DISSENTING OPINION OF SIR ARNOLD McNAIR

In this ease the Court has to decide whether certain areas of water off the coast of Norway are high seas or Norwegian waters, either territorial or internal. If they are high seas, then foreign fishermen are authorized to fish there. If they are Norwegian waters, then foreign fishermen have no right to fish there except with the permission of Norway. I have every sympathy with the small inshore fisherman who feels that his livelihood is being threatened by more powerfully equipped competitors, especially when those competitors are foreigners ; but the issues raised in this case concern the line dividing Norwegian waters from the high seas, and those are issues which can only be decided on a basis of law.

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The preamble and the executive parts of the Decree of 1935 are as follows:

"On the basis of well-established national titles of right; by reason of the geographical conditions prevailing on the Norwegian coasts; in safeguard of the vital interests of the inhabitants of the northernmost parts of the country; and in accordance with the Royal Decrees of the 22nd February, 1812, and 16th October, 1869, the 5th January, 1881, and the 9th September, 1889, are hereby established lines of delimitation towards the high sea of the Norwegian fisheries zone as regards that part of Norway which is situated northward of 66° 28,8' North latitude.

These lines of delimitation shall run parallel with straight base-lines drawn between fixed points on the mainland, on islands or rocks, starting from the final point of the boundary line of the Realm in the easternmost part of Varangerfjorden and going as far as Træna in the County of Nordland.

The fixed points between which the base-lines shall be drawn are indicated in detail in a schedule annexed to this Decree."

[Schedule]

Mr. Arntzen, the Norwegian Agent and Counsel, told the Court (October 5th) that:

"The Decree of 1935 is founded on the following principles: the Norwegian territorial zone is four sea-miles in breadth. It is measured from straight lines which conform to the general direction of the coast and are drawn between the outermost islands, islets and reefs in such a way as never to lose sight of the land."

Although the Decree of 1935 does not use the expression "territorial sea" or "waters" or "zone", it cannot be denied that the present dispute relates to the Norwegian territorial sea. The Judgment of the Court is emphatic on this point. The same point emerges clearly from the United Kingdom's Application instituting the proceedings and was insisted upon in the Norwegian written and oral argument on numerous occasions. Thus, on October 9th, the Norwegian Counsel, Professor Bourquin, said:

"What is the subject of the dispute ? It relates to the base-lines - that is to say, to the lines from which the four miles of the Norwegian territorial sea are to be reckoned...."

And again, in his oral reply he said on October 25th:

"What [Norway] claims - apart from her historic title - is that the limits imposed by international law with regard to the delimitation of her maritime territory have not been infringed by the 1935 Decree and that this Decree can therefore be set up as against the United Kingdom without any necessity for any special acquiescence on the part of the United Kingdom."

One thing this dispute clearly is not. It is not a question of the right of a maritime State to declare the existence of a contiguous zone beyond its territorial waters, in which zone it proposes to take measures for the conservation of stocks of fish. An illustration of this is to be found in President Truman's "Proclamation with respect to Coastal Fisheries in certain areas of the High Seas, dated September 28th, 1945" (American Journal of Internatiomal Law, Vol. 40, 1946, Official Documents, p. 46); it will suffice to quote the following statement:

"The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected."

That is not this case, for here the question is whether certain disputed areas of sea water are parts of the high seas or parts of the territorial or internal waters of the coastal State.

In the course of the proceedings in the case, the United Kingdom has made certain admissions or concessions which can be summarized as follows:

(a) that for the purposes of this case Norway is entitled to a four-mile limit;

(b) that the waters of the fjords and sunds (including the Varangerfjord and Vestfjord) which fall within the conception of a bay, are, subject to a minor point affecting the status of the Vestfjord which I do not propose to discuss, Norwegian internal waters ; and

(c) that (as defined in the Conclusions of the United Kingdom) the waters lying between the island fringe and the mainland are Norwegian waters, either territorial or internal.

The Parties are also in conflict upon another minor point, namely, the status of the waters in certain portions of Indreleia. about which I do not propose to say anything.

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I shall now summarize the relevant part of the law of territorial waters as I understand it:

(a) To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters (and in some cases national waters in addition). International law does not say to a State: "You are entitled to claim territorial waters if you want them." No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.

(b) While the actual delimitation of the frontiers of territorial waters lies within the competence of each State because each State knows its own coast best, yet the principles followed in carrying out this delimitation are within the domain of law and not within the

discretion of each State. As the Supreme Court of the United States said in 1946 in the United States v. State of California, 332 U.S. 19, 35:

"The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dan¬gers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts. And in so far as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units". (Cited and re-affirmed in 1950 in United States v. State of Texas, 339 U.S. 707, 718.)

(c) The method of delimiting territorial waters is an objective one and, while the coastal State is free to make minor adjustments in its maritime frontier when required in the interests of clarity and its practical object, it is not authorized by the law to manipulate its maritime frontier in order to give effect to its economic and other social interests. There is an overwhelming consensus of opinion amongst maritime States to the effect that the base-line of territorial waters, whatever their extent may be, is a line which follows the coast-line along low-water mark and not a series of imaginary lines drawn by the coastal State for the purpose of giving effect, even within reasonable limits, to its economic and other social interests and to other subjective factors.

In 1894 Bonfils (Droit international public, § 491) described la mer juridictionnelle ou littorale, as: "la bande de l'ocean qui entoure et enceint les cotes du territoire continental ou insulaire et sur laquelle l'Etat peut, du rivage que baignent les eaux de cette mer, faire respecter sa puissance".

(d) The calculation of the extent of territorial waters from the land is the normal and natural thing to do; its calculation from a line

drawn on the water is abnormal and requires justification, for instance, by showing that the line drawn on the water is drawn from the terminal line of internal waters in a closed bay or an historic bay or a river mouth, which will be dealt with later. One must not lose sight of the practical operation of the limit of territorial waters. It is true that they exist for the benefit of the coastal State and not for that of the foreign mariner approaching them. Nevertheless, if he is to respect them, it is important that their limit should be drawn in such a way that, once he knows how many miles the coastal State claims, he should – whether he is a fisherman or the commander of a belligerent vessel in time of war - be able to keep out of them by following ordinary maritime practice in taking cross-bearings from points on the coast, whenever it is visible, or in some other way. This practical aspect of the matter is confirmed by the practice of Prize Courts in seeking to ascertain whether a prize has been captured within neutral territorial waters or on the high seas ; see, for instance, The Anne (1818) Prize Cases in the United States Supreme Court, page 1012; The Heina (1915), Fauchille, Jurisprudence frangaise en matiere de prises, I, page 119; II, page 409, a Norwegian ship captured by a French cruiser in 1914 at a point four miles and five-sixths from an island forming part of the Danish Antilles; and by decisions upon illegal fishing within territorial waters, e.g. Ship May v. The King, Canada Law Reports, Supreme Court, 1931, page 374, or upon other illegal entry into territorial waters, The Ship "Queen City" v. The King, ibid., page 387.

Reference should also be made to the statement in the Report on Territorial Waters approved by the League Codification Committee in 1927 for transmission to governments for their comments, particularly page 37 of League document C.196.M.70.1927.V., where, after referring to what it calls the seaward limit of the territorial sea, the Report continues :

"Mention should also be made of the line which limits the rights of dominion of the riparian State on the landward side. This question is much simpler. The general practice of the States, all projects of

codification and the prevailing doctrine agree in considering that this line should be low-water mark along the whole of the coast".

(c) In 1928 and 1929 replies were sent by a number of governments to the questions put to them by the Committee of Five which made the final preparations for the Hague Codification Conference of 1930 (League of Nations, C.74.M.39.1929.V., pp. 35 et sqq.).

As I understand these replies – the language is not always absolutely plain – seventeen governments declared themselves in favour of the view that the base-line of territorial waters is a line which follows the coast-line along low-water mark and against the view that the base-line consists of a series of lines connecting the outermost points of the mainland and islands. The following Governments took the latter view: Norway, Sweden, Poland, Soviet Russia and, probably, Latvia. (In this respect my analysis corresponds closely to that of paragraph 298 of the Counter-Memorial.)

It may be added that Poland had recovered sovereignty over her maritime territory only eleven years before, after an interval of more than a century, and that Latvia became a State only in 1918. All the States parties to the North Sea Fisheries Convention of 1882, Belgium, Denmark, France, Germany, Great Britain and the Netherlands, as I understand their replies, accepted the rule of low-water mark following the line of the coast; so also did the United States of America. Governments are not prone to understate their claims.

(f) It is also instructive to notice the Danish reply because Denmark was, with Norway, the joint author of the Royal Decree of 1812, on which the Norwegian Decree of 1935 purports to be based, and Denmark told the League of Nations Committee that the Decree of 1812 was still in force in Denmark. The Danish reply states that:

"Paragraph 2 of Article 3 of the regulations introduced by Royal Decree of January 19th, 1927, concerning the admission of war-vessels belonging to foreign Powers to Danish ports and territorial waters in time of peace, contains the following clause:

'Danish internal waters comprise, in addition to the ports, entrances of ports, roadsteads, bays and firths, the waters situated between, and on the shoreward side of, islands, islets and reefs, which are not permanently submerged'.

(Quotation from Decree of 1927 ends.)

"Along the coast the low-water mark is taken as a base in determining the breadth of the territorial waters. 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".

(g) But although this rule of the limit following the coast line along low-water mark applies both to straight coasts and to curved and indented coasts, an exception exists in the case of those indentations which possess such a configuration, both as to their depth and as to the width between their headlands, as to constitute landlocked waters, by whatever name they may be called. It is usual and convenient to call them "bays", but what really matters is not their label but their shape.

A recent recognition of the legal conception of bays is to be found in the reply of the United States of America given in 1949 or 1950 to the International Law Commission, published by the United Nations in Document A/CN.4/19, page 104, of 23rd March, i960:

"The United States has from the outset taken the position that its territorial waters extend one marine league, or three geographical miles (nearly 3½ English miles) from the shore, with the exception of waters or bays that are so landlocked as to be unquestionably within the jurisdiction of the adjacent State".

(Then follow a large number of references illustrating this statement.)

There are two kinds of bay in which the maritime belt is measured from a closing line drawn across it between its headlands, that is to say, at the point where it ceases to have the configuration of a bay. The first category consists of bays whose headlands are so close that they can really be described as landlocked. According to the strict letter and logic of the law, a closing line should connect headlands whenever the distance between them is no more than double the

agreed or admitted width of territorial waters, whatever that may be in the particular case. In practice, a somewhat longer distance between headlands has often been recognized as justifying the closing of a bay. There are a number of treaties that have adopted ten miles, in particular the Anglo-French Convention of 1839, and the North Sea Fisheries Convention of 1882, which was signed and ratified by Germany, Belgium, Denmark, France, Great Britain and the Netherlands. It cannot yet be said that a closing line of ten miles forms part of a rule of customary law, though probably no reasonable objection could be taken to that figure. At any rate Norway is not bound by such a rule. But the fact that there is no agreement upon the figure does not mean that no rule at all exists as to the closing line of curvatures possessing the character of a bay, and that a State can do what it likes with its bays; for the primary rule governing territorial waters is that they form a belt or bande de mer following the line of the coast throughout its extent, and if any State alleges that this belt ought not to come inside a particular bay and follow its configuration, then it is the duty of that State to show why that bay forms an exception to this general rule.

The other category of bay whose headlands may be joined for the purpose of fencing off the waters on the landward side as internal waters is the historic bay, and to constitute an historic bay it does not suffice merely to claim a bay as such, though such claims are not uncommon. Evidence is required of a long and consistent assertion of dominion over the bay and of the right to exclude foreign vessels except on permission. The matter was considered by the British Privy Council in the case of Conception Bay in Newfoundland in Direct United States Cable Company v. Anglo-American Telegraph Company (1877) 2 Appeal Cases 394. The evidence relied upon in that case as justifying the claim of an historic bay is worth noting. There was a Convention of 1818 between the United States of America and Great Britain which excluded American fishermen from Conception Bay, followed by a British Act of Parliament of 1819, imposing penalties upon "any person" who refused to depart from the bay when required by the British Governor. The Privy Council said:

"It is true that the Convention would only bind the two nations who were parties to it, and consequently that, though a strong assertion of ownership on the part of Great Britain, acquiesced in by so powerful a State as the United States, the Convention, though weighty, is not decisive. But the Act already referred to ... goes further" ...

"No stronger assertion of exclusive dominion over these bays could well be framed." [This Act] "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 show that this bay is by prescription part of the exclusive territory of Great Britain ...".

Claims to fence off and appropriate areas of the high seas by joining up headlands have been made from time to time, but usually in the case of particular pieces of water and not on the thoroughgoing scale of the Decree of 1935. There is a considerable body of legal authority condemning this practice. This theory – to the effect that the coastal State is at liberty to draw a line connecting headlands on its coast and to claim the waters on the landward side of that line as its own waters – has sometimes been referred to as the "headland theory" or "la theorie" or "la doctrine des caps".

There are two decisions by an umpire called Bates in arbitrations between the United States of America and the United Kingdom in 1853 or 1854 (Moore's International Arbitrations, Vol. 4, pp. 4342-5): the Washington, seized while fishing within a line connecting the headlands of the Bay of Fundy, which is 65 to 75 miles wide and 130 to 140 miles long and "has several bays on its coasts", and the Argus, seized while fishing 28 miles from the nearest land and within a line connecting two headlands on the north-east side of the island of Cape Breton; I do not know the distance between them. In both cases, the seizures were condemned and compensation was awarded to the owners of the vessels. In the Washington the umpire said:

"It was urged on behalf of the British Government that by coasts, bays, etc., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of headlands is new, and has received a proper limit in the Convention between France and Great Britain of August 2nd, 1839, in which 'it is agreed that the distance of three miles fixed as the limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland".

Then, in 1881, Mr. Evarts, American Secretary of State, sent a despatch to the American representative in Spain which contained the following passage (Moore's Digest of International Law, i, p. 719):

"Whether the line A'hich bounds seaward the three-mile zone follows the indentations of the coast or extends from headland to headland is the question next to be discussed.

The headland theory, as it is called, has been uniformly rejected by our Government, as will be seen from the opinions of the Secretaries above referred to.

The following additional authorities may be cited on this point:

In the opinion of the umpire of the London Commission of 1853 I think he refers to the Washington or the Argus], it was held that: "It can not be asserted as a general rule, that nations have an exclusive right of fishery over all adjacent waters to a distance of three marine miles beyond an imaginary line drawn from headland to headland".

He concluded:

"We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are

islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign".

And "la theorie des caps" is condemned by Fauchille, Droit international public, para. 493 (6), in the words: "Elle ne saurait juridiquement prevaloir: elle est une atteinte manifeste a la liberte des mers."

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I shall now examine the Decree of 1935 and direct attention to the results produced by the "straight base-lines" which it lays down. It is difficult without the visual aid of large-scale charts to convey a correct picture of the base-lines and the outer lines of delimitation established by the Decree of 1935. The area affected begins at Træna on the north-west coast not far from the entrance to Vestfjord and runs round North Cape down to the frontier with Russia near Grense-Jacobselv, the total length of the outer line being about 560 sea miles without counting fjords and other indentations. There are 48 fixed points – often arbitrarily selected - between which the base-lines are drawn. Twelve of these base-points are located on the mainland or islands, 36 of them on rocks or reefs. Some of the rocks are drying rocks and some permanently above water. The length of the base-lines and the corresponding outer lines varies greatly.

At some places, where there are two or more rocks at a turning point, the length of the base-lines may be only a few cables. At other places the length is very great, for instance,

between	5 and 6		25 miles
"	7 and 8	19	"
"	8 and 9	25	"
"	11 and 12	39	"
"	12 and 13	19	"
"	18 and 19	26½	"
"	19 and 20	19,6	"
"	20 and 21	44	"

"	21 and 22	18	"
"	25 and 26	19½	"
"	27 and 28	18	"

I have omitted the base-lines connecting base-points i and 2 and base-points 45 and 46, which are respectively 30 and 40 miles, because they are the closing lines of Varangerfjord and Vestfjord, and these fjords, like the others, have been conceded by the United Kingdom to be Norwegian waters, subject to a minor controversy as to the precise position of the closing line of the latter. I have also omitted mention of all base-lines less than 18 miles.

The base-line connecting base-points 20 and 21 (44 miles) rests for a brief moment upon Vesterfall in Gasan (21), a drying rock eight miles from the nearest island, and then continues, with an almost imperceptible bend, in the same direction for a further 18 miles to base-point 22, a drying rock ; thus between base-points 20 and 22 we get an almost completely straight line of 62 miles. Again, the base-line which connects base-points 18 and 20, both abovewater rocks, runs absolutely straight for 46.1 miles.

In order to illustrate the distance between many parts on the outer lines and the land, I shall take two sectors which I find particularly difficult to reconcile with the ordinary conception of the maritime belt - namely, that comprised by base-points 11 and

12 (39 miles apart), an area sometimes called Sværholthavet, and that comprised by base-points 20 and 21 (44 miles apart), an area sometimes called Lopphavet. In each case I propose to proceed along the outer line and take, at intervals of 4 miles, measurements in miles from the outer line to the nearest land on the mainland or on an island:

Sværholthavet: Measurements to mainland or islands from the outer line, at intervals of 4 miles proceeding from base-point 11 to base-point 12 are as follows:

4 miles at base-point 11, then 5§, 8J, 11, 13, 12 (or 11 from a lighthouse), 11 (or 9 from a lighthouse), 8, 6, and nearly 5;

Lopphavet: Measurements to mainland or islands from the outer line, at intervals of 4 miles proceeding from 20 to 21, are as follows: 4

miles at base-point 20, then 6, 8½, 12, 16, 16, 18, 17, 14½, I2½ (or 8 from base-point 21, a drying rock), 12 (or 5 from base-point 21).

Moreover, each of these two areas – Sværholthavet and Lopphavet – in no sense presents the configuration of a bay and comprises a large number of named and unnamed fjords and sunds which have been admitted by the United Kingdom to be Norwegian internal waters within their proper closing lines. In one part of Lopphavet the outer line is distant more than 20 miles from the closing line of a fjord. In the opinion of the Court (see p. 141) Lopphavet "cannot be regarded as having the character of a bay"; and I may refer to an additional circumstance which militates against the opinion that the Whole of this large area is Norwegian waters : that is, that according to the (British Admiralty) Norway Pilot, Part III, page 607, the approach to the port of Hammerfest through Soroysundet, which runs out of Lopphavet towards Hammerfest, "is the shortest and, on the whole, the best entrance to Hammerfest from westward, especially in bad weather"; see The lleganean (Moore, International Arbitrations, iv, pp. 4332-4341, "that it can not become the pathway from one nation to another" - as one of the conditions for holding Chesapeake Bay to be a closed historic bay). Another questionable area is that comprised by the lines connecting base-points 24 and 26, totalling 36 miles.

These three illustrations are among the extreme cases. A more normal base-line is that which connects base-points 5 (a point on the island of Reinoy) and 6 (Korsneset, a headland on the mainland); this base-line – 25 miles in length – runs in front of Persfjord, Syltefjord and Makkaufjord, all of which have been admitted by the United Kingdom to be Norwegian internal waters, but the line pays no attention to their closing lines; at no place, however, is the distance between the outer line and the land or closing line of a fjord more than about six miles.

I draw particular attention to the fact that many, if not most, of the base-lines of the Decree of 1935 fence off many areas of water which contain fjords or bays, and pay little, if any, attention to their closing lines; in the case of the Washington, referred to above, the umpire, in

rejecting the claim to treat the Bay of Fundy as a closed bay, twice drew attention to the fact that it comprised other bays within itself: "it has several bays on its coasts", and again he refers to "the imaginary line ... thus closing all the bays on the shore".

The result of the lines drawn by the Decree is to produce a collection of areas of water, of different shapes and sizes and different lengths and widths, which are far from forming a belt or bande of territorial waters as commonly understood. I find it difficult to reconcile such a pattern of territorial waters with the almost universal practice of defining territorial waters in terms of miles – be they three or four or some other number. Why speak of three miles or four miles if a State is at liberty to draw lines which produce a maritime belt that is three or four miles wide at the base-points and hardly anywhere else? Why speak of measuring territorial waters from low-water mark when that occurs at base-points and hardly anywhere else? It is said that this pattern is the inevitable consequence of the configuration of the Norwegian coast, but I shall show later that this is not so.

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Norway has sought to justify the Decree of 1935 on a variety of grounds, of which the principal are the following (A, B, C and D):

(A) That a State has a right to delimit its territorial waters in the manner required to protect its economic and other social interests. This is a novelty to me. It reveals one of the fundamental issues which divide the Parties, namely, the difference between the subjective and the objective views of the delimitation of territorial waters.

In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law ; moreover, the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard.

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(B) That the pattern of territorial waters resulting from the Decree of 1935 is required by the exceptional character of the Norwegian coast.

Much has been said and written in presenting the Norwegian case for the delimitation made by the Decree of 1935 of the special character of the Norwegian coast, the poverty and barrenness of the land in northern Norway and the vital importance of fishing to the population, and so forth, and of the skerries and "skjsergaard", which runs round the south, west and north coasts and ends at North Cape (Norwegian oral argument, nth October). This plea must be considered in some detail from the point of view both of fact and of law. Norway has no monopoly of indentations or even of skerries. A glance at an atlas will shew that, although Norway has a very long and heavily indented coast-line, there are many countries in the world possessing areas of heavily indented coast-line. It is not necessary to go beyond the British Common wealth. The coast of Canada is heavily indented in almost every part. Nearly the whole of the west coast of Scotland and much of the west coast of Northern Ireland is heavily indented and bears much resemblance to the Norwegian coast.

Skerry is a word of Norwegian origin which abounds in Scotland, both as "skerry" and as "sgeir" (the Gaelic form). The New Oxford Dictionary and any atlas of Scotland afford many illustrations. From this dictionary I extract two quotations: Scoresby, Journal of Whale Fishery (1823), page 373: "The islands, or skerries, which .... skirt the forbidding coast on the western side of the Hebrides"; W. McIlwraith, Guide to Wigtownshire (1875) (in the south-west of Scotland), page 62: "The rocks stretch seaward in rugged ledges and skerries." The following passage occurs in the Encyclopedia Britannica (1947), Volume 20, sub-title "Scotland", page 141:

"The Western Highland coast is intersected throughout by long narrow sea-lochs or fiords. The mainland slopes steeply into the sea and is fronted by chains and groups of islands ... . The Scottish sea-lochs must be considered in connection with those of western Ireland and Norway. The whole of this north-western coast line of Europe bears witness to recent submergence".

As was demonstrated to the Court by means of charts, in response to a suggestion contained in paragraph 527 of the Counter-Memorial, the north-west coast of Scotland is not only heavily indented but it

possesses, in addition, a modest "island fringe", the Outer Hebrides, extending from the Butt of Lewis in a south-westerly direction to Barra Head for a distance of nearly one hundred miles, the southern tip being about thirty-five miles from the Skerryvore lighthouse. At present the British line of territorial waters round this island fringe, inside and outside of it, follows the line of the coast and the islands throughout without difficulty and does not, except for the closing lines of lochs not exceeding ten miles, involve straight base-lines joining the outermost points of the islands. This is also true of the heavily indented and mountainous mainland of the north-west coast of Scotland lying inside of and opposite to the Outer Hebrides.

A further factor that must be borne in mind, in assessing the relevance of the special character of the Norwegian coast, is that not very much of that special character remains after the admissions (referred to above) made by the United Kingdom during the course of the oral proceedings. The main peculiarity that remains is the jagged outer edge of the island fringe or "skjærgaard". In estimating the effect of the "skjærgaard" as a special factor, it must also be remembered that, running north-west, it ends at North Cape, which is near base-point 12.

Another special aspect of the Norwegian coast, which has been stressed in the Norwegian argument, and is mentioned in the Judgment of the Court, is its mountainous character; for instance, Professor Bourquin said on October 5th:

"The shore involved in the dispute is an abrupt coast towering high above the level of the sea; that fact is of great importance to our case. It is therefore a coast, which can be seen from a long way off. A mariner approaching from the sea catches sight of a mountainous coast, like this of Norway, very soon. From this point of view a coast like this of Norway cannot be compared with a flat coast such as that, for example, of the Netherlands".

The Norwegian argument also repeatedly insists that the base-lines of the Decree of 1935 have been so drawn that the land is visible from every point on the outer line.

I am unable to see the relevance of this point because I am aware of no principle or rule of law which allows a wider belt of territorial waters to a country possessing a mountainous coast, such as Norway, than it does to one possessing a flat coast, such as the Netherlands.

In brief, for the following reasons, I am unable to reconcile the Decree of 1935 with the conception of territorial waters as recognized by international law –

(a) because the delimitation of territorial waters by the Decree of 1935 is inspired, amongst other factors, by the policy of protecting the economic and other social interests of the coastal State;

(b) because, except at the precise 48 base-points, the limit of four miles is measured not from land but from imaginary lines drawn in the sea, which pay little, if any, attention to the closing lines of lawfully enclosed indentations such as fjords, except Varangerfjord and Vestfjord;

(c) because the Decree of 1935, so far from attempting to delimit the belt or bande of maritime territory attributed by international law to every coastal State, comprises within its limits areas of constantly varying distances from the outer line to the land and bearing little resemblance to a belt or bande;

(d) because the Decree of 1935 ignores the practical need experienced from time to time of ascertaining, in the manner customary amongst mariners, whether a foreign ship is or is not within the limit of territorial waters.

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(C) That the United Kingdom is precluded from objecting to the Norwegian system embodied in the Decree of 1935 by previous acquiescence in the system.

Supposing that so peculiar a system could, in any part of the world and at any period of time, be recognized as a lawful system of the delimitation of territorial waters, the question would arise whether the United Kingdom had precluded herself from objecting to it by acquiescing in it. An answer to that question involves two questions :

When did the dispute arise?

When, if at all, did the United Kingdom Government become aware of this system, or when ought it to have become aware but for its own neglect; in English legal terminology, when did it receive actual or constructive notice of the system?

When did the dispute arise? Three dates require consideration: 1906, 1908 and 1911. I do not think it greatly matters which we take. As for 1906, Chapter IV of the Counter-Memorial is entitled "History of the Dispute since 1906". The Storting Document No. 17/1927 (to be described later) says (p. 122) that "in 1905 English trawlers began to fish in the waters along northern Norway and Russia", and the Counter-Memorial, para¬graph 91, states that "British trawlers made their first appearance off the coast of Eastern Finnmark towards 1906". Some apprehension occurred among the local population. A Law of June 2, 1906, prohibiting foreigners from fishing in Norwegian territorial waters, was passed, and "since 1907, fishery protection vessels have been stationed every year in the waters of Northern Norway" (ibidem, paragraph 93).

As for 1908, Norwegian Counsel told the Court (October 25) that "as early as 1908 Norway organized its fishery patrol service on the basis of the very lines which were subsequently fixed in the 1935 Decree". It is strange that these lines were not communicated to the United Kingdom in 1908. According to Annex 56 of the Counter-Memorial, a Report made by the General Chief of Staff of the Norwegian Navy,

"The instructions given to the naval fishery protection vessels as early as 1906 specified two forms of action to be taken in regard to trawlers: warning and arrest.

The first warning, after the trawlers had begun to visit our Arctic waters, was given in the summer of 1908 to the British trawler Golden Sceptre".

As for 1911, on March nth of that year, when the British trawler Lord Roberts was arrested in Varangerfjord and the master was fined for breach of the Law of 2nd June, 1906, Notes were exchanged between the British and Norwegian Governments and the Norwegian Foreign Minister had an interview with Sir Edward Grey, the British

Foreign Minister, in London. At that interview, the Norwegian Minister, M. Irgens, "insisted on the desirability of England not at that moment lodging a written protest" (ibidem, paragraph 98 a), but on the nth July, 1911, the British Government sent a protest to Norway (Counter-Memorial, Annex 35, No. 1), in which they maintained that they had "never recognized the Varanger and the Vest fjords to be territorial waters, nor have they participated in any international agreement for the purpose of conferring the right of jurisdiction beyond the three-mile limit off any part of the Norwegian coasts". On October 13th, 1951, Mr. Arntzen said in the course of his oral argument:

"The Norwegian Government is happy to see the dispute which has lasted so long submitted for the decision of the International Court of Justice. I think it may be relevant to recall that M. Irgens, the Norwegian Foreign Minister, at the time of his discussions [that is, in 1911] with Sir Edward Grey concerning the Lord Roberts incident in 1911, was already speaking of the possibility of arbitration as a solution to the dispute".

In later years many other trawlers were arrested, and the dispute widened, but it was not until during the course of these proceedings that the United Kingdom admitted that the waters of Varangerfjord within the line claimed by Norway were Norwegian waters.

Between the arrest of the Lord Roberts in 1911 and May 5th, 1949, sixty-three British and other fishing vessels were arrested for fishing in alleged Norwegian waters, and many others were warned (see Counter-Memorial, Annex 56).

I must now examine the Decrees on which the Decree of 1935 purports to be based and some of which have been mentioned as evidence that the United Kingdom had acquired or ought to have acquired notice of the Norwegian system before the dispute began.

(i) The Royal Decree of February 22nd, 1812. The Storting Document No. 17/1927 tells us (pp. 506, 507) that after discussion between the Admiralty and Foreign Office of the Kingdom of Denmark-Norway, it was decided to request the King for a royal resolution and the Chancellery defined the matter to be "whether the

territorial sovereignty, or the point from which the sovereign right of protection is fixed, shall be measured from the mainland or from the extremest skerries".

Thereupon the King of Denmark and of Norway made the Decree, of which a translation will be found on page 134 of the Judgment of the Court. The Decree makes no mention of straight lines between islands or islets, or of connecting headlands of the mainland by any lines at all.

This is the first of the Decrees mentioned in the preamble as the basis of the Decree of 1935, and it has been treated by the Norwegian Agent and Counsel as the basis and the starting-point of a series of Decrees made in the 19th century and of the Decree of 1935 - a kind of Magna Carta. The Judgment of the Court attributes "cardinal importance" to it. It therefore deserves close examination. For this purpose, I must refer again to Storting Document No. 17 1927, which is a Report made by one section of the "Enlarged Committee on Foreign Affairs and Constitution of the Norwegian Storting" in April 1927, later translated into English and then printed and published by Sijthoff in Leyden in 1937, under the title of The Extent of Jurisdiction in Coastal Waters, by Christopher B. V. Meyer, Captain, Royal Norwegian Navy.

On pages 492 ff., this document passes under review a large number of 17th and 18th-century Decrees and Proclamations, amongst others that of June 9, 1691 (Annex 6, I, to the Counter-Memorial), and another of June 13, 1691 (Annex 6, II) which, it will be noticed, refers to the area between the Naze in Norway and the Jutland Reef. It then refers to the Decree of 1812 and tells us that it was "not in reality intended to be more than a regulation for the actual purpose: prize cases on the southern coasts". Further, on page 507, we are told that the Royal Resolution "was communicated ... to all the Governors in Denmark and Norway whose jurisdictions border the sea, all the prize courts in Denmark and Norway and the Royal Supreme Admiralty Court". It was communicated "for information" with the additional order: "yet nothing of this must be published in printing".

Page 507 contains the following footnote: "N.R.A. Chanc., drafts. As far as is known, the resolution was printed for the first time in 1830 in Historisk underretning от landvaernet by J. Chr. Berg. Dr. Raestad states that up to that time it was little known and apparently no appeal was made to it previously, either in Denmark or in Norway".

Then follow several quotations from Dr. Raestad's Kongens Stromme, commenting on the expression "in all cases", which should be noted because his interpretation of "in all cases" differs from that about to be quoted from this document, and because Dr. Rsestad stated that, though the Decree of 1812 "was intended for neutrality questions", "the one-league limit at that time was the actual limit - at any rate the actual minimum limit—also for other purposes than for neutrality". We are then told (p. 509) that "in the light of the most recent investigations it seems quite clear that the term "in all cases" only means "in all prize cases". The Resolution of 22nd February, 1812, only completed the foregoing neutrality rescripts by deciding the question which was left open in 1759: whether the league should be measured from terra jirma or from the appurtenant skerries, etc. The one-league limit of 1812 had, therefore, no greater scope than the one-league limit mentioned in the previous Royal Resolutions of the 18th century, that is to say, it applied only to neutrality questions, and was laid down only for the guidance of national authorities, not of foreign Powers".

The relevance of these passages is that they shew:

(a) that the Decree of 1812 was little known for some 18 years;

(b) that it was intended for administrative purposes and not for the guidance of foreign States;

(c) that, in the opinion of some people, it only applied to prize cases and even then, according to this document, only to prize cases on the southern coasts. On page 510 the Report speaks of "the prize case rule of 22nd February, 1812".

It is clear that between 1869 and 1935 "the prize case rule of 22nd February, 1812" was acquiring a wider connotation, as we shall now see.

It does not matter whether the views expressed in the Storting Document No. 17/1927 as to the meaning of the Royal Decree of 1812 are right or wrong. What is important from the point of view of the alleged notoriety of the Norwegian system is that such views as to the true import of the Decree of 1812 and its connection with the Norwegian system could be held by responsible persons in Norway as late as the year 1927.

(ii) The Les Quatre Freres incident of 1868. This French fishing boat was turned out of the Vestfjord by the Norwegian authorities. The French Government protested on the ground that the Vestfjord was not part of Norwegian territorial waters and "serves as a passage for navigation towards the North". Correspondence between the two Governments ensued, and the Minister of Foreign Affairs of Norway and Sweden on November 7th, 1868, claimed Vestfjord "as an interior sea", which appears to have closed the incident.

(iii) A Royal Decree of October 16th, 1869, provided:

"That a straight line drawn at a distance of 1 geographical league parallel to a straight line running from the islet of Stor- hofinen to the island of Svinoy shall be considered to be the limit of the sea belt for the coast of the Bailiwick of Sunnmore, within which the fishing shall be exclusively reserved to the inhabitants of the country".

This, according to Professor Bourquin (October 6), was the first application of the Decree of 1812 to fishing. The straight base-line connecting the two islands above mentioned was 26 miles in length.

The Counter-Memorial contains in Annex 16 a Statement of Reasons submitted by the Minister of the Interior to the Crown dated October 1st, 1869, about which a few very much compressed comments must be made, firstly, it represents the cry of the small man in the open boat against the big man in the decked boat. It says that the area in question "has of recent years been invaded by a growing number of decked vessels, both Swedish and Norwegian cutters, from which fishing was practised with heavy lines", etc. Apparently the

Swedes began it in 1866 and the Norwegians followed suit. Another passage states that the local fishermen "bitterly complained of the fact that intruders on the fishing grounds previously visited exclusively by Norwegians were mainly foreigners – Swedes". The fear was also expressed that fishing boats from other countries, especially France, might soon appear on the fishing banks. Accordingly, the Minister had been asked "to form an opinion on the possibility of claiming them as Norwegian property". (The reference to France was probably prompted by the Vestfjord incident of the previous year which would be fresh in the departmental mind.)

The Statement of Reasons invokes the precedent of the Decree of 1812.

In addition, there is a letter of November 1st, 1869 (Annex No. 28 to the Counter-Memorial) from the Norwegian Minister of the Interior to the Swedish Minister of Civil Affairs, informing him of the Decree made on the 16th instant, and it contains the passage: "it has been desired to bring this matter to the notice of the Royal Ministry in order that the latter may publish the information in those Swedish districts from which the fishing fleets set out for the Norwegian coast". (There is no evidence of any notification of the Decree to any other State.) The penultimate sentence in this letter is as follows:

"Moreover, if the fishery in these areas were left open, there is reason to believe that the fishermen of many foreign countries would visit them, with the result of a diminution of the products of the fishery for everybody".

The Decree was a public document. A large part of the Statement of Reasons is quoted in the Norwegian Report of a Commission on the Delimitation of Territorial Waters of 1912, but, so far as I am aware, the Statement of Reasons was not published at the time of making the Decree.

The French Government – probably on the qui-vive by reason of the Vestfjord incident of the previous year - became aware of the Decree of 1869 two months later and a diplomatic correspondence between the two Governments ensued, in which the French Government contended that "the limits for fishing between [Svinoy

and Storholmen] should have been a broken line following the configuration of the coast which would have brought it nearer that coast than the present limit". The last item in this correspondence is a Note from the French Charge d'Affaires at Stockholm to the Foreign Minister of Norway and Sweden, dated July 27, 1870, which referred to "the future consequences ... that might follow from our adhesion to the principles laid down in the Decree", and stated that "this danger ... could easily be avoided if it were understood that the limit fixed by the Decree of October 16th does not rest upon a principle of international law, but upon a practical study of the configuration of the coasts and of the conditions of the inhabitants", and offered to recognize the delimitation de facto and to join in "a common survey of the coasts to be entrusted to two competent naval officers". It would appear that the French Government wished to protect itself against a de jure recognition of principle. Meanwhile, on July 19, the Franco-Prussian war had broken out, and there the matter has rested ever since.

(iv) A Royal Decree of September gth, 1889, extended the limit fixed by the Decree of 1869 northward in front of the districts of Romsdal and Nordmore by means of a series of four straight lines, connecting islands, totalling about 57 miles, so that the two Decrees of 1869 and 1889 established straight base-lines of a total length of about 83 miles. The Decree of 1889 was also motivated by a Statement of Reasons submitted by the Minister of the Interior to the Crown, which was included in a publication called Departements-Tidende of March 9, 1890. This Statement of Reasons, which also refers to the Decree of 1812, indicates the necessity of empowering the Prefect responsible for Nordmore and Romsdal to make regulations prohibiting fishing boats from lying at anchor at certain points on the fishing grounds during February and March. It makes no reference to foreign vessels.

The question thus arises whether the two Decrees of 1869 and 1889, affecting a total length of maritime frontier of about 83 miles, and connecting islands but not headlands of the mainland, ought to have been regarded by foreign States when they became aware of them, or ought but for default on their part to have become aware, as

notice that Norway had adopted a peculiar system of delimiting her maritime territory, which in course of time would be described as having been from the outset of universal application throughout the whole coast line amounting (without taking the sinuosities of the fjords into account) to about 3,400 kilometres (about 1,830 sea-miles), or whether these Decrees could properly be regarded as regulating a purely local, and primarily domestic, situation. I do not see how these two Decrees can be said to have notified to the United Kingdom the existence of a system of straight base-lines applicable to the whole coast. In the course of the oral argument. Counsel for the United Kingdom admitted that the United Kingdom acquiesced in the lines laid down by these Decrees as lines applicable to the areas which they cover.

(v) A Decree of January 5th, 1881, prohibited whaling during the first five months of each calendar year "along the coasts of Finnmark, at a maximum distance of one geographical league from the coast, calculating this distance from the outermost island or islet, which is not covered by the sea. As regards the Varangerfjord, the limit out to sea of the prohibited belt is a straight Une; drawn from Cape Kibergnes to the River Grense-Jakobselv.

It must thereby be understood, however, that the killing or hunting of whales during the above-mentioned period will also be prohibited beyond that line at distances of less than one geographical league from the coast near Kibergnes".

Thus, while expressly fixing a straight base-line across the mouth of the Varangerfjord (which is no longer in dispute in this case), the Decree makes no suggestion and gives no indication that it instituted a system of straight base-lines from the outermost points on the mainland and islands and rocks at any other part "along the coasts of Finnmark". I find it difficult to see how this Decree can be said to have given notice of a Norwegian system of straight base-lines from Traena in the west to the Russian frontier in the east.

(vi) The 1881 Hague Conference regarding Fisheries in the North Sea resulting in the Convention of 1882. The Judgment of the Court refers to this incident and draws certain conclusions from it.

This Conference was summoned upon the initiative of Great Britain with a view to the signature of a Convention as to policing the fisheries in the North Sea. The following States were represented: Germany, Belgium, Denmark, France, Great Britain, Sweden, Norway, the delegate of the last-named being M.E. Bretteville, Naval Lieutenant and Chief Inspector of Herring Fishery.

The intention was that the Convention should operate on the high seas and not in territorial waters, and consequently it was necessary to define the extent of the territorial waters within the area affected. The proces-verbaux of the meetings are to be found in a British White Paper C. 3238, published in 1882.

The northern limit of the operation of the Convention was fixed by Article 4 at the parallel of the 61st degree of latitude, which is south of the area in dispute in this case.

At the second session of the Conference, the question of Territorial Waters was discussed, and the following statement appears in the proces-verbaux:

"The Norwegian delegate, M.E. Bretteville, could not accept the proposal to fix territorial limits at 3 miles, particularly with respect to bays. He was also of opinion that the international police ought not to prejudice the rights which particular Powers might have acquired, and that bays should continue to belong to the State to which they at present belong".

Strictly speaking, there was no need for the Norwegian delegate to refer to the Decree of 1869 because the Convention deals with the area south of the parallel of the 61st degree of latitude, but if a system of straight base-lines had already been adopted by Norway in 1881 as being of general application all round the coast, it is surprising that he made no reference to it at a Conference at which all the States primarily interested in fishing in the North Sea were represented, and as a result of which all, except Norway and Sweden, accepted the provisions of Article II of the Convention, of which the following is an extract:

"Article II

The fishermen of each country shall enjoy the exclusive right of fishery within the distance of 3 miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks.

As regards bays, the distance of 3 miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed 10 miles".

The Convention was eventually signed and ratified by all the States represented except Norway and Sweden.

This incident, to which I attach particular importance, induces me to put two questions:

(a) If a Norwegian system of delimiting territorial waters by means of straight base-lines had been in existence since 1869 (only 12 years earlier), could the Norwegian delegate, the Chief Inspector of Herring Fishery, have found a more suitable opportunity of disclosing its existence than a Conference of Governments interested in fishing in the North Sea ? In fact, could he have failed to do so if the system existed, for it would have afforded a conclusive reason for inability to participate in the Convention of 1882?

(b) Could any of the Governments which ratified this Convention, knowing that Norway claimed four miles as the width of territorial waters and claimed her fjords as internal waters, be affected by the abstention of Norway with notice of the existence of a system which one day in the future would disclose long straight base-lines drawn along a stretch of coast line about 560 miles in length (without counting fjords and other indentations), and which is applicable to the whole coast?

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Paragraph 96 of the Counter-Memorial, in discussing the events of the year 1908, states that "it may be asked why Norway did not from the beginning use force on all her territorial waters to apply the existing laws relating to foreign fishermen" ... "In this respect it must be remembered that Norway had but recently acquired a separate diplomatic service, following the dissolution of the union with Sweden in 1905".

It is possible that this fact may explain the absence of any categorical assertion of the Norwegian system of straight base-lines as a system of universal application along the Norwegian coasts and the notification of that system to foreign States. But even if this is the explanation, it is difficult to see why it should constitute a reason why foreign States should be affected by notice of this system and precluded from protesting against it when it is enforced against them.

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In these circumstances, I do not consider that the United Kingdom was aware, or ought but for default on her part to have become aware, of the existence of a Norwegian system of long straight base-lines connecting outermost points, before this dispute began in 1906 or 1908 or 1911.

I must refer very briefly to certain incidents occurring after the dispute began, though they have no bearing on the question of acquiescence. Some of them are dealt with in the Judgment of the Court or in other Individual Opinions.

In 1911, the Norwegian Government appointed a "Commission, for the Limits of Territorial Waters in Finnmark", which reported on February 29th, 1912. A copy of Part I, General, was translated into French and sent "unofficially" to the United Kingdom Government.

The following passage occurs on page 20 of this Part I:

"En général, dans les cas particulires, on prendra le plus sűrement une decision en conformité avec la vieille notion juridique norvégienne si l'on considère la ligne fondamentale comme étant tareé sntre les points les plus extrêmes don't il pourrait être question, nonobstatnt la longueur de la linge".

This is clearly the language of a proposal. The tenses of the verbs should be noted.

On the same day, "the Commission presented Report No. 2 'Special and Confidential Part', containing proposals for the definite fixing of base-lines around Finnmark" (Counter-Memorial, paragraph 104). In 1913 a confidential Report was made upon the proposed base-lines on the coasts of the two other provinces concerned, Nordland and Troms (ibidem, paragraph 105). It appears (ibidem) that

the base-points proposed in these confidential Reports are those ultimately adopted by the Decree of 1935; the confidential Reports were not disclosed until 1950 when they appeared as Annexes 36 and 37 of the Counter-Memorial.

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The Judgment of the Court refers to the Judgment of the Supreme Court of Norway in the St. Just case in 1934, in which that British vessel was condemned for fishing in territorial waters under the Law of 1906. It is clearly a decision of high authority. From 1934 onwards, it is conclusive in Norway as to the meaning of the Decree of 1812 and as to its effect, whether or not it has been specifically applied to portions of the coast by later Decrees. But this Court, while bound by the interpretation given in the St. Just decision of Norwegian internal law, is in no way precluded from examining the international implications of that law. It is a well-established rule that a State can never plead a provision of, or lack of a provision in, its internal law or an act or omission of its executive power as a defence to a charge that it has violated international law. This was decided as long ago as in the Geneva Arbitration of 1870-1871 on the subject of the Alabama Claims, when the British Government pleaded that it had exercised all the powers possessed by it under its existing legislation for the purpose of preventing the Alabama from leaving a British port and cruising against Federal American shipping, an omission which cost Great Britain a large sum of money.

The Si. Just decision is important in the sense that, after the decision, the existence of a Norwegian system of straight base-lines cannot be denied either within Norway or on the international plane. Only eight years earlier there had occurred the Deutschland case (a case of an attempt by a German vessel to sell contraband spirits) (Annex 9 to the Memorial and Annex 47 to the Counter-Memorial and Annex 31 to the Reply), in which the Norwegian Supreme Court, b\ a majority of 5 to 1, quashed a conviction by an inferior Court which had been upheld by the Court of Appeal.

In the Deutschland, case, which has now been overruled by the St. Just, it was possible for so distinguished a Norwegian jurist as the

late Dr. Raestad (much quoted by both Parties in this case) to say in the Opinion supplied by him at the request of the Public Prosecutor that:

"The question arises, however, whether in the present case the extent of the maritime territory must be determined from islands, islets and isolated reefs, or – as the Court of First Instance has done – from imaginary base-lines drawn between two islands, islets or reefs and, if necessary, how these base-lines are to be drawn.

A distinction must be made here. On the one hand, the problem arises whether according to international law a State is entitled to declare that certain parts of the adjoining sea fall under its sovereignty in certain – or all – respects. On the other hand, the question may arise whether a State under international law, or by virtue of its own laws, is entitled to consider that its national legislation in the determined case extends to these same parts of the adjoining sea when it has not yet been established that its sovereignty extends that far. A State may have a certain competence without having made use of it."

and later

"Neither the letters patent [that is, in effect, the Decree of 1812] nor, if they exist, the supplementary rules of customary law, prescribe how and between what islands, islets or rocks the base-lines . should be drawn ... ."

It does not greatly matter whether Dr. Raestad's views are right, or wrong.

What is important, from the point of view of the notoriety of the Norwegian system of straight base-lines, is that, in the year 1926, a lawyer of his standing and possessing his knowledge of the law governing Norwegian territorial waters should envisage the possible alternative methods of drawing base-lines, for the Norwegian contention is that the United Kingdom must for a long time past have been aware of the Norwegian system of straight base-lines connecting the outermost points on mainland, islands and rocks, and had acquiesced in it.

The following passage occurs in the Deutschland case in the Judgment of Judge Bonne vie, who delivered the first judgment as a member of the majority:

"It is also a matter of common knowledge that the public authorities have claimed, since time immemorial, certain areas, such as for example the Vestfjord and the Varangerfjord, as being Norwegian territorial waters in their entirety, and that the territorial limits should be drawn on the basis of straight lines at the mouth of the fjord (sic), regardless of the fact that very great areas outside the four-mile limit are thus included in Norwegian territory. But, for the greater part of the extensive coast of the country, no documents have been produced to prove that there exist more precise provisions, except for the coast off the county of More, for which reference is made to the two royal decrees of 1869 and 1889 referred to above".

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Between 1908 and the publication of the Decree of 1935, the United Kingdom repeatedly asked the Norwegian Government to supply them with information as to their fishery limits in northern Norway; see the Report of the Foreign Affairs Committee of the Storting dated June 24th, 1935 (Memorial, Annex 15), which states that "The British Government have repeatedly requested that the exact limit of this part of the coast should be fixed so that it might be communicated to the trawler organizations". The Norwegian reply to these requests has been that the matter was still under consideration by a Commission or in some other way, e.g., in the letter of August nth, 1931, from the Norwegian Ministry of Foreign Affairs, "the position is that the Storting have not yet taken up a standpoint with regard to the final marking of these lines in all details".

The impression that I have formed is that what in the argument of this case has been called "the Norwegian system" was in gestation from 1911 onwards, that the St. Just decision of 1934 (overruling the Deutschland decision) marks its first public enunciation as a system applicable to the whole coast, and that the Decree of 1935 is its first concrete application by the Government upon a large scale. I find it

impossible to believe that it was in existence as a system at the time of the Deutschland decision of 1926.

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(D) Another ground upon which Norwegian counsel have sought to justify the Decree of 1935 is that in any case the waters com¬prised within the outer lines fixed by that Decree lie well within the ancient fishing grounds of Norway to which she acquired a historic title a long time ago.

I think it is true that waters which would otherwise have the status of high seas can be acquired by a State by means of historic title, at any rate if contiguous to territorial or national waters ; see Lord Stowell in The Twee Gebroeders (1801), 3 Christopher Robinson's Admiralty Report 336, 339. But, as he said in that case:

"Strictly speaking, the nature of the claim brought forward on this occasion is against the general inclination of the law; for it is a claim of private and exclusive property, on a subject where a general, or at least a common use is to be presumed.

It is a claim which can onlv arise on portions of the sea, or on rivers flowing through different States ... . In the sea, out of the range of cannon-shot, universal use is presumed ... . Portions of the sea are prescribed for ... . But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established, on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence."

Another rule of law that appears to me to be relevant to the question of historic title is that some proof is usually required of the exercise of State jurisdiction, and that the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them.

When the documents that have been submitted in this case in support of historic title are examined, it appears to me that, with one

exception which I shall mention, they are marked by a lack of precision as to the waters which were the subject of fishing.

We get expressions such as "near our fortress of Varshus", "off the coasts of Finnmark", "the waters off the coast of this country", "near the land", "fish quite close to the coast", "unlawful fishing which they have been practising in certain localities", "the waters of Finnmark", "fjords or their adjacent waters", "whaling in the waters which wash the coast of Norway and its provinces, in particular Iceland and the Faroe Islands", etc., etc.

The exception is the case of the licences granted to Eric Lorch in the seventeenth century (see Annex 101 to Norwegian Rejoinder). In 1688 he received a licence to fish in, amongst other places, "the waters ... of the sunken rock of Gjesbaen"; in 1692 he received a licence to hunt whales; in 1698 he received another licence to hunt whales, which mentions, among other places, "the waters ... of the sunken rock of Gjesbaen". The last two licences state that it is forbidden to "all strangers and unlicensed persons to take whales in or without the fjords or their adjacent waters, within ten leagues from the land".

I do not know precisely where the rock called Gjesbæn or Gjesbæne is situated, beyond the statement in paragraph 36 of the Counter-Memorial that it is "near the word Alangstaran", which is marked on the Norwegian Chart 6 (Annex 75 to the Rejoinder) as being outside the outer Norwegian line of the Decree of 1935. On the same chart of the region known as Lopphavet there appear to be two fishing-banks called

"Ytre Gjesboene" and, south of it, "Indre Gjesboene", the former being outside the outer line of the Decree of 1935 and the latter between the outer line and the base-line of that Decree. What the dimensions of the fishing-banks are is not clear. The length of the base-line (from point 20 to 21) which runs in front of Lopphavet is 44 miles, so that even if the licences formed sufficient evidence to prove a historic title to a fishing-bank off "the sunken rock of Gjesbæn", they could not affect so extensive an area as Lopphavet. The three

licences cover a period of ten years and there is no evidence as to the duration of the fishery or its subsequent history.

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In these circumstances I consider that the delimitation of territorial waters made by the Norwegian Decree of 1935 is in conflict with international law, and that its effect will be to injure the principle of the freedom of the seas and to encourage further encroachments upon the high seas by coastal States. I regret therefore that I am unable to concur in the Judgment of the Court.

(Signed) Arnold D. McNair