bring the risk of war nearer to the American States and lead to friction between on the one hand the Allies, pursuing their legitimate belligerent activities, and on the other the American republics, endeavouring to make this new policy prevail.
>
> The risk of such friction, which His Majesty's Government would be the first to deplore, would be increased by the application of sanctions. His Majesty's Government must emphatically repudiate any suggestion that His Majesty's ships have acted, or would act, in any way that would justify the adoption by neutrals of punitive

measures which do not spring from the accepted canons of neutral rights and obligations. If, therefore, the American States were to adopt a scheme of sanctions for the enforcement of the zone proposal, they would, in effect, be offering a sanctuary to German warships, within which His Majesty's ships would be confronted with the invidious choice of having either to refrain from engaging their enemy or laying themselves open to penalties in American ports and waters.

. . . . . .

With regard to the specific incidents of which mention is made in the communication under reply, His Majesty's Government must observe that the legitimate activities of His Majesty's ships can in no way imperil, but must rather contribute to the security of the American continent, the protection of which was the object of the framers of the Declaration of Panama. His Majesty's Government cannot admit that there is any foundation for a claim that such activities have in any way exposed them to justifiable reproach, seeing that the zone proposal has not been made effective and belligerent assent has not yet been given to its operation.

In view of the difficulties described above, it appears to His Majesty's Government that the only effective method of achieving the American object of preventing belligerent acts within the zone would be, firstly, to ensure that the German Government would send no more warships into it. Secondly, there are obvious difficulties in applying the zone proposal at this stage of the war when so much German shipping has already taken refuge in American waters. If the Allies are to be asked to forego the opportunity of capturing these vessels, it would also seem to be necessary that they should be laid up under Pan-American control for the duration of the war.

In the view of His Majesty's Government it would only be by means such as those indicated that the wish of the American Governments to keep war away from their coasts could be realized in a truly effective and equitable manner. Until His Majesty's Government are able to feel assured that the scheme will operate satisfactorily, they must, anxious as they are for the fulfilment of American hopes, necessarily reserve their full belligerent rights in order to fight the menace presented by German action and policy and to defend that conception of law and that way of life, which they believe to be as dear to the peoples and Governments of America as they are to the peoples and Governments of the British Commonwealth of Nations."

The French Government replied in substantially the same manner as the British Government, saying that it appreciated the desire of the American republics to keep the war away from the coasts of the American continent and that it had examined in a most sympathetic spirit the proposal aiming at the establishment of a zone of maritime security. The French Government said that

"... It interprets the steps taken in the name of the American Governments, both on 23rd December and also by the preceding communication of the Declaration of Panama, as implying that in the minds of those Governments the constitution of such a zone,

involving a renunciation by the belligerent States of the exercise, over wide areas, of rights well established by international custom could result only from an agreement among all the States interested."

The French Government also stated that the facts relating to the *Graf Spee* case illustrated very plainly the situation which the American Governments were attempting to regulate; that the actions of the Germans in this case could not, in the opinion of the French Government, have any effect on the outcome of the war; but that if such acts were committed or attempted it was the right of France and Great Britain to oppose them by a counter-attack and, therefore, that if the maritime security zone was to be effective it was necessary for the American Governments to furnish the French Government with a satisfactory assurance that the German Government would no longer send warships or supply ships into the security zone. The French Government considered that the security zone had the effect of offering a zone of protection to German vessels and of thus depriving the Allies of advantages which arose out of their naval superiority over Germany. It asked that effective measures be taken to hold in the ports of the American countries the German ships which had taken refuge there and continued:

"5. The American Governments do not appear to contemplate assuming the responsibility of insuring within the wide areas which would constitute the zone of protection the suppression of acts of aid to the enemy (un-neutral service). The possibility of such acts is so great, thanks in particular to radio communications, that naval forces could not be deprived of the right of preventing them and repressing them to the full extent permitted by international law."

The German Government said:

"(2) The German Government believes itself to be in agreement with the American Governments that the regulations contained in the Declaration of Panama would mean a change in existing international law and infers from the telegram of 4th October of last year that it is desired to settle this question in harmony with the belligerents. The German Government does not take the stand that the hitherto recognized rules of international law were bound to be regarded as a rigid and forever immutable order. It is rather of the opinion that these rules are capable of and require adaptation to progressive development and newly arising conditions. In this spirit, it is also ready to take up the consideration of the proposal of the neutral American Governments. However, it must point out that for the German naval vessels which have been in the proposed security zone so far, only the rules of law now in effect could, of course, be effective. The German naval vessels have held most strictly to these rules of law during their operations. Therefore, in so far as the protest submitted by the American Governments is directed against the action of German warships, it cannot be recognized by the German Government as well grounded.... Besides, the German Government cannot recognize the right of the Governments of the American republics to decide unilaterally upon measures in a manner deviating from the rules hitherto in effect....
.... there arises first of all one important point which causes the situation of Germany and the other belligerent Powers to appear

disparate with respect to this: that is, while Germany has never pursued territorial aims on the American continent, Great Britain and France have, however, during the course of the last few centuries, established important possessions and bases on this continent and the islands off shore, the practical importance of which also with respect to the questions under consideration here does not require any further explanation. By these exceptions to the Monroe Doctrine in favour of Great Britain and France the effect of the security zone desired by the neutral American Governments is fundamentally and decisively impaired to start with. The inequality in the situation of Germany and her adversaries that is produced hereby might perhaps be eliminated to a certain extent if Great Britain and France would pledge themselves, under the guarantee of the American States, not to make the possessions and islands mentioned the starting points or bases for military operations; even if that should come about, the fact would still remain that one belligerent State, Canada, not only directly adjoins the zone mentioned in the West and the East, but that portions of Canadian territory are actually surrounded by the zone.

(4) Despite the circumstances set forth above, the German Government, on its side, would be entirely ready to enter into a further exchange of ideas with the Governments of the American republics regarding the putting into effect of the Declaration of Panama. However, the German Government must assume from the reply of the British and French Governments, recently published by press and radio, that those two Governments are not willing to take up seriously the idea of the security zone."

Annex 38

PROTEST BY UNITED KINGDOM GOVERNMENT AGAINST DECLARATION BY THE PRESIDENT OF PERU ON 1st AUGUST, 1947

British Embassy,
Lima,
6th February, 1948.

Your Excellency,

Under instructions from His Britannic Majesty's Principal Secretary of State for Foreign Affairs I have the honour to inform Your Excellency that the declaration made on 1st August, 1947, by His Excellency the President of the Peruvian Republic regarding Peruvian sovereignty over certain territory and waters adjacent to the Peruvian coasts has come to the attention of His Majesty's Government in the United Kingdom. Reference was made in that declaration to earlier proclamations by the Governments of the United States and Mexico regarding their sovereignty over the continental shelves adjacent to their coasts, and to those of the Argentine and Chilean Republics regarding their sovereignty over the continental shelf and the waters above it.

In his declaration, the President of Peru

(1) decreed that national sovereignty and jurisdiction may be extended to the submerged continental or insular shelf adjacent to the continental or insular shores of national territory, whatever the depth and extension of that shelf may be ;
(2) proclaimed the extension of national sovereignty and jurisdiction over the sea adjoining the shores of national territory, whatever its depth, so far as might be necessary to reserve, protect, maintain, and use natural resources and wealth of any kind which may be found in or below those waters ;
(3) declared on behalf of the State that it would establish the limits of the zones of control and protection of natural resources, so as to exercise that control and protection over the seas adjacent to the Peruvian coast in the area between the coast and an imaginary line parallel to it at a distance of 200 nautical miles measured following the line of the geographical parallels ; and also in the area between the shores of islands pertaining to the Peruvian nation and an imaginary line, traced round the islands at a distance of 200 nautical miles, measured from all points on the contour of those islands.

His Majesty's Government in the United Kingdom are gravely disquieted by the implications of the above claims which go far beyond those put forward in the earlier declarations referred to above of the United States and Mexico. In particular it would appear from the first item quoted in the preceding paragraph that it is the intention of the Peruvian proclamation to extend sovereignty over the continental shelf without regard to the depth of the sea or the distance from the coast ; and from the third item that a distance of 200 nautical miles from the Peruvian coast may be contemplated for the sea bed as well as for the waters of the sea, whereas the United States Government's announcement made at the time of the issue of their declaration and the Mexican declaration define the continental shelf as that part of the sea bed contiguous to the continent which is covered by not more than 100 fathoms in the case of the United States and not more than 200 metres or 109 fathoms in the case of Mexico. No precise definition of the continental shelf appears to have been given in the proclamation and decree of the Argentine Government on this subject.

In the light of the foregoing considerations His Majesty's Government in the United Kingdom, while not opposed in principle to claims to the exercise of sovereignty over the sea bed contiguous to the Peruvian coast, are unable to accept the claims set forth in the declaration of 1st August, 1947.

The Peruvian Government's action, on the other hand, in claiming that sovereignty may be extended over the large areas of the high seas above the continental shelf appears to be quite irreconcilable with any accepted principle of international law, governing the extent of territorial waters, hitherto recognized by the Peruvian Government or the great majority of other maritime States. In this connection it is permissible to point out that President Truman's Proclamation of September, 1945, while asserting certain claims to the control and conservation of fisheries adjacent to the United States coast, made no claim to territorial sovereignty over those waters.

While recognizing therefore that the protection and control of fisheries and conservation of the natural resources in the seas are the legitimate concern of any country within those waters over which its territorial jurisdiction extends, His Majesty's Government are obliged to place firmly on record with the Peruvian Government that they do not recognize territorial jurisdiction over waters outside the limit of 3 miles from the coast; nor will they regard British vessels engaged in their lawful pursuits on the high seas as being subject, without the consent of His Majesty's Government, to any measures which the Peruvian Government may see fit to promulgate in pursuance of the declaration.

His Majesty's Government also recognize that the protection of fisheries and the conservation of natural resources in the high seas outside territorial waters are a proper object of agreement, between those States whose nationals have joined in developing and maintaining the fisheries and other activities by which those resources are put to use. They are therefore prepared to enter into negotiations with the Peruvian Government, and with any other government which may have an established interest in the waters concerned, in order to agree on such protection and conservation of the resources in the sea as can be proved to be necessary in the common interest. They note, however, with regret that the declaration claims to establish protection and conservation over the high seas without having obtained any such agreement, and without providing any safeguards with respect to the established interests of other States such as were mentioned in the declaration made by the President of the United States referred to above. They are therefore obliged to have placed firmly on record with the Peruvian Government that, until such an agreement has been reached, they do not recognize, and will not consider their nationals as being subject to, any measures of restriction or control over the high seas outside territorial waters which the Peruvian Government may see fit to promulgate in pursuance of the declaration.

In this connection it should be noted with particular reference to whaling that progress has been made in the conservation of whaling stocks by the International Agreement for the Regulation of Whaling signed in Washington on 2nd December, 1946, by the representatives of the Peruvian Government, of His Majesty's Government and of twelve other governments. It is the intention of this agreement to safeguard by international action the legitimate interests of all those States which are parties to it, as well as the common interest of all in the conservation of whales at a productive level, and His Majesty's Government would accordingly be glad to consider, in consultation with the other governments which are or may become parties to the agreement, any additional measures which the Peruvian Government may consider it desirable to adopt for the conservation of whales in the waters adjacent to the Peruvian coasts. They are unable, meanwhile, to recognize as applicable to British whaling vessels any unilateral restrictions on whaling which the Peruvian Government may see fit to impose, in pursuance of the declaration referred to above, on Peruvian vessels.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

(Signed) JOHN C. DONNELLY.

His Excellency
Señor Doctor Don Enrique Garcia Sayán,
Minister for Foreign Affairs, Lima.

Annex 39

TREATY

BETWEEN HIS MAJESTY IN RESPECT OF THE UNITED KINGDOM AND THE PRESIDENT OF THE UNITED STATES OF VENEZUELA

RELATING TO THE SUBMARINE AREAS OF THE GULF OF PARIA

CARACAS, FEBRUARY 26, 1942 [1]

[Not reproduced]

Annex 40

PROTEST BY UNITED KINGDOM GOVERNMENT AGAINST DECLARATION BY THE PRESIDENT OF CHILE OF 23rd JUNE, 1947

In a letter of 13th August, 1947, the Chargé d'Affaires in London of the Government of the Chilean Republic enclosed for the information of His Majesty's Government a copy of a declaration dated 23rd June, 1947, by His Excellency the President of the Chilean Republic regarding Chilean sovereignty over certain territory and waters adjacent to the Chilean coasts. Reference was made in that declaration to earlier proclamations by the Governments of the United States of America and Mexico regarding their sovereignty over the continental shelves adjacent to their coasts, and to that by the Argentine Republic regarding its sovereignty over the continental shelf and the waters above it.

2. In his declaration, the President of Chile

(1) proclaimed on behalf of the Government of Chile national sovereignty over the continental shelf adjacent to the continental and island coasts of its national territory, whatever might be its depth below the sea and claimed in consequence all the natural riches existing on the said shelf or under it;

(2) proclaimed national sovereignty over the seas adjacent to its coast, whatever their depths, within those limits necessary in order to preserve and exploit the natural resources within the said seas and placed within the control of the Government all fishing and whaling activities on them;

(3) declared protection and control immediately over all the seas contained within the perimeter formed between the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coast of Chilean territory.

3. His Majesty's Government in the United Kingdom are gravely disquieted by the implications of the above claims which go far beyond

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[1] Published by His Majesty's Stationery Office, London, Cmd. 6400, 1942 (reprinted 1950).

those put forward in the earlier declarations referred to above of the United States of America and Mexico. In particular, it would appear from the third item quoted in the preceding paragraph, that it is the intention of the Chilean proclamation to define the continental shelf as extending to the unprecedented distance of 200 nautical miles from the Chilean coast without regard to the depth of the sea, whereas the United States Government's announcement, made at the time of the issue of their declaration, and the Mexican declaration define the continental shelf as that part of the sea bed contiguous to the continent which is covered by not more than 100 fathoms in the case of the United States of America and not more than 200 metres or 109 fathoms in the case of Mexico. No precise definition of the continental shelf appears to have been given in the proclamation or decree of the Argentine Government on this subject.

4. In the light of the foregoing considerations His Majesty's Government in the United Kingdom, while not opposed in principle to claims to the exercise of sovereignty over the sea bed contiguous to the Chilean coast, are unable to accept the claims set forth in the declaration of 23rd June, 1947.

5. The Chilean Government's action on the other hand in claiming sovereignty over the large areas of the high seas above the continental shelf appears to be quite irreconcilable with any accepted principle of international law governing the extent of territorial waters hitherto recognized by the Chilean Government or the great majority of other maritime States. In this connection it is permissible to point out that President Truman's Proclamation of September 1945 while asserting certain claims to the control and conservation of fisheries adjacent to the United States coast, made no claim to territorial sovereignty over those waters.

6. While recognizing therefore that the protection and control of fisheries and the conservation of the natural resources in the seas are the legitimate concern of any country within these waters over which its territorial jurisdiction extends, His Majesty's Government are obliged to place firmly on record with the Chilean Government that they do not recognize territorial jurisdiction over waters outside the limit of 3 miles from the coast; nor will they regard British vessels engaged in their lawful pursuits on the high seas as being subject, without the consent of His Majesty's Government, to any measures which the Chilean Government may see fit to promulgate in pursuance of the declaration.

7. His Majesty's Government also recognize that the protection of fisheries and the conservation of natural resources in the high seas outside territorial waters are a proper object of agreement between those States whose nationals have joined in developing and maintaining the fisheries and other activities by which those resources are put to use. They are, therefore, prepared to enter into negotiations with the Chilean Government, and with any other government which may have an established interest in the waters concerned, in order to agree on such protection and conservation of the resources in the sea as can be proved to be necessary in the common interest. They note, however, with regret that the declaration claims to establish protection and conservation over the high seas without having obtained any such agreement, and without providing any safeguards with respect to the established

interests of other States, such as were mentioned in the declaration made by the President of the United States referred to above. They are, therefore, obliged to place firmly on record with the Chilean Government that, until such an agreement has been reached, they do not recognize, and will not consider their nationals as being subject to, any measures of restriction or control over the high seas outside territorial waters which the Chilean Government may see fit to promulgate in pursuance of the declaration.

8. In this connection it should be noted in particular that, as regards whaling, both the United Kingdom and Chile are parties to the International Agreement for the Regulation of Whaling, signed in London on 8th June, 1937, and to the Protocol of 24th June, 1938; and signatories of the Protocol signed at Washington on 2nd December, 1946, amending that agreement by which the contracting parties mutually imposed upon themselves certain restrictions directed towards the conservation of whales. His Majesty's Government have been scrupulous in fulfilling their obligations under this agreement and would be prepared to consider, in consultation with the other governments which are or may become parties to the agreement, any additional measures which the Chilean Government may consider it desirable to adopt for the conservation of whales in the waters adjacent to the Chilean coasts. They are unable, meanwhile, to recognize as applicable to British whaling vessels any unilateral restrictions on whaling which the Chilean Government may see fit to impose, in pursuance of the declaration referred to above, on Chilean vessels.

(The above protest was delivered on 6th February, 1948.)

Annex 41

INTERNATIONAL NORTH-WEST ATLANTIC FISHERIES CONFERENCE

FINAL ACT AND CONVENTION,

WASHINGTON, 8th FEBRUARY, 1949[1]

[*Not reproduced*]

Annex 42

DESCRIPTION OF THE ARCS OF CIRCLES METHOD OF DELIMITING TERRITORIAL WATERS

(The French expression for this method is "la courbe tangente")

The exterior limit of territorial waters consists of the envelopes of the arcs of all circles of (in the case of Norway) 4 miles radius, whose centres

[1] Printed and published by His Majesty's Stationery Office, London, Cmd. 7658, 1949.

form the low-water line of the mainland and of islands, rocks, banks, etc., under the rules stated in paragraph 122 of the Memorial.

The word "envelope" is a mathematical term and denotes a curve forming a common tangent to a number of other curves arranged according to some fixed principle. With regard to territorial waters this has been illustrated in Fig. 1 [1] where points, arcs from which form the "envelope", have been numbered consecutively from 1 to 48. (It will be seen that arcs from points 6 A, 15 A, 19 A, 23 A, 26 A, 32 A, 34 A and 34 B do not affect the outer limit.)

Theoretically, the centres of the circles should be all the points on the low-water line (i.e. there should be an infinite number of them); but in practice the position of the territorial limit may be obtained by taking points at short distances apart on the low-water line and, with these as centres, striking arcs of 4 miles radius and joining the outer arcs in a continuous series of curves. It should be noted that

(a) If the low-water line be straight or itself a smooth curve, the envelope will be of the same character. (This is illustrated in Fig. 1 between points 1 and 10.)

(b) If the low-water line be indented with projecting points, the envelope will not form a smooth curve but a number of short intersecting arcs. (This is illustrated in Fig. 1 between points 17 and 23.)

In the example in Fig. 2 [1] the low-water line between points B and C is concave to the sea and the intervening low-water line lies on the shoreward side of the circumference of the circles with centre A (the intersection of the arcs from B and C) and of similar radius. It will be seen that, in such cases, when drawing the territorial limit, no account need be taken of any points between B and C, as all the arcs from centres on the low-water line between them lie shoreward of the intersection of the arcs from B and C. Thus these two arcs form the territorial limit in the vicinity.

Annex 43

OPINION OF M. LÖFGREN ON THE STATUS OF LAHOLM BAY (1925)

Extract from Jessup, *The Law of Territorial Waters, pp. 413-424*

The Swedish position in regard to Laholm Bay and to other bays and fjords in that country, has been authoritatively set forth by M. Eliel Löfgren in an opinion rendered 11th February, 1925, to the Swedish Minister for Foreign Affairs. M. Löfgren was then legal adviser to the Foreign Office and is now himself Minister for Foreign Affairs. The case involved the seizure of the German trawler *Heidrich Augustin* 1.4 distance minutes outside the line drawn from Halland's Väderö lighthouse and Tylö lighthouse at the entrance to Laholm Bay. It is now being heard on appeal before the Supreme Court of Sweden. The opinion herein quoted in translation is taken from the MS. records of the Department of State by courteous permission of the Department and of

[1] Not reproduced.

M. Löfgren. For this permission the writer expresses his grateful appreciation. Additional opinions in the same case by M. Unden, former Minister for Foreign Affairs, and by Dr. Gihl are also of great importance but were not received in time to be incorporated here. The opinion of M. Löfgren follows :

"To His Excellency the Minister for Foreign Affairs.

"In connection with the capture on 19th January, 1925, of a German ship reported to have been found trawling at the place of capture, 1.4 distance minutes outside of the line between Halland's Väderö lighthouse and Tylö lighthouse, at the mouth of Laholm Bay, Your Excellency has requested me to make a statement concerning the extension of Swedish territorial waters in this district ; and in fulfillment of this request I have the honour to make the following statement.

"In order to confirm the views I hold regarding the territorial waters around Laholm Bay, it is necessary to touch upon the question of Swedish territorial water limits in general.

"It is well known that there exist no uniform international rules as regards the extent of the water limits within which a country holds sovereignty and jurisdiction for the protection of its political and economic interests. Judging from various theories of international law doctrines which have been submitted (see below), each country has recognized different rules in legislation and practice for a territorial limit of 3, 4 or 6 nautical miles or, in some cases, even more, according to its particular interests (for example fishing), within which the country claims jurisdiction. And in so far as such claims have had sufficient weight and reasonable limit—it may be noted that different limits may be claimed for different purposes—they have been respected by international law. Tradition by means of century-long practice, during which a certain national limit has been claimed as far as possible, has of course been regarded as an important ground for its recognition even in international law.

"As regards Sweden, a limit has long been claimed for territorial waters of 1 geographic mile, consisting of 1/15 degree or 4 nautical miles calculated from the line of low water. For neutrality purposes this limit has been supported in several decrees ever since the latter half of 1700, and the same basis has been used for regulations concerning police and customs guards and for fishing, which has been reserved for Swedish citizens (Royal Decree 1871 concerning fishing off the west coast of Sweden and later decrees).

"In statements made to foreign Powers, the Swedish Government has repeatedly referred to tradition and decrees upon which are based the claims of a territorial water limit of 4 nautical miles from the coast. This was done in 1874, for example, in connection with the circular note of the then British Minister for Foreign Affairs of 28th September of the same year ; and again when declaring its neutrality to the foreign Powers in question at the beginning of the World War. It is true that the warring nations did not always respect this claim during the World War. But in the exceptions when action was taken in conflict with the Swedish attitude, the Swedish Government protested against the lawlessness of such hostile action. Neither was the Swedish privilege abandoned by the issuance of two decrees by the Swedish Government on 29th November, 1915, and 19th July, 1916, whereby it declared itself content to support

a limit of only 3 nautical miles in regard to the right of submarines to pass Swedish territorial waters. On the contrary, the formulation of these decrees ('in Swedish territorial waters within 3 nautical minutes') proves that, in the opinion of the Swedish Government, the limit for territorial waters extended beyond 3 miles.

"A decree issued on 14th July, 1916, prohibiting air traffic over Swedish territory, was so put into effect that Swedish water limits were regarded as extending 4 nautical miles from the coast.

"As to the *international recognition* of the above-mentioned rule, it is worthy of note that the prominent international law expert, Professor Franz V. Liszt, in a memorandum prepared by him, at the request of the Swedish Government, in connection with the capture of the *Elida* during the World War by German marine forces at a distance of between 3 and 4 minutes from the Swedish coast, declared that *Sweden's claim to a 4-mile limit for its territorial waters has won international acknowledgment and that this limit was also binding for the German Government.*

"The rule having a claim to general recognition, which has been cited as opposed to the Swedish and Norwegian 4-mile claim, is the 3-mile limit accepted by England, among others. This rule, however, was not fixed until the first part of 1800, in order to establish a firm basis for the calculation of territorial waters, in place of the principle cited by Grotius that the territorial waters of a country should extend as far as they could be enfiladed with artillery from the coast. Three miles was probably at that time the range-limit of guns, but the principle upon which the rule was based should later have required an extension of the territorial water limits, corresponding with the technical development of the limit of the range of guns.

"The longer distance of Swedish and Norwegian territorial waters have presumably remained as the reduced results of an effort to claim a still more extended limit, calculated according to a measure competing with the 'range of guns', viz. the so-called 'sight or range of vision rule' : they tried to claim for Swedish (and for Norwegian) territorial waters the distance from which the rigging of a large ship could first be seen from land. The extensive investigations made in connection with the Norwegian regulations concerning territorial waters, are of the greatest interest. About the middle of 1700 a decision was made concerning the Norwegian territorial waters, both as regards protection of neutrality and fishing, which proclaimed as Norwegian territorial waters one (old) Norwegian mile which is equal to 1 geographic mile or 4 minutes. (See Dr. Böye's *Territorial Waters* at the conference at Stockholm in 1924 of the International Law Association.) In Sweden a Royal communication of 1758 was still based upon the range of vision rule, which made territorial waters 3 geographic miles (equal to 12 nautical miles). But in the King's instructions to the navy's commanders of 28th May, 1779, it was declared that, 'for the present', 'Swedish Dominions should extend one nautical or so-called "German" mile (1 geographic mile) beyond the shores of the islands, small islands and ridges farthest from the mainland'—that is to say, the Government did not cancel its claim manifested at an earlier date for a more extended territorial limit (3 geographic miles), but remained content to decrease it for the time being in this manner. However, the limit fixed in the instruction of 1779 became effective for the future.

"Both for Sweden and Norway the limit of 1 geographic mile (4 minutes) constituted the final point in the development of the law and was fixed at the same time as other countries fixed the 3-minute distance as the limit of their territory.

"Without a general international agreement, the claim for general recognition of the latter rule cannot be passed further than that it may be deemed in force if and as long as an individual country does not make a well-founded claim for another limit for *its* territorial waters. In practice, international law has gone no further than to regard the 3-mile limit as the usual *one;* on the contrary, it has taken it for granted that even between countries recognizing the 3-mile rule, special rules for recognition of a more extended limit may be fixed. (Compare the arbitration in 1893 between England and America concerning seal hunting in the Behring Straits.)

"I have mentioned above that even where the 3-mile limit is the recognized one with special reference to neutrality protection, special rules may be in force in other respects, as for instance, for fishing, customs control and control over liquor traffic, etc. As to fishing, Great Britain, the United States, France, Germany, Belgium and the Netherlands have supported the 3-mile rule both in the North Sea Convention of 6th May, 1882, and in certain other agreements. Denmark has also adhered to the convention in regard to fishing in the North Sea, but, on the other hand, the same country supports the 4-mile rule in the Convention of 14th July, 1899, concerning fishing in the waters between Denmark and Sweden, to which fact I will refer later.

"In suggesting a general international agreement in the premises, the proposal has been based upon the suggestion that the limit should *either* be generally extended to 6 minutes (nautical miles) *or* that the 3-mile limit, as being the most usual, should be adopted, but with the reservation of the right to maintain the greater limit which had formerly been in force in certain places and/or in special cases according to established custom.

"In quoting the Fishery Decree of 5th May, 1871, the fishing waters, as regards fishery, reserved for Swedish citizens: 'The territorial waters are regarded as extending 1 geographic mile from land or from the shores of the islands, small islands and ridges farthest *from the Swedish coast, which are not constantly submerged.*' Islands and ridges situated near the coast should, therefore, be calculated as land territory, from the outermost limit of which, at low water, the geographic mile (the 4 nautical miles) should be calculated.

"In general, the outer limit of the territorial waters will be parallel with the coast's main outline, so that—with the reservations which will be given below—bays and gulfs, which are included in the land territory belonging to one and the same State, will be regarded as this State's water territory. In the latter case, therefore, the limit of the territorial waters in the open sea will extend four nautical miles, parallel with a line drawn straight across the waters of the gulf or bay from land to land or from islands or ridges close to it and on both sides of it. Natural formations and necessary practical considerations must, of course, influence the lines of demarcation in each special case.

"However, the rule described above, according to international law, includes bays and gulfs of certain dimensions (width at mouth) only on condition that more than a century-old custom can be referred to in

support of its claim to be considered as belonging to the territory of the country. If it is not possible to refer to such tradition, free water for foreigners in such large gulfs and bays shall be between the territorial waters which are measured from shore to shore along the gulf.

"What width may such a gulf have *without* support of century-old tradition, in order to be calculated as State territorial waters ?

"Opinions differ in this respect both in theory and in practice, and precedents, conventions and authoritative statements give no definite lines for any reply *acceptable in general*. On the other hand, they give rather reliable aid when, having as a basis the above-mentioned regulations for the limits of Swedish territorial waters, the forming of a well-founded opinion as to how a *Swedish*-international point of law should be decided upon.

"The strictest view taken, from a territorial point of view, is that no gulf or bay may be regarded as a State's territorial waters which measures more than 6 nautical miles at its mouth, or, where the width at the mouth is broader than the interior of the bay, the water limit may be regarded as internal territorial waters only from the points closest to the mouth where the width is 6 nautical miles at the most. This attitude has been proclaimed by the British Government upon different occasions, and also by the German Government towards Sweden in regard to breaches of neutrality during the World War. The same opinion was supported by the United States of America in a conflict with Great Britain decided before the Permanent Arbitration Court at The Hague in 1910, concerning fishing off the North Atlantic coast. But the Court *rejected* the attitude supported by America.

"This attitude, which is a schematic application of the 3-mile rule calculated from *both shores* of a bay or gulf, has been almost unanimously rejected as unreasonable by the doctrines of international law. *Oppenheim*, who must be regarded as one of the most prominent international law experts of our time, says 'that no writer of authority can be referred to as supporting this view', and he proves that Great Britain herself in several cases has rejected it. How the case referred to by the Swedish Government upon a previous occasion, the so-called King's Chambers, may be regarded, needs not be touched upon. It is probable that England's claims in the premises have been given up by now. But Oppenheim declares that Great Britain still regards the Bay of Conception in Newfoundland as belonging to its territory, although this bay extends 40 miles inwards, and is more than 20 miles in width at its mouth. Oppenheim states that this is also the practice in several other countries, owing to their political and geographical conditions—especially as regards the large Norwegian fjords, of which more below.

"In fact not only a 6-mile limit but a 10-mile limit has been practised in this regard, even by England and Germany and other countries, which in general claim the 3-mile limit for territorial waters. On 2nd August, 1839, a fisheries agreement was made between France and Great Britain by which each country reserved for its citizens sole fishing rights within the 3-mile limit off the coasts of each country. And as regards bays, the mouths of which were not broader than 10 nautical miles, the decision was made that the 3-mile limit out to the sea should be measured from a straight line drawn from shore to shore. In the above-mentioned convention concerning North Sea fishing of 6th May, 1882, the fishing rights of the citizens of the respective countries were reserved

within a limit of 3 miles. As to bays, the 3-mile limit was to be calculated from a straight line drawn right across the bay from the points where the opening first has a width of 10 miles.

"The Institute of International Law (Institut de Droit international, annuaire 1894-1895), which prepared a plan in 1894 for the extension of the territorial waters to 6 nautical miles, proposed simultaneously that the greatest width permissible in territorial bays be 12 nautical miles (plainly according to the same formula which, in the case of the double 3-mile limit in bays, was expressed in the theory for a 6-mile latitude).

"The theoretical premise in proposing a 10-mile—or a 12-mile—limit has principally been 'the vision-range rule', which has again asserted itself, and which may as well be taken as a criterion for a 12-mile—yes, and even for a 16- to 20-mile—limit, as it can be taken as a reason for the decision of 10 nautical miles as the shortest distance at which it is possible to see from shore to shore. Oppenheim and others support the theory of 'the gun range', calculated for artillery upon either or *both* sides of the bay; and, in fact, in our time this makes at least the same distance as when based upon sight range. ('International Law, a treatise', by L. Oppenheim, Professor at Cambridge University, Vol. 1, Peace, second edition, p. 262, para. 191.)

"A far more reliable basis for judging the consequences of the generally accepted international principles for our rights in this connection, is obtained by applying the *argumentation* concerning our prevalent right in connection with the fisheries conventions of 1893.

"The member of the Institute of International Law, then professor in New York, J. Moore, now member of the new Permanent Court at The Hague, makes a declaration in connection with the negotiations in 1894 in the premises for the motives upon which the 10-mile limit in the said connections is based. [Here follows the statement of Judge Moore's views which have already been quoted fully earlier in this chapter.]

. . . . . .

"If this argumentation is good, the consequences as regards Swedish territorial waters in gulfs and bays are as follows: the maximum line of 6 miles, supported upon the 3-mile limit, when based upon the Swedish 4-mile limit, would plainly mean a territorial water line of 8 nautical miles. As mentioned above, this principle is practically unanimously rejected by international law doctrines, and was also rejected by the Court at The Hague in the above-mentioned law case in 1910. This was a case where, owing to the territorial rules of both parties, the premise was the 3-mile limit. But, with the argumentation upon which the 10-mile limit was based, according to Mr. Moore, foreign fishing in Swedish bays should not be allowed other than when free water is more extensive than territorial waters, if it is calculated from the shore, or in any case not less than the 4 miles which were taken into consideration even when based upon the 3-mile limit. Bays and gulfs of a width of *at least* 12 nautical miles should, according to this principle, be regarded as Sweden's territorial waters as regards fishing. In a practical manner for analogous application, we arrive at the same result as that designated by the Institute of International Law.

"Sweden, as well as Norway, has not only always opposed the recognition of a base-line in the premises of at most 6 nautical miles, but the Swedish-Norwegian Government officially declared, during the negotia-

tions for the Fisheries Convention of 1882, that a base-line of 10 nautical miles would be insufficient in view of the peculiar formations of the coasts of Sweden and Norway. As regards Norway, the Vestfjord and the Varangerfjord, in spite of their extensive width, have been regarded as Norwegian territorial waters, where only Norwegians enjoy fishing rights. As regards Norway, it was further stated in the negotiations which preceded the Convention of 1882, that the formation of the fjords prevented the establishment of reliable demarcation lines *in* the fjords. Neither Sweden nor Norway adhered to the convention.

"During the World War, the Swedish Government had reason upon several occasions to insist as a Swedish claim upon the understanding that such bays as Laholm Bay and Skälderviken were Swedish territorial waters, whether the base-line at the opening of the bays were drawn at 10 or 12 miles in length. Such a declaration was made at the time when the British torpedoed the German steamship *Trave* outside of Kullen, upon which occasion the Swedish Minister for Foreign Affairs protested in referring to the fact that Skälderviken and a distance outside of it were Swedish territorial waters. In handling this matter a statement was made by Hj. Hammarskjöld, now Governor, in which he especially pointed out that according to international law 'each State has the right to decide the extent of its own territorial waters with the consequent rights and obligations—in case "the claim is not unreasonable", which in this case is quite clear'. Besides referring to the statement of the Institute of International Law and to the Convention of 1882, Governor Hammarskjöld points out that 'the Swedish attitude has been proclaimed —and even in a case where the shores of a gulf only partly belong to Sweden—in the Decree of 4th July, 1910, where it is expressly decreed that territorial waters are to extend to a certain distance from a base-line which connects two points on each side of the mouth of the bay. No opposition has been encountered regarding this decision. The arbitration which is the basis of the decree in question takes it for granted that the limits of territorial waters are mainly parallel with the general direction of the coast, which is not modified by a deep and narrow cut such as the Skälderviken.'

"The diplomatic negotiations concerning the torpedoing of the *Trave* led to no result, as the case was settled by arbitration in connection with the general prize right agreement with England.

"As to Laholm Bay, the same attitude and protest were expressed after the seizure of the Danish ship *Maja* in 1917 by German warships. The capture took place in about the middle of the bay at a point situated 3½' from the nearest shore, and, therefore, outside of Swedish territorial waters, if calculated from the shores of the bay, but within them in the event of the entire bay being regarded as territorial water. The Swedish Government preferred almost the same argumentation for its attitude as in the case of the *Trave* in 1916. The *Maja* was released by the Germans, but with the emphatic statement that Germany did not abandon its view that it was not permissible to close bays of more than 6 nautical miles in width.

"It is of great importance for the consideration of the opinion in the premises which Sweden has always supported, that in the convention with Denmark concerning fisheries in the waters between Sweden and Denmark, both the signatory Powers evidently regarded the entire Laholm Bay as Swedish territorial waters, and that they should extend

from there 4 miles out to sea from a base-line at the mouth of the bay. As previously mentioned, the limit where fishing is reserved for the citizens of each country was decided at one geographic mile from the coast 'or from the outermost isles or rocks which are not permanently submerged'. However, there is one exception to this general rule, namely, that Swedish fishermen are allowed to fish off the Island of Anholt as close as ¾ geographic mile from the coasts of this island, and that Danish fishermen, at a similar distance, 'are allowed to fish outside of the base-line drawn from Halland's Väderö lighthouses to the Tylö light-house'. On the basis of this convention a decree as above was issued on 25th October, 1907, paragraph 7 of which contained a corresponding regulation. It is to be observed that the regulation in question was to give Danish fishermen privileges in return for privileges given to Swedish fishermen, and that the basis of such a privilege accorded Denmark is that Swedish territorial waters extend 4 miles outside of the mouth of Laholm Bay. Should this arrangement not have been made, Danish fishermen would have been in a less privileged situation to that of other foreign fishermen who *had no* treaty to refer to in support of their right.

"It is worthy of note, finally, that the Decree of 20th December, 1912, concerning action for the protection of Sweden's neutrality in time of war, includes all bays on the Swedish coast as '*internal* territorial waters'.

"In the above argumentation the question has not been raised as to whether Laholm Bay should be regarded as Swedish territorial waters owing to century-old custom. I cannot produce any memorandum of an investigation, but as far as I have been able to obtain information, it would seem that old custom can be referred to, according to which the district in question and the waters at a certain distance outside of it have been regarded and treated as Swedish waters. In order to form my opinion I have regarded the argumentation given above as sufficient.

"Another question is between what points the base-line is to be drawn, from which the territorial waters out to sea should be calculated—whether this should be from mainland to mainland upon both sides of the mouth of the bay or from islands and ridges outside of it.

"It may be of importance to know whether Halland's Väderö can be regarded as a part of the configuration which forms the mouth of the bay. According to Norwegian practice, which is more established than ours, such islands, islets and ridges as form a fjord together with the mainland, are included in Norwegian territorial waters. The opinion of the Norwegian Sea Boundary Commission, based upon extensive studies, has been expressed in such a manner that international law allows each State to regulate the details of the boundaries in question, although full consideration must be taken in this connection, to historic and other circumstances. It is pointed out, finally, that the arbitration in the conflict in 1910 concerning the fisheries off Newfoundland is based upon the standpoint that the base-line for the calculation of the coast water outside of bays should be a straight line drawn across the water 'at the place where this ceases to have the structure characteristic of a bay'.

"Laholm Bay forms a sea gulf which can be quite naturally marked off by a line Tylö lighthouse (or perhaps Tjuvhälsudden)-Höghallsudde, by which the mouth is a little over 10, but much narrower than 12 miles. But, as regards this bay, a special base-line seems to be traditional, namely, the one between Tylö lighthouse and Halland's Väderö light-

house. And with reference to the longer base-line, which is obtained in this manner, no obstacles would seem to be met in taking the latter line as the beginning of the outer territorial waters. During the negotiations before the Convention of 1899 with Denmark, there does not seem to have been mention made of any other base-line from which territorial boundaries outside of Laholm Bay should be calculated than the line Tylö lighthouse-Halland's Väderö lighthouse, and no objection whatsoever was made by the Danes against this line. A similar base-line as the basis for boundaries has been successfully supported by Sweden in border treaties with Norway, namely, the Swedish part of the line Great Drammen-Hejekubb. (Compare with the Royal Decree of 4th July, 1910, mentioned in Governor Hammarskjöld's memorandum.)

"With reference to the above, I believe that the Swedish Government is fully entitled to claim that the entire Laholm Bay and waters out to sea be regarded as territorial waters within which fishing is reserved for Swedish subjects.

(Signed) ELIEL LÖFGREN."

Stockholm, 11th February, 1925.

Annex 44

OPINION OF LAW OFFICERS (1875) CONCERNING GREAT BARRIER REEF

THE LAW OFFICERS OF THE CROWN TO COLONIAL OFFICE

My Lord,

We are honoured with your Lordship's commands, signified in Mr. Malcolm's letter of the 10th instant, stating that he was directed by your Lordship to transmit to us a copy of a despatch from the Governor of Queensland[1] respecting doubts which have arisen in that colony in regard to the jurisdiction of the local government under Letters Patent of 30th May, 1872, and Proclamation by the Governor of the colony, dated 22nd August, 1872 (copies of which were annexed), whereby islands within 60 miles of the coast of the colony are brought within the jurisdiction of the local government.

In regard to the question whether the miles referred to in these instruments are statute or geographical miles, Mr. Malcolm was desired to inclose a copy of a letter from the Board of Admiralty [2], showing the standard of measurement in which the 60 miles' limit was marked by their Lordships' direction on certain charts designed to show the islands comprised within the 60 miles' limit.

As bearing upon other points raised in the present papers, Mr. Malcolm was directed by your Lordship to transmit to us the inclosed copy of an opinion given by the Law Officers of the Crown [3] upon a question which arose in Bermuda in the year 1862, as to the point on the coral reefs from which the territorial jurisdiction of that colony seawards

[1] Governor of Queensland (No. 63), 18th November, 1874.
[2] Board of Admiralty, 1st March, 1875.
[3] Law Officers' opinion, 3rd December, 1862.

should be estimated, and Mr. Malcolm was desired to request that we would take these papers into our consideration, and favour your Lordship with our opinion upon each of the points raised in the recent despatch (and inclosures) from the Governor of Queensland.

In obedience to your Lordship's commands we have taken these papers into consideration, and have the honour to report:

1. That Queensland has no legislative authority over the seas beyond the distance of 3 marine miles from low-water mark on the mainland and islands respectively.
2. That the miles referred to in the proclamation are marine miles.
3. That the whole of an island which lies partly within and partly without the 60 miles' limit belongs to the colony.
4. Land not submerged at ordinary high tides, however small in extent, is an island.
5. Reefs attached to an island and dry at low water are part of the island.
6. Reefs detached from any islands and dry at low water only are not islands.

(Signed) RICHARD BAGGALLAY.
(Signed) JOHN HOLKER.

Annex 45

LETTER FROM THE UNDER-SECRETARY OF STATE FOR THE COLONIES IN NOVEMBER 1836 TO S. COXE, ESQ., DEFINING THE BOUNDARIES OF THE BRITISH SETTLEMENT OF BELIZE

Downing Street,
23rd November, 1836.

Sir,

I am directed by the Secretary of State to acknowledge the receipt of your letter of the 17th instant, inquiring on behalf of the Eastern Coast of Central America Company, "what are the boundaries claimed by His Majesty's Government for British Honduras or Belize", and I am to acquaint you, in answer, that the territory claimed by the British Crown, as belonging to the British settlements in the Bay of Honduras, extends from the River Hondo on the North to the River Sarstoon on the South, and as far West as Garbutt's Falls on the River Belize, and a line parallel to strike on the River Hondo on the North, and the River Sarstoon on the South. The British Crown claims also the waters, islands and cays lying between the coast defined and the meridian of the easternmost point of Lighthouse Reef.

I am, at the same time, to warn you that the greater part of the territory in question has never been the subject of actual survey, and that parties who should assume the topography of the remoter tracts, and especially the course of the rivers, upon the authority of maps, would in all probability be led into error.

I have, etc.

(Signed) GEORGE GREY.

Annex 46

No. 1

LETTER FROM THE GOVERNOR OF BRITISH HONDURAS TO THE COLONIAL OFFICE

Government House,
Belize, 20th December, 1932.

Sir,

With reference to the previous correspondence ended with your confidential despatch of 11th October last on the subject, *inter alia*, of the territorial waters of British Honduras, I have the honour to address you regarding the small stretch of high seas which is shown by the Admiralty chart enclosed in your confidential despatch of 23rd July to lie between the Island of Turneffe and the rest of the colony. I enclose a tracing of the portion of the chart referred to [1].

2. The area between the points A and B and C and D, i.e. between lines drawn from Maugre Caye to the south end of Chapel Caye and Caye Bokel lighthouse and Glory Caye respectively, has always been regarded as territorial waters. It has been represented to me that the existence of a stretch of "high seas", in the middle of the colony as it were, will embarrass the customs in dealing with vessels suspected of transhipping cargoes of contraband goods for landing on adjoining cayes or of other breaches of the Customs Ordinance in this area, since it will be difficult to establish a vessel's position with sufficient accuracy to obtain a conviction.

3. If it is possible to take any action to have the area in question declared to be within the limits of the territorial waters of the colony, I shall be glad if it may be done.

I have, etc.

(Signed) HAROLD D. KITTERMASTER,
Governor.

No. 2

REPLY OF THE COLONIAL OFFICE TO THE GOVERNOR OF BRITISH HONDURAS

Downing Street,
3rd June, 1933.

Sir,

I have the honour to acknowledge the receipt of your confidential despatch of 20th December, 1932, concerning the possibility of declaring a small stretch of high seas lying between the Island of Turneffe and the rest of the colony to be within the limits of the territorial waters of British Honduras, and to inform you that this proposal has been fully considered in consultation with the Departments concerned.

[1] Not reproduced.

2. It is not clear on what grounds the two areas in question have in the past been regarded as territorial waters of the colony. While the difficulties of the existence of a stretch of high seas of this nature are fully appreciated, it is clear that there is no basis in international law for claiming these areas as territorial waters, and that in fact to do so would be contrary to the accepted policy of His Majesty's Government as explained in my confidential despatch of 23rd July, 1932. In these circumstances I feel sure that you will appreciate that in a matter of this kind local interests must give way to the larger interests involved.

I have, etc.

(Signed) CUNLIFFE-LISTER.

Annex 47

THE BRITISH HONDURAS (ALTERATION OF BOUNDARIES) ORDER IN COUNCIL, 1950

(Made 9th October, 1950)

Whereas it is desirable to extend the boundaries of the colony of British Honduras so as to include the continental shelf contiguous to the coasts of the colony :

Now, therefore, His Majesty, in pursuance of the powers conferred upon Him by the Colonial Boundaries Act, 1895[1], and of all other powers enabling Him in that behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows :

1. This order may be cited as the British Honduras (Alteration of Boundaries) Order in Council, 1950.

2. The boundaries of the colony of British Honduras are hereby extended to include the area of the continental shelf which lies beneath the sea contiguous to the coasts of British Honduras.

3. Nothing in this order shall be deemed to affect the character as high seas of any waters above the continental shelf and outside the limits of territorial waters.

Annex 48

CHART OF BERMUDA ISLANDS

[*In separate cover*]

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[1] 58 and 59 Vict., c. 34.

Annex 49

No. 1

LETTER EXPLAINING THE JUDGMENT OF SIR SAMUEL EVANS IN THE CASE OF THE "LØKKEN"

[*This letter was from an official in the Law Courts Branch of the Treasury Solicitor's Department to an official in the Prize Branch*]

Treasury Solicitor's Department,
Law Courts Branch,

31st July, 1918.

My dear Woods,

"*Løkken*"

I spoke to the President this morning about the paragraph in his judgment in this case which you will find at page 5 of the transcript which I return.

Dr. Pearce Higgins thought it meant that the President had assented to a proposal that the proper way of measuring the limit of territorial waters in a bay, the headlands of which were 13 miles apart, was to take a line between the two headlands and to measure from that, but the President says he laid down nothing of the sort, that no one had contended that this was the correct way to measure such a wide bay, but he assumed the claimants' contention (barring of course the question of measuring from the two rocks) and that even on that assumption the *Løkken* was outside the 3-mile limit. He did not feel inclined to make his judgment on this point any clearer, but it might be better expressed.

Yours sincerely,
(Signed) R. W. GREENWOOD.

No. 2

JUDGMENT OF SIR SAMUEL EVANS IN THE CASE OF THE "LØKKEN"

(DELIVERED 26th JULY, 1918)

JUDGMENT

The PRESIDENT: This Norwegian vessel was captured by H.M.S. *Calliope* off that part of the coast of Norway which lies between The Naze and the Island of Rauna. She was carrying a full cargo of sulphur pyrites for Lübeck. She had been engaged for months in this traffic to the knowledge of her owners and master, indeed she had been bought from the former Danish owners for this very purpose. The Crown claim condemnation of the vessel and cargo of absolute contraband as prize. It is not in dispute that if the capture took place outside territorial waters, the ship and cargo are subject to condemnation.

The Norwegian Government however have asked for an investigation in this Court of the allegation of the owners of the ship and cargo that the capture took place within the territorial waters of that kingdom. The owners themselves could not, according to Prize law, claim relief or exemption on this ground (see the *Bangor* 2 Trehern P.C. 206). But if the Norwegian Government put forward the case on behalf of subjects of Norway, and established that at the material times the captured or capturing ship was within the territorial waters of the State, the ship and cargo would be released.

The Court is not called upon to decide in this case whether the limit of territorial waters is 3 marine miles, or some greater distance, from the coast. This has been rendered unnecessary by reason of an arrangement between the Norwegian and British Governments, which is summarized as follows in a letter of the 22nd November, 1916, written on behalf of the Government of Norway to the British Foreign Secretary :

> "The Norwegian Government maintain a more extensive line as to the limit of their territorial waters ; but, without abandoning their principal point of view, they deem that they in this case ought to limit themselves to discuss the question whether the vessel has been seized within a distance from the Norwegian coast of 3 miles or outside the 3-mile limit, as they are aware of the fact that in questions concerning neutrality, they have not hitherto succeeded in obtaining the recognition of the belligerent Powers to the further extension of Norwegian territorial waters."

It must be taken that it was intended that the distance mentioned was 3 nautical miles.

This however still leaves for determination by the Court the difficult question of what ought to be regarded as "the Norwegian coast" from which the distance is to be measured. It was contended that the place where the ship was captured was near a bay of enclosed waters, and that the limit was to be taken from the line marking the seaward edge of the bay. This part of the coast, like most of the coast of Norway, is full of indentations, small islands, jutting rocks, and shoals.

What is a bay, and what are its exact boundaries or delimitations, has never been decided as a matter of law. The subject has been discussed in various cases, some relating to belligerent rights and others to rights of fishing, or other proprietary or jurisdictional rights. It is indeed in each case a question of fact. Lord Blackburn said in delivering the judgment of the Judicial Committee of the Privy Council in the "Conception Bay" case : "It does not appear to their Lordships that jurists and text-writers are agreed as to dimensions and configurations which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts ; and it has never, that they can find, been made the ground of any judicial determination." (The Direct United States Cable *v.* Anglo-American Telegraph Co., 2 App. Cases 394 at p. 420).

In a recent case also in the Privy Council (The Attorney-General for British Columbia *v.* Attorney-General for Canada, 1914 A.C. 153) there is to be found this passage in the judgment (at p. 174) : "Their Lordships desire to point out that the 3-mile limit is something very different from the narrow-seas limit discussed by the older authorities, such as Selden and Hale, a principle which may be said to be now obsolete. The doctrine

of the zone comprised in the former limit owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a conference, it is not desirable that any municipal tribunal should pronounce on it."

If it were necessary in the present case to lay down a rule, it would be my duty to undertake the task notwithstanding its difficulty, because I have to administer international law. But I do not think the necessity arises. I am prepared to assume for the purposes of this case, that the waters somewhere between the Naze and Rauna Island or the main land off which it lies is a "bay", although it has no name and has never had one, so far as I know. But it remains to fix upon the line which marks its seaward limit, and from which the marine league which determines the territorial waters is to be measured.

It has been suggested that the line should be drawn between "Bispen" and "Ystesteinen"—a distance of about 4½ miles, which could not possibly be a correct or even convenient configuration of the "bay". "Bispen" is merely a tiny isolated piece of rock, on which it has been found useful to place a small obelisk as a day mark. "Ystesteinen" is "another little rocky island—a tiny little one". I see no good reason for taking these small rocks as defining the coast line: no more reason than for taking the larger islands of Folo, Marko, Allero, or South Katland. Sir Erle Richards, who presented the case for the Norwegian Government, mentioned the two rocks above named as possible extremities of the line, but his main argument was that the bay should be marked from headland to headland on either side of it. In my view it would be a misdescription to call these rocks headlands, and an error to hold that they marked the enclosed waters or bay.

Assuming as I have done for the purpose of this case, that these waters form a bay, I think the headlands ought to be taken to be the Naze light on the East, and on the West the head of the mainland off which Rauna Island lies at a distance of less than a mile. I take the line between these two points as marking the bay. This line is really the same as that between the Naze and Rauna lights. That is the most practical and sensible one to adopt; and it is not unfair to the case presented against the Crown. I may add that the two headlands mentioned are about 13 miles distant from each other. The line being thus fixed, the questions of fact remain to be investigated and determined whether at the material times either the capturing or captured vessel was within or outside three nautical miles of it. These depend upon the proper result of the testimony of the witnesses on either side. The evidence must be tested by these main considerations. What set of witnesses were best qualified to fix distances and positions? Who had the best means of doing that? Who, in fact, made the best observations, or formed the most accurate estimates; and what witnesses were the most trustworthy and reliable? The material times already referred to are those when the capturing vessel first started the operation of closing on the *Løkken* and ordered her to stop; and when the *Løkken* stopped her engines in obedience to that order. There was no substantial controversy in argument at the Bar as to these being the material times. The authorities, which it does not seem necessary to

quote, sufficiently establish that. Some criticism was made as to the position of the *Calliope* in reference to territorial waters before any action was taken. I do not accept it ; and therefore I do not propose to discuss it here. In connection with that topic I will merely cite the following passage from the Commentaries of Mr. Chancellor Kent (12th ed., p. 119, Vol. 1).

"If a belligerent owner inoffensively passes over a portion of water lying within neutral jurisdiction, that fact is not usually considered such a violation of the territory as to affect and invalidate an ulterior capture made beyond it. The passage of ships over territorial portions of the sea, is a thing less guarded than the passage of armies on land because less inconvenient, and permission to pass over them is not usually required or asked. To vitiate a subsequent capture, the passage must at least have been expressly refused, or the permission to pass obtained under false pretences." That passage is taken from the judgment in the *Twee Gebroeders* (3, Rob : 336) ; but the learned jurist adopted it as his own view ; and it appears, if I may express my own view, to be quite sound.

Upon the question of fact, I propose to examine first in order the testimony of the *Løkken's* witnesses. That was the earliest given. In comparing the evidence as to the times, it has to be borne in mind that the time logged and spoken to by the Norwegians was mid-European time ; and that by the naval officers, Greenwich mean time. The mid-European time is one hour in advance of Greenwich mean time, so that, if the ships' clocks otherwise synchronised, 4 o'clock on the *Løkken* would be 3 o'clock on the *Calliope*.

I take the times when the *Calliope* sighted the *Løkken* to be about 3.8 a.m. (G.M.T.) ; when the order to stop was given 3.10 a.m. (G.M.T.) ; and when the order was obeyed by stopping the *Løkken's* engines about 3.11 or 3.12 a.m. (G.M.T.). The story of the *Løkken* may be taken to begin at 2.35 a.m. (M.E.T.) according to her ship's time.

Berthelsen, the second officer, was then on watch. He said he took a four-point bearing of Lister light abeam, bearing N.E. by E. ½ E. and 2¾ miles off, the patent log showing 80.5. The vessel was going at full speed, making 9 knots. He could not state his course when the four-point bearing was taken other than by saying : "It must have been South something—S.S.E. ½ E." He added that he was steering then according to the bearings on the shore, but he was "fairly sure of his four-point bearing". The weather was overcast and hazy. From Lister, the course set was S.E. ½ E. Whether that was kept or not is another matter. According to the statement made before the Consul hereinafter mentioned, it was not. The next bearing he spoke of was at 3.10 (M.E.T.) when Rauna light was abeam bearing N.E. ½ N. and two miles away. The log showed 86. This was also obtained by a four-point bearing. Shortly afterwards he said he obtained a cross-bearing of Lister and Launa lights. At the end of his watch, at 4 o'clock, the patent log was read at 93. At 4 o'clock he was relieved by Olssen, the chief officer. On the change of watch the second officer said he reported to the chief officer that he had passed Rauna and gave him the distance of the light, and the steering course *(Questions 149-151)*. It is important to note that Olssen said the distance was 2½ miles *(Question 217)*—Olssen's phrase was the "distance from the shore", but he must have meant off Rauna, as they were talking about it, and no other distance had been

taken, nor were they as near to any other part of the shore. This of course would put the *Løkken* another half mile further out from the bay along the whole line of her alleged course.

Positions taken by four-point bearings are not satisfactory, of course, unless all the factors, such as the courses, tides, and speeds, are accurate.

As to the courses, Berthelsen, who was on watch during the important times, stated on oath, in the declaration made before the Consul at Newcastle in May 1916, that the course was "varying S.E. ½ E." and again, "all courses and soundings were varying". Whether by soundings he meant bearings or soundings for depths does not seem clear.

As to speeds, logs frequently vary; and it is to be observed that the *Løkken's* log registered a speed of nine and three-sevenths knots an hour between 2.35 and 3.10, and eight and two-fifths knots an hour between 3.10 and 4 o'clock.

About five minutes after 4 the chief officer sighted the British warships. At this time the *Løkken* would be ¾ of a mile further to the S.E. than the position marked by the officers of the *Løkken* at 4 o'clock, if the speed was 9 knots, and over two-thirds of a mile if 8½ knots. This would again place the *Løkken* further out from the land than alleged by her master. When the warships were sighted the chief officer put the helm a-starboard, or hard a-starboard, and made towards the shore. It is a matter of fair observation, and to be properly, but not of course too heavily, weighed, that if the ship was well within territorial waters this action was not necessary, and was more consistent with her being outside them. Some time afterwards, estimated by the *Løkken's* witnesses at 10 minutes—a time which I think is considerably exaggerated—it was said the order to stop was given. The result of the evidence and of the statements made in the aforesaid declaration is that the *Løkken's* engines were stopped at once on receipt of the first signal, and after the signal threatening fire they were put full speed astern.

The interval between sighting and these two signals, according to the log of the *Calliope*, was about 4 minutes, and this is more likely to be true. According to the evidence of her master the *Løkken* had travelled two miles and one cable from her 4 o'clock position before she reached the place where she was boarded.

Taking her position at 4.5, at 9 knots speed when she was said to have sighted the British cruisers and to have starboarded, she would have reached the same place at a distance of 1 mile 7 cables from where she left her course, and would have starboarded nearly 6 points. Compare with this the evidence of Berthelsen, who was said to have taken the distances; he marked the chart showing that before the signal to stop was given the *Løkken* had traversed a distance of 1½ miles from the 4.5 o'clock position, and had already turned about 8½ points on the starboard helm before the order to stop was given. In his evidence, however, he said the ship did not alter more than 4½ points, i.e. from S.E. ½ E. to E. by N. Berthelsen also said in his evidence that they steered for the shore because they wished a cross-bearing to make sure that they were inside the 3-mile limit. It does not appear that any such cross-bearing was taken.

Olssen in evidence said that when he saw the first signal hoisted, the *Løkken* was "2¼ to 2½ miles from the shore—2½ at the most". In his declaration before the Consul he had said when her engines were stopped in obedience to the *Calliope's* signal order, she was about half a mile

from the shore. And the man at the helm, Hanssen, declared that the *Løkken* was ordered to stop, and did stop; and that "the steamer was so near land" that they were "afraid of running against the coast".

The master of the *Løkken* was aroused from his bunk after the warships were sighted. His evidence was not helpful. He confused a message sent from the *Calliope* to the officer on the *Løkken* after she was boarded. It is clear that the message was to give the position—not of the *Løkken*, but of the *Calliope*, before the prize crew started with the captured ship for Kirkwall. The master said the position was intended to be that of the *Løkken*. But it is to be noted that it was a position 1 mile and 3 cables S. by E. of that he had marked as that of his ship when boarded.

It was said that the master protested that he was within the territorial waters after the ship was boarded. It is noteworthy that every time he referred to this he spoke in the present tense: "We are within the 3-mile limit." That at any rate indicated his view of her position after she had travelled, with a 9-knot speed, and a heavy cargo, till she came to a standstill, and not when she received and obeyed the signal to stop. And it is significant that he took no steps to ascertain and establish his position by cross-bearings or otherwise. It may be that the *Løkken's* officers had a general desire to keep their vessel within the territorial waters, but it may also well be that they took no effective steps to do this, particularly in the very early morning with the overcast and hazy condition of the weather that prevailed, which made the close skirting of the coast in that region risky and perilous.

I now proceed to examine the evidence given by the British naval officers.

On duty off the Norwegian coast, the *Calliope*—the commodore's ship—was accompanied by the *Constance* and the *Comus*.

They at first steamed in line ahead and astern. At 3 o'clock a.m. (G.M.T.) the commodore, Captain Le Mesurier, R.N., ordered the *Constance* and the *Comus* to spread abeam to port for look-out duty. The *Calliope* remained the shoreward ship.

Lieutenant Boyd was on duty as the navigating officer. At 3 o'clock (G.M.T.) he fixed his position by the range-finder, and noted the Naze light bearing N. 25° E., 8,000 yards away. The *Calliope* was hauled in a little, on a N. 15° W. course for a minute or so, and was then put on a N. 52° W. course. The *Løkken* was sighted shortly afterwards—broad, i.e. 3 to 4 points, on the port bow, and about 2 miles away. The commodore, who was in his cabin on the bridge, at once received a report of this, and immediately went out on the lower bridge. Using his glasses he saw the *Løkken* and estimated her to be 1½ to 2 miles off and 2 to 3 points on the port bow. He observed her alter her course towards the land across the *Calliope's* bows. She was then "well clear of the three-mile limit". He went to the upper bridge and got her bearing and name, and hoisted a signal for her to stop, at the same time altering his course to cut her off; and as he did not think she was obeying, he, after a minute or so, hoisted another signal: "Heave to, or I will fire at you." The positions were not fixed by the commodore personally, but by his navigating officer and range-finder. But the commodore said that with a range-finder the exact distance can be fixed with almost certainty, as one would expect on a British cruiser; and he said he was absolutely satisfied that the *Løkken* was outside the three-mile limit. After the *Løkken* stopped in the water, a boarding party was sent on board, and about 3.47, the

commodore having read a message that her master said he was within the three-mile limit, put his range-finder on Bispen, the nearest rock, and the range given was 6,700 yards. That was, of course, after the signal to stop was given and acted upon—when the vessels were further away from the coast. And the commodore said that throughout the whole manœuvres the *Løkken* was on his off-shore hand.

A very important witness, of course, was the navigating officer on the *Calliope*, Lieutenant Boyd, R.N. He took and noted several bearings and positions. At 2.28 he observed and noted the bearing of the Naze light; and at 3 o'clock a distance was taken by the range-finder, a man experienced in taking ranges in actions, and it was noted as 8,000 yards. At this time the *Løkken* had not been sighted, so this was not done with any reference to this particular case. After altering course to N. 15° W. for a very short time, he put the ship on a course of N. 52° W. When heading on that course he saw the *Løkken*. The time he gives is about 3.5 to 3.7. When sighted she was broad—about 4 points—on the port bow. The *Løkken* was on a south-easterly course, and showed her port side to that of the *Calliope*. He saw her altering her course under starboard helm to head towards the shore. He heard the signals to stop already referred to, and at 3.7 he noted the bearing and distance of the Naze light, at 6,175 yards. At 3.15, after the signal to stop was given, and obeyed, he fixed the position of the *Calliope* by three cross-bearings, and checked the distance from the Naze by the range-finder at 8,400 yards. The position so fixed he marked on his chart. At that time, he said, the *Løkken* was to seaward of the *Calliope*, and therefore further out from the land. After the boarding, by reason of the statement received by signal from the *Løkken*, he took another three-point bearing. This was at 4.5. He marked this on the chart. At the same time he observed by the compass that the *Løkken* bore S.W. from the *Calliope*, and estimated she was seven cables, or nearly three-quarters of a mile away from the cruiser, and further out to sea. Considerable discussion was raised about the position said to have been given by Lieutenant Boyd to Lieutenant Milne, who was in charge of the prize crew on the *Løkken* before the latter started for Kirkwall. The master of the *Løkken* said that was fixed as the position of the *Løkken*. I am quite satisfied that it was not. It was only given to Lieutenant Milne as the rough position of the *Calliope* at the time. Lieutenant Boyd's evidence was that during the whole time the *Løkken* was to seaward of the *Calliope*.

The evidence of Lieutenant Boyd was supported by that of Lieutenant Spooner, the navigating officer of H.M.S. *Constance*. He also took bearings as described in his testimony. As it can be referred to, I refrain from setting it out. I only observe that the independent observations by the navigating officer of the *Constance* as to the position of the *Løkken* where she was about 4 o'clock is strong testimony in support of that of the *Calliope* that the *Løkken* was rather more than seven cables to S.W. of the *Calliope*, and well outside the line of demarcation, which I have fixed, or any line suggested by Counsel for the Norwegian Government; and she was never nearer to the coast than at that time.

Finally, there was the evidence of Lieutenant Milne, the boarding officer. At the time he left the cruiser, the *Løkken* was on the port bow, about half a mile away. After he boarded the *Løkken* the master of the *Løkken* said, "I am inside the 3-mile limit". The Lieutenant said, "You are not". He had boarded at 3.25 a.m. and entered the reference position

of the *Calliope* according to the note that had been sent to Lieutenant Milne by Lieutenant Boyd. Lieutenant Milne also stated that on the way to Kirkwall, the master of the *Løkken* said that it was rather difficult to navigate near the coast in the hazy weather that prevailed, and that at the time of capture he was further out than usual.

This was not put to the master for the reasons that were explained. But I see no reason to doubt the word of Lieutenant Milne that this statement was made, and it fits in with the facts as in my view they existed.

On the whole of the case I accept the evidence of the experienced officers of the cruisers as more trustworthy and reliable than that of the witnesses for the *Løkken*.

I have set out the circumstances in such detail, not because I entertain any doubt as to the right conclusion, but out of deference to the friendly neutral State of Norway, whose Government has in its sovereign rights intervened to ask for an impartial investigation of the facts on behalf of a Norwegian ship, although she was admittedly engaged on this voyage, as on all earlier ones, in carrying contraband goods to the German Government to be used for the direct purposes of war.

On the only issue which was, or could be raised, I pronounce without hesitation, that the evidence has convinced me that the capture, and all the operations which immediately led to it, did not take place in the territorial waters of Norway, but outside the limits of such waters. The capture was therefore not irregular. The result is that I condemn the ship and cargo as good and lawful prize.