DISSENTING OPINION OF JUDGE J.E. READ

While I agree with the majority of the Court in accepting the Norwegian contentions as regards the Indreleia and the Vestfjord, I am unable to concur in parts of the judgment which relate to other sections of the coast in question. It is, therefore, necessary for me to state the reasons which have led me to the conclusion that the establishment of certain of the base-lines by the Royal Norwegian Decree of 1935 was not in conformity with international law.

The Government of the United Kingdom has relied upon a rule or principle of international law, which has been referred to as the Tide-Mark or Coast-Line Rule. The contention is that the belt of territorial waters must be measured from the coast line in the widest sense of that term : from the low-tide mark on the mainland coast and on islands; and from the outer limit of internal waters. It is conceded that the point of departure for the base-lines may be the outer fringe of the "skjærgaard".

The Government of Norway contends that the coastal State is entitled to establish its belt or zone of territorial waters measured from straight lines drawn between the outermost islands, rocks or mainland points, with no restriction on the length of the lines. Norway admits to some limitations: geographic, such as visibility and conformation to the general direction of the coast; and others of a political, social or economic character, such as the needs of the coastal population and the location of fishing banks.

Norway further contends that, even if international law recognizes a Coast-Line Rule, it is not applicable to the Arctic coast of Norway, because the rule is not and cannot be applied to broken coast lines, and especially to the unique Norwegian coast.

Before examining the legal aspects of the dispute, it is necessary to look at some of the facts.

Norway, by the Decree of 1935, has asserted a claim over extensive areas of the seas off the coasts of Finnmark, Troms and part of Nordland. The outer limit of these areas is shown on the Norwegian charts, 3-9, by a heavy blue line, which may be referred to as the Blue

Line. It is parallel to and 4 sea miles distant from the base-lines connecting points 1-48.

The United Kingdom concedes Norway's right to a marginal belt of 4 miles, measured from the coast at low-water mark and from the closing lines of fjords and sunds and other internal waters. The extent of the waters thus conceded is indicated by the pecked green line on these charts, which may be referred to as the Green Line. This line would need minor modification to ensure exact correspondence with the "pecked green line" marked on the British charts. It would also need substantial readjustment on charts 5-9 to take into account the decision of the Court regarding the Indreleia and the Vestfjord, but this can be disregarded for the time being.

The parts of the sea between the Blue Line and the Green Line are in dispute. They are indicated in the British charts used during the Oral Proceedings by yellow patches. The United Kingdom claims that they are high seas; Norway, that they are territorial waters. It will be convenient to refer to them as Disputed Areas.

Returning to the legal aspects of the problem, I have no doubt that the Coast-Line Rule is an established rule of international law.

The collapse of the claims to maritime domain, based on mare clausum and similar doctrines – including those asserted by the Kingdom of Denmark and Norway – brought about the regime of mare liberum, the freedom of the seas; under which the seas were open to all men of all nations for all purposes. Pressure of belligerents in naval warfare destroyed the older pretensions; but the needs of defence and neutrality led States, even under the new regime, to assert new exclusive rights over belts or zones based on the coast.

The recognition of such zones by belligerents was closely linked with the power of the coastal State to exercise effective control, and it was, at the outset, restricted to areas within cannon range of fortified points. In time, it was extended to cover all areas capable of being covered by cannon shot, whether they were fortified or not.

It was an easy step from the range of cannon to the 3-mile limit: a belt of territorial waters 1 marine league in breadth, subject to the exclusive authority of the coastal State and from which foreign

belligerent operations were excluded. Some countries have claimed wider zones or more extensive areas; but, for a very long time, none has disputed the right of a coastal State to assert sovereignty over a belt of territorial waters measured from the coast.

In the course of the 19th century, it became necessary to give further consideration to bays. The establishment of a belt of territorial waters measured from the coast met most of the needs of coastal States as regards defence and security.

Such waters were in their very nature part of the sea. Bays, however, presented a special problem. They penetrated into the country, and were largely enclosed by their headlands. The application of the concept of a belt of territorial waters of fixed breadth to larger bays would bring the sea, both high seas and territorial sea, into the heart of the country. It would treat waters which were in their nature internal, as part of the open sea, and it would bring smugglers and foreign warships and fishermen into the interior of the coastal State, to the prejudice of its security and vital interests.

The solution of this problem developed along two different lines.

First: there was a tendency to recognize the right of the coastal State to claim as internal waters bays which penetrated the coast, notwithstanding that the distance between the headlands was greater than double the breadth of the marginal belt, e.g., more than 6 or 8 miles. The records of State practice embodied in the documents prepared for the Hague Conference, 1930, indicated that there was a readiness on the part of most States to recognize such claims over bays not more than 10 miles wide.

There were, however, maritime Powers, which asserted the right to claim as internal waters bays of greater breadth, or even to claim all bays regardless of the distance between headlands; but there was no indication that such wider claims were recognized by the international community. Further, there were some States, which adhered to a six-mile limit.

Second: it was recognized that, regardless of breadth, the coastal State could treat as internal waters those bays over which they had exercised sovereignty, without challenge, for a long time. This is the

doctrine of historic waters, and it is not confined to bays, but can be applied to the assertion of rights over historic waters which do not possess all the characteristics of a bay. The rights of the coastal State are, in this case, fully supported by customary law.

As regards these three types of waters – the belt of territorial waters, 10-mile bays and historic waters – there is no instance in which the claim of a coastal State has been successfully challenged since the North Atlantic Fisheries Arbitration. They can, therefore, all be regarded as established by rules of customary international law. Whether or not claims to bays of greater breadth can be supported, apart from historic factors, is a question which does not need to be considered in this case. It should also be noted that, in the case of all types of bays or historic waters, the marginal belt of territorial waters is measured from the outer limit of the internal waters.

In this case Norway is asserting the right to measure the 4-mile belt, not from the coast line, but trom long straight base-lines. These lines depart from the line of the coast in Eastern Finnmark, and from the line of the outer fringe of the "skjærgaard" between the North Cape and the Vestfjord. The Court is concerned with this question:

– whether customary international law recognizes the right of a coastal State to use straight base-lines for the delimitation of its belt of territorial waters in such a manner as to depart from the line of the coast, and to encroach upon the high seas, thus depriving other States of rights and privileges to which they had previously been entitled under the rules of international law.

It has been contended that such a claim can be derived from the sovereignty of the coastal State, but I do not see how this can be. Here, we are not dealing with the exercise, by a State, of sovereignty within its domain. We are dealing with State action which extends its domain, and purports to exclude all other States from areas of the high seas. We are dealing with expansion of the maritime domain designed to deprive other States of rights and privileges which, before the extension, they were entitled to enjoy and exercise, under the rules of international law.

In these circumstances, I should have much difficulty in justifying the Norwegian system as an exercise of powers inherent in State sovereignty.

The question remains: whether action by a State, encroaching on the high seas and depriving other States of their rights and privileges, can be justified by customary international law.

The true legal character of the problem has been obscured. It has been treated as if the issue concerned the existence or nonexistence of a rule of customary international law restricting the exercise of sovereign power by coastal States.

It has been assumed that the United Kingdom must establish the existence of such a restrictive rule in order to challenge the validity of the 1935 Decree. It has been suggested that the British case must fail, unless it can be proved that such a restrictive rule is founded on customary international law.

The actual legal problem with which we are concerned is different.

By the Decree of 1935, Norway has attempted to enlarge the Norwegian maritime domain and to encroach on extensive areas of the high seas, and has seized and condemned foreign ships. Accordingly, we must consider whether such a course is justified. Disregarding, for the time being, the historic factor, we must begin by examining the extent of the power to delimit its maritime domain, given to a coastal State by international law.

Here, I have no doubt about the position. The power of a State to delimit its maritime domain is the same as its power to delimit any other part of its domain.

It can extend its domain in any way that does not impair the rights of other States or of the international community: e.g., it can occupy no man's land, res nullius; or it can annex occupied territory, with the consent of the territorial sovereign. It cannot go beyond the territorial limits of its existing sovereignty, if such a course impairs rights or privileges conferred on other States by international law.

No question of res nullius or annexation arises in the case of the sea. All nations enjoy all rights and all privileges in and over all of the

sea beyond the limit of territorial waters. It follows that the power of a coastal State to mark out its maritime domain cannot be used so as to encroach on the high seas and impair these rights and privileges. Its power is limited to the marking out of areas already subject to its sovereignty.

Accordingly, it is necessary to examine the actual extent of Norwegian territorial waters, as recognized by customary international law before the making of the 1935 Decree. It certainly consisted of a belt of territorial waters 4 sea miles in breadth: but the question is to determine the starting points from which the belt should be measured.

Few States have marked out their maritime domains, and the course followed by Norway, in 1869, 1881, 1889 and 1935, was unusual. In general, the matter has been left to national courts, to prize courts, to arbitral tribunals and to diplomatic procedures in the innumerable cases which have arisen and which have been dealt with in the practice of States. Over the last century-and-a-half, there have been many hundreds of cases in which foreign ships have been seized by the authorities of coastal States. They have arisen in naval war, in smuggling, in fisheries protection and in other matters. They have given rise to legal problems, national and international.

The demarcation of territorial waters or of customs zones or the establishment of the distance from the coast has nearly always been in issue, and has been decided by national courts or international tribunals, or settled by diplomatic negotiations.

In naval war, instructions have been given to commanders, and seizures have been dealt with by prize courts.

Customary international law is the generalization of the practice of States.

This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. Such claims may be important as starting points, which, if not challenged, may ripen into historic title in the course of time.

The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters

in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration.

Here, it is necessary to rule out seizures made by Norway at and since the commencement of the dispute. They met with immediate protest by the United Kingdom, and must, therefore, be disregarded. Seizures made in bays need not be taken into account, because it is common ground that coastal States may measure the belt of territorial waters from straight base-lines joining the headlands of bays.

Setting aside these instances which are irrelevant to the present issue, State practice may be examined. To begin with, the Record in this case shows that Norway has maintained a four-mile limit for territorial waters since 1745. For part of the time this was used only for neutrality and prize; but, for much of the time, it was applied to fisheries. During the whole of the period since 1747 foreign fishermen have been fishing in the neighbourhood of the Norwegian coast; Russians in the north, and, during the last eighty or ninety years, French and Swedish fishermen in the south. Further, there have been many naval wars in which Norway was neutral, and the Record shows that infringements of neutrality and incursions of privateers were a serious menace to the country. It is noteworthy that there is not a single instance in which Norway asserted sovereignty in any of the Disputed Areas – or, indeed, over waters measured from long base-lines in other parts of the country – by seizing a foreign poaching fisherman or by action taken against a trespassing privateer, prize or man-of-war.

The same situation obtains in the case of other coastal States. No instance has been cited by either Party in which a coastal State has seized a foreign ship and justified and maintained the seizure, on the international plane, by relying on long base-lines departing from the direction and sinuosities of the coast. It has been a universal practice - in diplomatic negotiations, in prize courts, in national tribunals (in so far as they were applying international law) and in international tribunals - to rely upon the measurement of the territorial belt from the nearest land (or internal waters).

There have been instances in which unsuccessful attempts have been made to justify seizures on the basis of long straight base-lines departing from the line and direction of the coast. There are the Moray Firth cases, in which seizures were upheld by the Courts on the authority of the local law, but in which the position thus asserted was abandoned on the international plane by the Government of the United Kingdom. There are also the cases cited in Moore (.Internatinal Law Digest, "The 'Headland' Theory", Vol. I, pp. 785-788), where attempts to justify seizures on this basis were frustrated, either in the course of diplomatic negotiation or by international tribunals.

The practice of States in dealing with actual assertion and enforcement of claims over territorial waters is clear, unequivocal and consistent. It has been based upon the measurement of the territorial belt from the nearest land. I am compelled to conclude that "The Headland Theory", the claim by a coastal State to a belt of territorial waters measured from long base-lines which depart from the line of the coast, has no support in customary international law.

I do not think that the Court is called upon to pronounce upon the various methods by which hydrographers have worked out the limits of territorial waters on charts. I must, however, point out that the so-called "arcs of circles method" is nothing more or less than a technical expression, used to describe the way in which the coast-line rule has been applied in the international practice of the last century-and-a-half.

In the earliest days, the cannon on the coast, when traversed, traced arcs by the splash of their shots. Later, the imaginary cannon traced imaginary arcs which intersected and marked out the limit based on cannon shot. Then, as now, the imaginary cannon, mounted in minor concavities of the coast, were wasted, because their arcs were within the limits of the intersection of the shots from guns mounted at minor headlands. The substitution of the 3 or 4-mile limit made no difference. The fisherman, the smuggler, the master of the revenue cutter and the captain of the cruiser all fixed the limit of territorial waters by measurement from the nearest land. Innumerable national courts, international tribunals and prize courts settled the limits in the

same way. Air patrols have followed the same course. All reached the same result; and it did not make any difference where the problem arose or what was the nationality of the ships. What is more, all reached precisely the same result as a hydrographer gets, by drawing circles on a chart.

Before turning to the historic aspect of the problem, I must deal with the Norwegian contention that, even if international law recognizes a Coast-Line Rule, it is not applicable to broken coast lines, or, in any event, not to the unique coast in question.

It is unrealistic to suggest that the northern coast of Norway is unique or exceptional in that it has a broken coast line in East Finnmark, or because West Finnmark, Troms and Nordland are bordered by a coastal archipelago, deeply indented by fjords and sunds. In other parts of the world, different names are used, but there are many other instances of broken coast lines and archipelagoes. The Court has seen the west coast of Scotland on the charts produced at the hearings. There are coastal archipelagoes, deeply indented bays and broken coast lines on the north, south, east and west coasts of Canada, in the panhandle of Alaska, in South America, and, doubtless, in other parts of the world. There could be no greater danger to the structure of international law than to disregard the general rules of positive law and to base a decision on the real or imaginary exceptional character or uniqueness of the case under consideration.

I cannot overlook the fact that the rejection of "The Headland Theory" by positive international law was based, to a very large extent, on the precedents collected in Moore's International Digest, cited above. They arose on the coast of Nova Scotia and Prince Edward Island, a coast line deeply indented and broken by bays and other inlets, fringed in many places with groups of islands, rocks and reefs, a coast to which the terms "exceptional" and "unique" could readily be applied.

I am therefore led to the conclusion that the rules of international law which, under comparable circumstances, are applicable to other countries in other parts of the world, must be applied to the coast of Norway.

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Having reached the conclusion that the Norwegian claim to measure its belt of territorial waters from long straight base-lines which depart from the line of the coast has no support in customary international law, it is necessary to consider the question of historic title. This aspect of the problem has arisen in two ways, both of which involve decisions on the same basic questions of fact. Both are related to the existence and application of the Norwegian System.

The Norwegian System involves the assertion, by Norway, of sovereignty over all the fjords and sunds, and over a 4-mile belt of territorial waters, measured from base-lines connecting points on the mainland, or on the outermost islands, islets or rocks not continuously submerged by the sea. The System involves appreciation and selection of the base-points by Norway, taking into account the social and economic needs of the local population. There is no limitation on the length of the lines. On the other hand, it is recognized that they must be reasonable and that they must conform to the general direction of the coast. By general direction is meant a fictional direction related to the country as a whole, and not to the sector of the coast under consideration. The System does not admit of any need to conform to the real direction either of the outer fringe of the "skjærgaard" or of the mainland coast.

The first way in which the historic aspect of the problem arises concerns the doctrine of historic waters. If it can be shown that the Norwegian System was actually applied to the Disputed Areas, they can be regarded as historic waters, and the British case fails.

The second way in which it arises concerns the general doctrines of international law. If it can be shown that the Norwegian System has been recognized by the international community, it follows that it has become the doctrine of international law applicable to Norway, either as special or as regional law, and the British case fails.

In both cases the burden is upon Norway to prove the following facts:

1st – that the Norwegian System came into being as a part of the law of Norway;

2nd – that it was made known to the world in such a manner that other nations, including the United Kingdom, knew about it or must be assumed to have had knowledge; and

3rd – that there has been acquiescence by the international community, including the United Kingdom.

As regards the question of historic waters there is the additional point referred to above, namely, that it must be shown that the System was actually applied to the Disputed Areas. In the second case, treating the System as special or regional law, it would be enough to show that Norway had asserted competence to apply its provisions to the coasts of Norway in general, including the Disputed Areas.

It would, however, be necessary to show that the 1935 Decree conformed to the requirements of the System.

This case, therefore, turns on the date when the Norwegian System came into being, as a system: part of the public law of Norway; applicable or applied to the coast in question; known to the world; and acquiesced in by the international community.

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It will be convenient to begin by examining the question: whether the System was actually applied to the Disputed Areas before the commencement of the dispute.

If not, the Norwegian contentions fail, as regards the doctrine of historic waters in the strict sense.

As the judgment of the Court does not rely on historic title in this sense, it is possible to treat it briefly. For that purpose, consideration can be given to the sector of the coast where most evidence is available – the Disputed Area between base-points 5 and 6 in East Finnmark. The question is whether the Norwegian System was applied to this Disputed Area so that it became subject to the doctrine of historic waters.

The highest Court in Norway decided, in the St. Just case, that the application of the Norwegian System, on that sector, meant the assertion of exclusive Norwegian rights over a belt of waters four miles in breadth measured from the base-line between points 5 and 6.

Uncontradicted evidence, presented by the Norwegian Agent, proves that the Norwegian Foreign Ministry, when defending the seizure of the Kanuck in 1923, relied upon the measurement of Norwegian territorial waters from the Harbakken-Kavringen base-line (9.4 miles) and not the Norwegian System. This is proved by the Norwegian Note of February 11th, 1924, and confirmed by the affidavit of Mr. Esmarch, Secretary-General of the Norwegian Foreign Ministry (Counter-Memorial, Annex 41).

In 1930-1931, the diplomatic correspondence between Sir Charles Wingfield and Mr. Esmarch, arising out of the seizure of the Lord Weir, strongly confirms this position. It is not contradicted by any evidence produced in the record. The statement made by Sir Charles Wingfield was questioned by the Norwegian Agent, who did not produce any evidence to the contrary. The statement was that the ground relied upon to justify the seizure of the Lord Weir was "that on the night of 15th September she had fished at a spot 3.6 nautical miles outside the line Haabrandnesset-Klubbespiret: i.e. more than 4 nautical miles from the nearest land". The Norwegian Agent had access to the Court records in Norway. The diplomatic correspondence was set forth in the Memorial, Annex 10. He had four opportunities to produce contradictory evidence: in the Counter-Memorial, in the Rejoinder and at the two stages of the oral proceedings. He did not choose to do so and in the circumstances I am compelled to accept Sir Charles Wingfield's statement. It proves: (1) that, in 1930-1931, the Norwegian judicial and police authorities were measuring territorial waters from the Haabrandnesset-Klubbespiret base-line (the same closing lines of Syltefjord as were subsequently adopted in the Reply at p. 248); (2) that, in 1930-1931, Norway was not applying the Norwegian System to the East Finnmark coast; (3) that Sir Charles Wingfield put forward specific requests for information as to the nature and extent of the Norwegian claims; (4) that Mr. Esmarch's reply was not responsive, and, even at that late date, he did not give any information that would enable the British Government to appreciate the nature and extent of the Norwegian System.

The evidence with regard to the Kanuck and Lord Weir incidents shows, beyond all reasonable doubt, that the Norwegian System was not being asserted and applied in the Disputed Area in 1923, 1930 or 1931. On the other hand, it is equally clear that the Norwegian System was being appUed in the year 1933. This point is settled by uncontradicted evidence arising out of the seizure of the St. Just on November 3rd, 1933. In that case, the St. Just was seized, prosecuted and condemned for having fished within a territorial belt 4 miles in breadth measured from a line connecting base-points 5 and 6. These base-points had not then been authorized by the 1935 Decree. It is only possible to assume that at some time between August nth, 1931, and the seizure, the Norwegian Government decided to commence the assertion and enforcement of a claim to a territorial belt measured from long base-lines connecting the outermost mainland points, islands, etc. In other words, during this period the Norwegian Government decided to put the Norwegian System into force. It is, therefore, clearly established that the Norwegian System was not actually applied to the Disputed Areas until after August nth, 1931. That date was long after the dispute had arisen, and the Norwegian contention fails, as regards historic title in the strict sense.

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Having dealt with the claim to the Disputed Areas as historic waters in the strict sense, the question remains: whether the Norwegian System can be treated as a doctrine of special international law, asserted by Norway, and recognized by the international community.

For this purpose, it is not necessary to show that it was actually applied in the Disputed Areas before 1933 or 1935. It would be sufficient to prove that Norway had consistently and persistently asserted the right to apply the System to the Norwegian coast generally, and that there had been acquiescence in this claim by the international community.

At the outset, I must explain that I do not regard the older historical data as important. I think that Norway has sufficiently proved that, at the close of the 18th century and under the

international law of the time, Norway was asserting exclusive rights ovet a belt of waters which, as regards fishing rights, was based on the range of vision. This belt was much more extensive than that which was marked out by the 1935 Decree. The maritime domain, at that time and for fishing purposes, extended beyond the Blue Lines and certainly included nearly all of the Disputed Areas. These extensive Norwegian rights were not much different from the rights of other countries where exclusive fishing rights based on range of vision were recognized by the early international law.

One might ask: how and when did Norway lose these rights? They disintegrated or fell into desuetude in Norway in the same manner as in other maritime countries.

In Norway, as elsewhere, it is difficult to point to a particular decree or to special governmental action marking the end. It is, however, possible to point, with reasonable certainty, to the date.

In the 18th century, the only foreigners engaged in fishing off the northern coast were Russians. They were excluded from a belt of waters 1 league from the coast; but were permitted to fish in what were then regarded as Norwegian waters beyond that limit, on payment of dues which covered both the fishing and shore privileges.

These arrangements were based on diplomatic negotia¬tions and on the Rescript of 1747.

In the course of time, however, there was general recognition that the fishing by the Russians beyond the 4-mile limit was of right and not dependent on permission from the Norwegian authorities.

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The Royal Commission established in 1825-1826 to examine measures relating to the economic development of Finnmark, looked upon the fishing beyond the 1-league limit as a special concession granted to the Russian fishermen. The Royal Legislative Commission took a different view and favoured the opinion that fishing beyond the 1-league limit was in principle free from restriction.

The Finnmark Commission had proposed for incorporation in Article 40 of its draft proposal for a law relating to trade in both East and West Finnmark specific words which would have made it clear

that the Russian fishing beyond the 1-league limit was permissive. These words were not included, and in Article 40 of the Law of 1830 the expression used read as follows: "If the Russians, by reason of such fishing as they indulge in beyond the distance of 1-league from the coast, should wish to come ashore, the places where they land must not be ... ." It is, therefore, clear that the views of the Royal Legislative Commission prevailed. (See Rejoinder, Annexes, pp. 31-32.)

This position is confirmed by the statement in the Report of the Territorial Waters Boundary Commission dated February 29th, 1912 which may be referred to as the 1912 Report, page 18: "Whatever may have been the object of the Rescript, a legal practice was nevertheless soon to develop whereby the dues were paid for the sojourn on land, and fishing beyond the distance of 1-league (1 mil) was regarded as fishing on the open seas".

There can, therefore, be no doubt about date. By 1830 there was definite recognition that fishing beyond the 4-mile limit was to be regarded as fishing on the open seas. The ancient exclusive rights of the offshore fishing grounds beyond that limit had disappeared in so far as Finnmark was concerned. Whether or not this situation obtained in other parts of Norway is not clearly established in the Record. There is no reason to believe that there was any difference in other parts of the country; but, in any event, by the year 1862 it was certain that the 4-mile limit had been established for the whole of the coast and for all purposes including fishing. (See Counter-Memorial, Annex No. 14.)

Accordingly, it is now necessary to consider how and when the Norwegian System came into being as a part of the public law of Norway.

The origin of certain elements of the Norwegian System – the four-mile limit, and the claims regarding the fjords and sunds and the "skjærgaard" – are to be found in the 18th century or earlier: but the use of long straight base-lines departing from the coast is a modern invention.

The foundation of the base-line doctrine has been attributed to the Royal Decree of 1691, which prohibited captures "within sight of Our coasts, which is computed as 4 or 5 leagues from the out-lying rocks". I am unable to accept this view, because I think that this Decree meant what it said. "Four or five leagues from the outlying rocks" meant a distance measured from the rocks and not from imaginary base-lines many miles seaward from the outlying rocks. "Within sight of the coast" meant range of vision. Range of vision, from its very nature, must be measured from something visible, a rock or the coast line. It is inconceivable that the Decree meant measurement from imaginary base-lines, invisible at short range, and, a fortiori, invisible at a distance of four or five leagues. There is nothing in the language used in subsequent laws or decrees, between 1691 and 1868, that indicates any change from the old, traditional practice of measurement from the coast line and outermost rocks, reefs and islands.

This view is confirmed by the fact that there is not even one instance, arising before the commencement of the dispute and cited in the Record of this case, in which Norwegian claims to waters measured from straight base-lines (apart, of course, from bays) were enforced against a poaching or trespassing foreign ship, under the Decrees of 1691,1745, 1747, 1756 or 1812, or under the Law of 1830.

The first suggestion of a base-line doctrine is to be found in the Statement of Reasons by the Ministry of the Interior which led to the Sunnmore Decree of 1869, and in the Norwegian Note No. 4 in the diplomatic correspondence with France, February 8th, 1870. The Norwegian System has had many restatements, and in the course of restatement there have been refinements and definitions and possibly even additions, but the heart of the System is to be found in these two documents.

Accordingly, while the matter is not free from doubt, I shall proceed on the assumption that the Norwegian System came into being in 1869.

It is not enough to prove that the Norwegian System came into being in order to establish it as a special doctrine of international law. It must be proved, that it was made known to the world in such

manner that other nations, including the United Kingdom, knew about it or must be assumed to have had knowledge.

The first attempt by Norway to rely upon this doctrine was in the Sunnmöre Decree of 1869. There is no text of this Decree (or of the similar Decree of 1889) in the Record of this case. In the circumstances, it is necessary to rely upon a quotation contained in paragraph 59 of the Counter-Memorial which does not purport to set forth the whole text of the Decree, but which probably does so, and which reads as follows:

"59. The Royal Decree of October 16th, 1869, provides that 'a straight line at a distance of one geographical league, parallel with a straight line joining the islet of Storholmen and the island of Svinöy should be considered as the limit of the sea belt off the bailiwick of Sondmöre, within which the fishing shall be exclusively reserved to the indigenous inhabitants'."

The text of the Decree is unequivocal. It establishes a line of demarcation for a sector of the Norwegian coast far from the Disputed Areas (the same is true for the 1889 Decree). It says nothing about the coasts of Finnmark, Troms or Nordland.

It does not pretend to lay down any principles of general application. In itself, it has no bearing on the present case. On the other hand, it does lay down a long base-line connecting two remote islands.

The question to be decided is whether the making of one Decree, limited in its scope and applicable only to the particular coast of Sunnmore in 1869, followed by a similar Decree continuing the line and using long straight base-lines for the particular coast of Romsdal in 1889, was enough to make known to the world the existence of the Norwegian System.

The British concession that the waters covered by the Sunnmöre and Romsdal Decrees are Norwegian historic waters would justify a finding that these Decrees were sufficiently well known, but they did not make any claims extending beyond these two localities.

On the other hand, neither the Norwegian Note to France, nor the Statement of Reasons was brought to the attention of other

governments and certainly not to the attention of the British Government.

Counsel for Norway reviewed the reasons for assuming British knowledge of the Norwegian System. He showed that the Decrees of 1869 and 1889 had been published in a gazette called the "Bulletin of the Ministries" and in books like Fulton and the Reports of the Institute of International Law. He made a good case for the view that the Decrees were well known to the world, but he did not point to any instance in which either the Statement of Reasons or the Note to France, No. 4, was communicated to the British Government, or, indeed, to any other foreign government.

In these circumstances, I am unable to conclude that the British Government, or, indeed, any other foreign government except France, had any reason to believe that a Norwegian System had come into being in 1869-1889, or that these Decrees were anything more than local ad hoc measures.

I do not intend to review all the official acts and public statements of the Norwegian Government or to examine the texts of the Laws and Decrees delimiting Norwegian waters, whether for fishing, prize or other purposes. For my part it is enough to say that they cover a long period of time, and that they indicate:

1st – that there was no Norwegian System under which exclusive rights were asserted over the fisheries in the Disputed Areas;

2nd – that the public acts of the Norwegian Government were, during this period, consistent with claims to a belt of territorial waters, four miles in breadth, measured from the coast;

3rd – that there was nothing m these public acts and documents which would lead the British, or any other foreign government, to believe that Norway was claiming the Disputed Areas; or a right, as regards the whole country, to measure territorial waters from long base-lines departing from the line and direction of the coast.

These circumstances greatly increase the difficulty which confronts me, when I am asked to find that there has been constructive notice to the British Government of the existence of the Norwegian System, or of such claims by the Norwegian Government. At most,

the British Government could be assumed to have had knowledge that there was a possibility that Norway might, at some future time, try out a course in other parts of the coast, similar to that which had been followed in the Sunnmöre and Romsdal Decrees.

It is impossible to overlook the fact that the evidence clearly indicates that the Government of the United Kingdom had no actual knowledge of the Norwegian System, or of the nature and extent of the rights claimed by Norway. Reference has already been made to an attempt by Sir Charles Wingfield to obtain information, and to the refusal by Mr. Esmarch to give any real indication of the nature and extent of the Norwegian claims. There are other instances of enquiries, and the Norwegian Agent gave an exhaustive list of the answers given (Statements in Court, pp. 175-176). An examination of these answers shows that no information was given to the Government of the United Kingdom, at any time before the commencement of the dispute, that could be regarded as actual or constructive notice that Norway was asserting the right to establish a belt of territorial waters measured from long base-lines departing from the line of the coast.

There is one of the "answers", to which the Norwegian Agent referred, which requires special consideration, namely, the 1912 Report. This was a report of a Norwegian commission intended for the information and guidance of the Norwegian executive and legislative authorities. It contained extensive quotations from the Statements of Reasons for the 1869 and 1889 Decrees; it showed that the commissioners favoured the method of measuring territorial waters from long straight base-lines; and it put forward concrete proposals, similar to those adopted in the 1935 Decree, in the Annex No. 1 (supplemented by a later report by another committee in 1913 – Counter-Memorial, Annexes 36 and 37). The Norwegian Government withheld these documents so that it was impossible for the British Government to understand the extent of the claims. Enough remained, however, in the body of the 1912 Report to show that Norway might be claiming the right to measure its belt of territorial waters from long straight base-lines.

Accordingly, the question arises: whether this communication of the 1912 Report was notice to the British Government of the existence of the Norwegian System; and, if so, whether there was acquiescence by that Government, so as to enable the claims constituting that System to ripen into rules of customary international law.

Here, without going into the question whether the Report was an adequate warning of the existence of the System, I shall consider whether the failure of the British Government to make specific protests on receipt of the 1912 Report and of the Norwegian Note of November 29th, 1913, can be regarded as acceptance of the Norwegian claims.

The circumstances attending this communication are plain enough. Controversy regarding the extent of Norwegian waters had arisen as a result of the seizure of the British trawler Lord Roberts in the Varangerfjord in March 1911 (Counter-Memorial, Annex 38). The difference between the two Governments, as understood at the time, was stated in the British Minister's Note of August 22nd, 1913, as follows:

"The points of view of the two Governments may be briefly defined as being that, while His Majesty's Government contend that, in the absence of any specific agreement to the contrary, jurisdiction cannot be exercised in waters beyond a distance of three marine miles from low-water mark, Norway claims as within her territorial jurisdiction all waters up to a distance of four marine miles, together with the whole area comprised in certain fjords".

The Minister proposed a modus vivendi, and, in his proposal, made it clear that " ... His Majesty's Government must insist on leaving the question of principle intact, and cannot admit that, failing a special understanding, the Norwegian Government are entitled to settle the disputed point arbitrarily in their own favour".

In the Norwegian Foreign Ministry's Note of November 29th, 1912 dealing with the proposal, reference was made to the 1912 Report: "The reasons advanced by Norway in support of her delimitation of her territorial waters, are set forth in the report of a Commission appointed in 1911. A few copies of a French translation

of this report were forwarded to you unofficially at the time by my predecessor Mr. Irgens. In it those principles of international law were set forth, which, in the opinion of the Norwegian Government, were favourable to its point of view, together with the particular circumstances obtaining in the matter of Norwegian territorial waters, including the recognition accorded thereto, either explicitly or implicitly by foreign Powers".

The Ministry went on to suggest modifications of the proposal. Nothing came of these negotiations, presumably because of the intervention of war.

The 1912 Report was transmitted and adopted by the Norwegian Foreign Ministry as a statement of the principles of international law supporting the Norwegian position. This was done, however, in the course of negotiations for the establishment of a modus vivendi. By its very nature, a modus vivendi implies the reservation and preservation of the legal positions of both Parties to the controversy. If nothing had been said, it would have been necessary to imply an intention of both Parties to admit nothing and to maintain their legal positions intact. In this case, however, the negotiations proceeded on the basis of sin express stipulation to leave "the question of principle intact".

In these circumstances, I think that the British Government was justified in regarding all aspects of the negotiations, including the 19x2 Report and the Note of November 29th, 1913, as covered by the basic reservation. The omission to make a specific reservation or objection at this stage cannot possibly be treated as proof of acquiescence in or acceptance of the Norwegian System.

There is the further point, that from the time of the seizure of the Lord Roberts, in 1911, until the present the Parties have been in controversy about the extent of Norwegian waters and about the rights of British ships in areas which were regarded by the British Government as part of the High Seas. Parts of the controversy have been settled by the British concessions with regard to the four-mile limit, the fjords and sunds, and the recognition of the outer fringe of the "skjærgaard" as the coast line.

Apart from these concessions, the British Government has never admitted the right to measure territorial waters from long base-lines departing from the line of the coast or the "skjærgaard", and it has maintained throughout the contention that the waters must be measured from the low-water mark. The transmission of the 1912 Report was made after the commencement of the dispute.

The position of the Parties regarding knowledge of the Norwegian claims or notice of the existence of the Norwegian System may be summed up. Shortly after the commencement of the dispute, in the correspondence exchanged in 1913 and referred to above, the British Government received some indication that Norway might be making extensive claims as regards the demarcation of territorial waters, but no definite information as to the extent of the claim; and, as I have already indicated, the information was received in such circumstances that the failure to make immediate protest could not have been regarded as acquiescence even if the extent of the claim had been indicated. In 1923 – 1924 at the time of the Kanuck incident, both the British Government and the Norwegian Foreign Ministry were in the dark as to the nature and extent of the claims which are now regarded as being involved in the Norwegian System. The British Government was informed by the late Sir Francis Lindley that the Norwegian Government was relying on the application of the 10-mile rule for the Persfjord. The Norwegian Foreign Ministry thought that it was relying on the Harbakken-Kavringen closing line for the fjord, 9.4 marine miles in length.

The communication by the Norwegian Foreign Ministry to the Secretary-General of the League of Nations, March 3rd, 1927, disclosed to the world the fact that Norway was asserting the right to mark out the belt of territorial waters from long straight base-lines, although even at that late date it was not yet clear that Norway was asserting the right to use base-lines that departed from the line and direction of the coast or of the outer fringe of the "skjærgaard". In the correspondence arising out of the Lord Weir seizure, there was a marked change on both sides. Sir Charles Wingfield's Note clearly indicated that the British Government had by that time learned that

Norway was asserting the right to use long straight base-lines, and that it suspected that the Norwegian claim might be even more extensive than that which was involved in the closing line for the Syltefjord then relied on by the Norwegian authorities. The British Government was requesting definite information as to the nature and extent of the Norwegian claim. Mr. Esmarch's Note shows clearly that the Norwegian Foreign Ministry was then aware that much more extensive claims were in the offing, but that it was still impossible to give any real information as to the nature and extent of the claims. The British Memorandum to the Norwegian Government, July 27th, 1933, set forth in the Counter-Memorial, Annex II, shows that even then the Government was still waiting for an authoritative statement as to the Norwegian claim. It is clear, therefore, that the British Government, notwithstanding repeated requests, was unable to obtain any definite information as to the true nature and character of the Norwegian System prior to the judgment in the St. Just case, and the publication of the Royal Norwegian Decree of 1935.

In these circumstances, I cannot avoid reaching the conclusion that it has not been proved that the Norwegian System was made known to the world in time, and in such a manner that other nations, including the United Kingdom, knew about it or must be assumed to have had constructive knowledge.

There is perhaps one qualification regarding the foregoing conclusion. It appears from the record of seizures and warnings to trawlers that Norway, in 1923, began to assert and enforce exclusive rights in the waters in dispute. There is an isolated instance of warning to a British trawler Caulonia in 1913, at a point outside the Green Line; but no other instance of either seizure or warning at a point outside of that line before 1923. Between the years 1923-1949, there were twenty-four seizures and twenty-three warnings of trawlers at points within the Disputed Areas.

There can therefore be no doubt that Norway, from 1923 on, was vigorously asserting and enforcing extensive exclusive rights. On the other hand, this was too late to support a claim to the existence of the Norwegian System as a doctrine of customary international law

binding on the United Kingdom. The first of the seizures, the Kanuck in 1923, was the subject of diplomatic negotiation. While it would be entirely proper to attribute to the Government of the United Kingdom knowledge that Norway, during the period from 1923 to 1933, was asserting very wide claims as regards the extent of territorial waters, this all took place after the present dispute had come into being.

It was too late to give effect to a special or regional doctrine of international law binding on the Government of the United Kingdom.

I do not intend to comment on the different sectors of the coast, or to indicate, in detail, the parts of the Disputed Areas which are open to objection as not having been delimited in conformity with the principles of international law. In East Finnmark

I consider that the Disputed Areas between base-points 5 and 12 are open to serious objection, and there I consider that the Green Line fairly indicates the extent to which the Blue Line is not in conformity with international law. Between base-points 12 and 35, while there are places where the Blue Line departs from the line and direction of the outer fringe of the "skjærgaard", the Green Line is unsatisfactory for two reasons: (1) because it needs to be rectified in accordance with the British alternative submission; and (2) because further rectification would be necessary to take into account penetrations in the fringe of the "skjærgaard" which in reality have the characteristics of bays enclosed by groups of islands.

Between base-points 35 and 48, while the matter is not free from doubt, I am not inclined to question the Blue Line.

Accordingly, in view of all of the foregoing considerations, I am led to the conclusion that the delimitation of the fisheries zone fixed by the Norwegian Royal Decree of July 12th, 1935, is not in conformity with the rules and principles of international law.

(Signed) J.E. Read.