

CHAPTER EIGHT: SOURCES OF GENERAL INTERNATIONAL LAW

Pages 185-200

A. Custom

Reading Assignment: *International Law Anthology*, pp. 51-101.

Re-read: *The Lotus Case*.

Fisheries Case
(United Kingdom v. Norway)
International Court of Justice
1951 I.C.J. 116

On September 28th, 1949, the Government of the United Kingdom of Great Britain and Northern Ireland filed in the Registry an Application instituting proceedings before the Court against the Kingdom of Norway, the subject of the proceedings being the validity or otherwise, under international law, of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of July 12th, 1935, for that part of Norway which is situated northward of 66 degrees 28.8' N. latitude. This Application asked the Court

(a) to declare the principles of international law to be applied in defining the base-lines, by reference to which the Norwegian Government is entitled to delimit a fisheries zone, extending to seaward 4 sea miles from those lines and exclusively reserved for its own nationals, and to define the said base-lines in so far as it appears necessary, in the light of the arguments of the Parties, in order to avoid further legal differences between them;

(b) to award damages to the Government of the United Kingdom in respect of all interferences by the Norwegian authorities with British fishing vessels outside the zone which, in accordance with the Court's decision under (a), the Norwegian Government is entitled to reserve for its nationals.

The historical facts laid before the Court establish that as the result of complaints from the King of Denmark and of Norway, at the beginning of the seventeenth century, British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616-1618 until 1906.

In 1906 a few British fishing vessels appeared off the coasts of Eastern Finnmark. From 1908 onwards they returned in greater numbers. These were trawlers equipped with improved and powerful gear. The local population became perturbed, and measures were taken by the Norwegian Government with a view to specifying the limits within which fishing was prohibited to foreigners.

The first incident occurred in 1911 when a British trawler was seized and condemned for having violated these measures. Negotiations ensued between the two Governments. These were interrupted by the war in 1914. From 1922 onwards incidents recurred. Further conversations were initiated in 1924. In 1932, British trawlers, extending the range of their activities, appeared in the sectors off the Norwegian coast west of the North Cape, and the number of warnings and arrests increased. On July 27th, 1933, the United Kingdom Government sent a memorandum to the Norwegian Government complaining that in delimiting the territorial sea the Norwegian authorities had made use of unjustifiable base-lines. On July 12th, 1935, a Norwegian Royal Decree was enacted delimiting the Norwegian fisheries zone north of 66 degrees 28.8' North latitude.

The United Kingdom made urgent representations in Oslo in the course of which the question of referring the dispute to the Permanent Court of International Justice was raised. Pending the result of the negotiations, the Norwegian Government made it known that Norwegian fishery patrol vessels would deal leniently with foreign vessels fishing a certain distance within the fishing limits. In 1948, since no agreement had been reached, the Norwegian Government abandoned its lenient enforcement of the 1935 Decree; incidents then became more and more frequent. A considerable number of British trawlers were arrested and condemned. It was then that the United Kingdom Government instituted the present proceedings.

The Norwegian Royal Decree of July 12th, 1935, concerning the delimitation of the Norwegian fisheries zone sets out in the preamble the considerations on which its provisions are based. In this connection it refers to "well-established national titles of right. . . the geographical conditions prevailing on the Norwegian coasts. . . the safeguard of the vital interests of the inhabitants of the northernmost parts of the country." It further relies on the Royal Decrees of February 22nd, 1812, October 16th, 1869, January 5th, 1881, and September 9th, 1889.

The claim of the United Kingdom Government is founded on what it regards as the general international law applicable to the delimitation of the Norwegian fisheries zone. The Norwegian Government does not deny that there exist rules of international law to which this delimitation must conform. It contends that its own system of delimitation [is] in every respect in conformity with the requirements of international law.

The coastal zone concerned in the dispute is of considerable length. It lies north of latitude 66 degrees 28.8'

N., that is to say, north of the Arctic Circle, and it includes the coast of the mainland of Norway and all the islands, islets, rocks and reefs, known by the name of the "skjaergaard" (literally, rock rampart), together with all Norwegian internal and territorial waters. The coast of the mainland, which, without taking any account of fjords, bays and minor indentations, is over 1,500 kilometers in length, is of a very distinctive configuration. Very broken along its whole length, it constantly opens out into indentations often penetrating for great distances inland: the Porsangerfjord, for instance, penetrates 75 sea miles inland. To the west, the land configuration stretches out into the sea: the large and small islands, mountainous in character, the islets, rocks and reefs, some always above water, others emerging only at low tide, are in truth but an extension of the Norwegian mainland. The number of insular formations, large and small, which make up the skjaergaard, is estimated by the Norwegian Government to be one hundred and twenty thousand. From the southern extremity of the disputed area to the North Cape, the skjaergaard lies along the whole of the coast of the mainland; east of the North Cape, the skjaergaard ends, but the coast line continues to be broken by large and deeply indented fjords.

Within the skjaergaard, almost every island has its large and its small bays; countless arms of the sea, straits, channels and mere waterways serve as a means of communication for the local population which inhabits the islands as it does the mainland. The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the skjaergaard.

The whole of this region is mountainous. The North Cape, a sheer rock little more than 300 meters high, can be seen from a considerable distance; there are other summits rising to over a thousand meters, so that the Norwegian coast, mainland and skjaergaard, is visible from far off.

Along the coast are situated comparatively shallow banks, veritable underwater terraces which constitute fishing grounds where fish are particularly abundant; these grounds were known to Norwegian fishermen and exploited by them from time immemorial. Since these banks lay within the range of vision, the most desirable fishing grounds were always located and identified by means of the method of alignments ("meds"), at points where two lines drawn between points selected on the coast or on islands intersected.

In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing. Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law.

The Parties being in agreement on the figure of 4 miles for the breadth of the territorial sea, the problem which arises is from what base-line this breadth is to be reckoned. The Conclusions of the United Kingdom are explicit on this point: the base-line must be the low-water mark on permanently dry land which is a part of Norwegian territory, or the proper closing line of Norwegian internal waters.

The Court has no difficulty in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States. This criterion is the most favorable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory. The Court notes that the Parties agree as to this criterion, but that they differ as to its application.

The Parties also agree that in the case of a low-tide elevation (drying rock) the outer edge at low water of this low-tide elevation may be taken into account as a base-point for calculating the breadth of the territorial sea.

The Court finds itself obliged to decide whether the relevant low-water mark is that of the mainland or of the skjaergaard. Since the mainland is bordered in its western sector by the skjaergaard, which constitutes a whole with the mainland, it is the outer line of the skjaergaard which must be taken into account in delimiting the belt of Norwegian territorial waters.

This solution is dictated by geographic realities. Three methods have been contemplated to effect the application of the low-water mark rule. The simplest would appear to be the method of the trace parallel, which consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities. This method may be applied without difficulty to an ordinary coast, which is not too broken.

Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the skjaergaard along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometrical construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast: the rule would disappear under the exceptions. Such a coast, viewed as a whole, calls for the application of a different method; that is, the method of base-lines which, within reasonable limits, may depart from the physical line of the coast.

It is true that the experts of the Second Sub-Committee of the Second Committee of the 1930 Conference for the codification of international law formulated the low-water mark rule somewhat strictly ("following all the sinuosities of the coast"). But they were at the same time obliged to admit many exceptions relating to bays, islands near the coast, groups of islands. In the present case this method of the trace parallel, which was invoked against Norway in the Memorial, was abandoned in the written Reply, and later in the oral argument of the Agent of the United Kingdom Government.

The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later.

The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in cases of minor curvatures of the coast line where it was solely a question of giving a simpler form to the belt of territorial waters.

It has been contended, on behalf of the United Kingdom, that Norway may draw straight lines only across bays. The Court is unable to share this view. If the belt of territorial waters must follow the outer line of the skjaergaard, and if the method of straight base-lines must be admitted in certain cases, there is no valid reason to draw them only across bays, as in Eastern Finnmark, and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island formations of the skjaergaard.

The United Kingdom Government concedes that straight lines, regardless of their length, may be used only subject to the conditions set out in point 5 of its Conclusions, as follows:

Norway is entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fall within the conception of a bay as defined in international law, whether the proper closing line of the indentation is more or less than 10 sea miles long.

A preliminary remark must be made in respect of this point. In the opinion of the United Kingdom Government, Norway is entitled, on historic grounds, to claim as internal waters all fjords and sunds which have the character of a bay. She is also entitled on historic grounds to claim as Norwegian territorial waters all the waters of the fjords and sunds which have the character of legal straits.

By "historic waters" are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title. The United Kingdom Government refers to the notion of historic titles both in respect of territorial waters and internal waters, considering such titles, in both cases, as derogations from general international law. In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*,¹ with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force. Norwegian sovereignty over these waters would constitute an exception, historic titles justifying situations which would otherwise be in conflict with international law.

As has been said, the United Kingdom Government concedes that Norway is entitled to claim as internal waters all the waters of fjords and sunds which fall within the conception of a bay as defined in international law whether the closing line of the indentation is more or less than ten sea miles long. But the United Kingdom Government concedes this only on the basis of historic title; it must therefore be taken that that Government has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law.

In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.

In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.

The Court now comes to the question of the length of the base-lines drawn across the waters lying between the various formations of the skjaergaard. Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.

In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or

ten or twelve sea miles), have not got beyond the stage of proposals.

Furthermore, apart from any question of limiting the lines to ten miles, it may be that several lines can be envisaged. In such cases the coastal State would seem to be in the best position to appraise the local conditions dictating the selection.

Consequently, the Court is unable to share the view of the United Kingdom Government, that "Norway, in the matter of base-lines, now claims recognition of an exceptional system." Thus the Court, confining itself for the moment to the Conclusions of the United Kingdom, finds that the Norwegian Government in fixing the base-lines for the delimitation of the Norwegian fisheries zone by the 1935 Decree has not violated international law.

It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law.² Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.

Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.

Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.

Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.

Norway puts forward the 1935 Decree as the application of a traditional system of delimitation, a system which she claims to be in complete conformity with international law. The Norwegian Government has referred in this connection to an historic title, the meaning of which was made clear by Counsel for Norway at the sitting on October 12th, 1951:

The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law.

This conception of an historic title is in consonance with the Norwegian Government's understanding of the general rules of international law. In its view, these rules of international law take into account the diversity of facts and, therefore, concede that the drawing of base-lines must be adapted to the special conditions obtaining in different regions. In its view, the system of delimitation applied in 1935, a system characterized by the use of straight lines, does not therefore infringe the general law; it is an adaptation rendered necessary by local conditions.

The Court must ascertain precisely what this alleged system of delimitation consists of, what is its effect in law as against the United Kingdom, and whether it was applied by the 1935 Decree in a manner which conformed to international law.

It is common ground between the Parties that on the question of the existence of a Norwegian system, the Royal Decree of February 22nd, 1812, is of cardinal importance. This Decree is in the following terms:

We wish to lay down as a rule that, in all cases when there is a question of determining the limit of our territorial sovereignty at sea, that limit shall be reckoned at the distance of one ordinary sea league from the island or islet farthest from the mainland, not covered by the sea; of which all proper authorities shall be informed by rescript.

This text does not clearly indicate how the base-lines between the islands or islets farthest from the mainland were to be drawn. In particular, it does not say in express terms that the lines must take the form of straight lines drawn between these points. But it may be noted that it was in this way that the 1812 Decree was invariably

construed in Norway in the course of the 19th and 20th centuries.

The Decree of October 16th, 1869, relating to the delimitation of Sunnmore, and the Statement of Reasons for this Decree, are particularly revealing as to the traditional Norwegian conception and the Norwegian construction of the Decree of 1812. It was by reference to the 1812 Decree, and specifically relying upon 'the conception' adopted by that Decree, that the Ministry of the Interior justified the drawing of a straight line 26 miles in length between the two outermost points of the skjaergaard. The Decree of September 9th, 1889, relating to the delimitation of Romsdal and Nordmore, applied the same method, drawing four straight lines, respectively 14.7 miles, 7 miles, 23.6 miles and 11.6 miles in length.

The 1812 Decree was similarly construed by the Territorial Waters Boundary Commission (Report of February 29th, 1912, pp. 48-49), as it was in the Memorandum of January 3rd, 1929, sent by the Norwegian Government to the Secretary-General of the League of Nations, in which it was said:

The direction laid down by this Decree should be interpreted in the sense that the starting-point for calculating the breadth of the territorial waters should be a line drawn along the skjaergaard between the furthest rocks and, where there is no skjaergaard, between the extreme points.

The judgment delivered by the Norwegian Supreme Court in 1934, in the St. Just case, provided final authority for this interpretation. This conception accords with the geographical characteristics of the Norwegian coast and is not contrary to the principles of international law.

It should, however, be pointed out that whereas the 1812 Decree designated as base-points "the island or islet farthest from the mainland not covered by the sea," Norwegian governmental practice subsequently interpreted this provision as meaning that the limit was to be reckoned from the outermost islands and islets "not continuously covered by the sea."

The 1812 Decree, although quite general in its terms, had as its immediate object the fixing of the limit applicable for the purposes of maritime neutrality. However, as soon as the Norwegian Government found itself impelled by circumstances to delimit its fisheries zone, it regarded that Decree as laying down principles to be applied for purposes other than neutrality. The Statements of Reasons of October 1st, 1869, December 20th, 1880, and May 24th, 1889, are conclusive on this point. They also show that the delimitation effected in 1869 and in 1889 constituted a reasoned application of a definite system applicable to the whole of the Norwegian coast line, and was not merely legislation of local interest called for by any special requirements. The following passage from the Statement of Reasons of the 1869 Decree may in particular be referred to:

My Ministry assumes that the general rule mentioned above [namely, the four-mile rule], which is recognized by international law for the determination of the extent of a country's territorial waters, must be applied here in such a way that the sea area inside a line drawn parallel to a straight line between the two outermost islands or rocks not covered by the sea, Svinoy to the south and Storholmen to the north, and one geographical league north-west of that straight line, should be considered Norwegian maritime territory.

The 1869 Statement of Reasons brings out all the elements which go to make up what the Norwegian Government describes as its traditional system of delimitation: base-points provided by the islands or islets farthest from the mainland, the use of straight lines joining up these points, the lack of any maximum length for such lines. The judgment of the Norwegian Supreme Court in the St. Just case upheld this interpretation and added that the 1812 Decree had never been understood or applied

in such a way as to make the boundary follow the sinuosities of the coast or to cause its position to be determined by means of circles drawn round the points of the Skjaergaard or of the mainland furthest out to sea--a method which it would be very difficult to adopt or to enforce in practice, having regard to the special configuration of this coast.

Finally, it is established that, according to the Norwegian system, the base-lines must follow the general direction of the coast, which is in conformity with international law.

Equally significant in this connection is the correspondence which passed between Norway and France between 1869-1870. On December 21st, 1869, only two months after the promulgation of the Decree of October 16th relating to the delimitation of Sunnmore, the French Government asked the Norwegian Government for an explanation of this enactment. It did so basing itself upon "the principles of international law." In a second Note dated December 30th of the same year, it pointed out that the distance between the base-points was greater than 10 sea miles, and that the line joining up these points should have been a broken line following the configuration of the coast. In a Note of February 8th, 1870, the Ministry for Foreign Affairs, also dealing with the question from the point of view of international law, replied as follows:

By the same Note of December 30th, Your Excellency drew my attention to the fixing of the fishery limit in the Sunnmore Archipelago by a straight line instead of a broken line. According to the view held by your

Government, as the distance between the islets of Svinoy and Storholmen is more than 10 sea miles, the fishery limit between these two points should have been a broken line following the configuration of the coast line and nearer to it than the present limit. In spite of the adoption in some treaties of the quite arbitrary distance of 10 sea miles, this distance would not appear to me to have acquired the force of an international law. Still less would it appear to have any foundation in reality: one bay, by reason of the varying formations of the coast and sea-bed, may have an entirely different character from that of another bay of the same width. It seems to me rather that local conditions and considerations of what is practicable and equitable should be decisive in specific cases. The configuration of our coasts in no way resembles that of the coasts of other European countries, and that fact alone makes the adoption of any absolute rule of universal application impossible in this case. I venture to claim that all these reasons militate in favor of the line laid down by the Decree of October 16th. A broken line, conforming closely to the indentations of the coast line between Svinoy and Storholmen, would have resulted in a boundary so involved and so indistinct that it would have been impossible to exercise any supervision over it.

Language of this kind can only be construed as the considered expression of a legal conception regarded by the Norwegian Government as compatible with international law. And indeed, the French Government did not pursue the matter. In a Note of July 27th, 1870, it is said that, while maintaining its standpoint with regard to principle, it was prepared to accept the delimitation laid down by the Decree of October 16th, 1869, as resting upon "a practical study of the configuration of the coast line and of the conditions of the inhabitants."

The Court, having thus established the existence and the constituent elements of the Norwegian system of delimitation, further finds that this system was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other States.

In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.

From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States. Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.

The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. One cannot indeed consider as raising objections the discussions to which the Lord Roberts incident gave rise in 1911, for the controversy which arose in this connection related to two questions, that of the four-mile limit, and that of Norwegian sovereignty over the Varangerfjord, both of which were unconnected with the position of base-lines. It would appear that it was only in its Memorandum of July 27th, 1933, that the United Kingdom made a formal and definite protest on this point.

The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies a fortiori to the Decree of 1889 relating to the delimitation of Romsdal and Nordmore which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice.

Norway's attitude with regard to the North Sea Fisheries (Police) Convention of 1882 is a further fact which must at once have attracted the attention of Great Britain. There is scarcely any fisheries convention of greater importance to the coastal States of the North Sea or of greater interest to Great Britain. Norway's refusal to adhere to this Convention clearly raised the question of the delimitation of her maritime domain, especially with regard to bays, the question of their delimitation by means of straight lines of which Norway challenged the maximum length adopted in the Convention. Having regard to the fact that a few years before, the delimitation of Sunnmore by the 1869 Decree had been presented as an application of the Norwegian system, one cannot avoid the conclusion that, from that time on, all the elements of the problem of Norwegian coastal waters had been clearly stated. The steps

subsequently taken by Great Britain to secure Norway's adherence to the Convention clearly show that she was aware of and interested in the question.

The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations. The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.

The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.

The question now arises whether the Decree of July 12th, 1935, which in its preamble is expressed to be an application of this method, conforms to it in its drawing of the base-lines, or whether, at certain points, it departs from this method to any considerable extent.

The schedule appended to the Decree of July 12th, 1935, indicates the fixed points between which the straight base-lines are drawn. The Court notes that these lines were the result of a careful study initiated by the Norwegian authorities as far back as 1911. The base-lines recommended by the Foreign Affairs Committee of the Storting for the delimitation of the fisheries zone and adopted and made public for the first time by the Decree of July 12th, 1935, are the same as those which the so-called Territorial Waters Boundary Commissions, successively appointed on June 29th, 1911, and July 12th, 1912, had drawn in 1912 for Finnmark and in 1913 for Nordland and Troms. The Court further notes that the 1911 and 1912 Commissions advocated these lines and in so doing constantly referred, as the 1935 Decree itself did, to the traditional system of delimitation adopted by earlier acts and more particularly by the Decrees of 1812, 1869 and 1889.

In the absence of convincing evidence to the contrary, the Court cannot readily find that the lines adopted in these circumstances by the 1935 Decree are not in accordance with the traditional Norwegian system.

Finally, it has been contended by the United Kingdom Government that certain, at least, of the base-lines adopted by the Decree are, irrespective of whether or not they conform to the Norwegian system, contrary to the principles stated above by the Court as governing any delimitation of the territorial sea. The Court will consider whether, from the point of view of these principles, certain of the base-lines which have been criticized in some detail really are without justification.

The Norwegian Government admits that the base-lines must be drawn in such a way as to respect the general direction of the coast and that they must be drawn in a reasonable manner. The United Kingdom Government contends that certain lines do not follow the general direction of the coast, or do not follow it sufficiently closely, or that they do not respect the natural connection existing between certain sea areas and the land formations separating or surrounding them. For these reasons, it is alleged that the line drawn is contrary to the principles which govern the delimitation of the maritime domain.

The Court observes that these complaints, which assumed a very general scope in the written proceedings, have subsequently been reduced.

The United Kingdom Government has directed its criticism against the LoppHAVET basin. The LoppHAVET basin constitutes an ill-defined geographic whole. It cannot be regarded as having the character of a bay. It is made up of an extensive area of water dotted with large islands which are separated by inlets that terminate in the various fjords. The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the general direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse; nor can one rely on the impression that may be gathered from a large scale chart of this sector alone. In the case in point, the divergence between the base-line and the land formations is not such that it is a distortion of the general direction of the Norwegian coast.

Even if it were considered that in the sector under review the deviation was too pronounced, it must be pointed out that the Norwegian Government has relied upon an historic title clearly referable to the waters of LoppHAVET, namely, the exclusive privilege to fish and hunt whales granted at the end of the 17th century to Lt.-Commander Erich Lorch under a number of licenses which show, *inter alia*, that the water situated in the vicinity of the sunken rock of Gjesbaaen or Gjesboene and the fishing grounds pertaining thereto were regarded as falling exclusively within Norwegian sovereignty. But it may be observed that the fishing grounds here referred to are made up of two

banks, one of which, the Indre Gjesboene, is situated between the base-line and the limit reserved for fishing, whereas the other, the Ytre Gjesboene, is situated further to seaward and beyond the fishing limit laid down in the 1935 Decree.

These ancient concessions tend to confirm the Norwegian Government's contention that the fisheries zone reserved before 1812 was in fact much more extensive than the one delimited in 1935. It is suggested that it included all fishing banks from which land was visible, the range of vision being, as is recognized by the United Kingdom Government, the principle of delimitation in force at that time. The Court considers that, although it is not always clear to what specific areas they apply, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of LoppHAVET. Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable.

For these reasons,

THE COURT, finds, by ten votes to two, that the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of July 12th, 1935, is not contrary to international law; and by eight votes to four, that the base-lines fixed by the said Decree in application of this method are not contrary to international law.

INDIVIDUAL OPINION OF JUDGE ALVAREZ

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

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

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

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

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

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

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

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

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

SEPARATE OPINION OF JUDGE HSU MO

In support of her historic title, Norway has relied on habitual fishing by the local people and prohibition of fishing by foreigners. As far as the fishing activities of the coastal inhabitants are concerned, I need only point out that individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State, and this despite the passage of time and the absence of molestation by the people of other countries. As for prohibition by the Norwegian Government of fishing by foreigners, it is undoubtedly a kind of State action which militates in favor of Norway's claim of prescription.

DISSENTING OPINION OF SIR ARNOLD MCNAIR

In this case 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.

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 Norwegian internal waters; and
- (c) that the waters lying between the island fringe and the mainland are Norwegian waters, either territorial or internal.

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

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.

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 dangers 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.)

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.

(d) 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.³

Norway has sought to justify the Decree of 1935 on a variety of grounds, of which the principal are the following:

(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.

(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 skjaergaard, which runs round the south, west and north coasts and ends at North Cape. 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 Commonwealth. 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.

The Norwegian argument also repeatedly insists that the baselines 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.

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.

DISSENTING OPINION OF JUDGE J. E. READ

The collapse of the claims to maritime domain, based on *mare clausum* and similar doctrines, 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 from 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 skjaergaard 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.

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.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Why does the international community need customary laws above and beyond treaty laws? What would it be like to have an international legal system based solely on consent?

2. Is a nation free to determine the breadth of its own territorial sea? Free within broad limits? Or free up to a certain internationally-fixed point? What is Judge Alvarez's auto-interpretation theory? How does it differ from the Court's majority opinion?

3. The majority opinion says the following, which has become the source of great controversy among international scholars:

In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.

(a) If the ten-mile rule were a rule of customary international law, can any state "opt out" of it simply by opposing it? If so, what would happen to customary international law?

(b) Is the Court saying that the ten-mile rule is *not* a rule of customary international law, but only a rule of thumb that might or might not apply in specific cases?

(c) Is the Court saying that the ten-mile rule does not apply in any case of "historic title"?

(d) Or is the Court saying that the ten-mile rule is just a presumption, which is rebuttable in any given case if a country signifies its opposition to it?

(e) What light is thrown on these questions by the discussion on "protests" in the *Anthology*, pp. 107-10.

(f) What light is thrown on these questions by the debate over the "persistent objector" in the *Anthology*, pp. 110-15?

4. The World Court counted as a factor in Norwegian's favor the dependence of Norwegian fishermen on coastal fishing. Should factors of economic equity be given weight in deciding international law disputes?

5. What incidents does the court rely on? How important is Great Britain's lack of formal protests? Do you agree with Waldock's assertion in the *Anthology*, p. 59, that Great Britain acted with commendable restraint? With this decision is the court encouraging military countermeasures? If so, is this in the best interests of the international community?

6. Customary law has a quantitative and a qualitative component. The quantitative component refers to what states actually do, or refrain from doing, in their relations with other states. The qualitative component refers to the normative sense that is part of all law--the sense that the actor ought to act in conformity with the law. But when the actor is a nation, how realistic is it for international lawyers to expect to find a feeling, or sense, or conviction on the part of a state that it ought to act in conformity with international law? Can we get evidence of this feeling from the statements made by governmental officials? What are the problems with that approach? Is there any way to reduce the qualitative component ultimately to a purely objective test?

7. How does W. Michael Reisman define an incident?

8. What practical difficulties does Reisman point out in using incidents? Does he offer solutions? If so, what are they?

9. Why should an incident help to create international custom? Do all incidents have precedential value?

10. Can every international judicial decision, whatever its precedential value might be in a system of jurisprudence, be viewed at least as being an incident?

11. Does Anthony D'Amato's use of incidents in his analysis of the Fisheries Case differ from Reisman's conception of incidents?

12. In the Seminar on Customary Law (*Anthology*, pp. 73-84), do you think Peter Weiss is right about powerful states controlling weaker states? Is D'Amato's reply to this point adequate?

13. How important are relative power balances in the establishment of customary international law? What are the implications of relative differences in power?

14. What argument does D'Amato make about the importance of other states' reactions in determining customary international law? What is Elisabeth Zoller's concern with his reasoning?

15. Is there a difference between general norms and abstract norms? Is it a crucial difference?

16. Should there be a reasonableness standard in international law? If so, who should determine whether an act is reasonable?

17. What is the doctrine of complementary prescriptions?

18. What are the differences, if any, between the theory of customary law as it has been developed in the *Anthology* and the views of Chinese writers on the subject (as summarized in the *Anthology* on p. 94)?

19. How did Oppenheim and Hall view the role of treaties in customary international law? Can you find any inconsistencies in their view?

20. What problems are associated with viewing treaties as contracts? Are treaties by their nature different from contracts?

21. Is a treaty an "incident" that hasn't happened? Is it a commitment to avoid having such an incident? If so, is its status as a generator of international custom at least as good as that of an incident? If not, why not?

B. General Principles

Reading Assignment: *International Law Anthology*, pp. 101-02.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Note Hersch Lauterpacht's pithy statement of "general principles" (*Anthology*, p. 102). Sometimes a general principle is all a lawyer has to go on. Suppose you are arguing a case against a corporation in an international court, and you discover that one of the judges on the court owns stock in the defendant corporation. You ask the judge to recuse himself and he refuses. What next? The problem is that there is no court rule addressing this issue, and you know of no treaty rule and no customary rule of international law. So you invoke the "general principle" cited by Lauterpacht--"that no one can be judge in his own cause." At least you have a rule of law to cite. You can argue that if the judge continues to sit in the case, he is violating the law. The other judges on the bench may be more receptive to your recusal motion if you have a rule of law to cite in its support.

2. Some writers say there are very few general principles--Lauterpacht's list and maybe one or two more at the most. Other writers say that general principles are extremely numerous. The difference between them is a matter of methodology. Article 38 of the Statute of the World Court says "general principles of law recognized by civilized nations." Putting aside the contentious and unnecessary term "civilized," the methodological question is how one pinpoints the general principles that nations recognize. Do we look to the internal law of the nations and make inductive generalizations therefrom? Could it be maintained that any internal statute of any nation is a general

principle if at least a few other nations have a similar statute? That approach would mean an enormous proliferation of general principles. Consider, for example, that rules of criminal law are very similar from one nation to another. Does that mean that most criminal statutes are "general principles" and thus become part of international law? Wouldn't this be a topsy-turvy way of looking at international law--take the internal laws of states and externalize them, making them binding on the very states that generated them in the first place for their own internal purposes? Doesn't this method prove too much?

3. Should we go to the opposite extreme and say that there can be no provable general principles of law? From time to time this has been suggested in the international law literature. But doesn't it prove too little? Shouldn't there at least be Lauterpacht's list of general principles as a minimum?

C. Decisions of National Courts

Reading Assignment: *International Law Anthology*, p. 102.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. How do national decisions affect international law?
2. Do national decisions fulfill the quantitative (act or restraint) component necessary to generate customary international norms?
3. Do they fulfill the qualitative (articulation) component necessary to generate customary international law?

D. Equity

Reading Assignment: *International Law Anthology*, p. 102-03.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. How has equity been used in international law?
2. What does Article 38 say about the use of equitable principles by the World Court? Should the World Court be applying equitable principles, or should the old Roman principle stand: "the law shall be applied even if the world should perish"?
3. Do you see a parallel between the development of the equity in the British chancery court system and the development of international law? In the classical view, equity runs against the person while law runs against the person's assets. Thus, an equity court can have a defendant imprisoned until she carries out the court's command. A law court can only issue a judgment for monetary damages. These classical distinctions of course have been merged today, so that most courts can issue injunctions as well as judgments for damages. In the world court, where states are parties (and can't be imprisoned like individuals), how important is it for the court to be able to issue injunctions?

E. Writings of Publicists

Reading Assignment: *International Law Anthology*, pp. 103-04.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. In what way is an international publicist possibly constrained the way a judge is constrained?
2. Does it make sense for private scholars--"international publicists"--actually to be a source of international law?
3. How does the role of an international publicist differ from the role of a domestic publicist? Consider: international law is "bottom up" law while national law is "top down" law. International law consists of inductive generalizations from the articulated behavior of states. Domestic law these days consists largely of authoritative statutes handed down from above as well as judicial decisions from courts of compulsory jurisdiction. Given this fundamental difference between international law and domestic law, should we expect the role of the publicist to be

more important in international law?

F. Consensus

Reading Assignment: *International Law Anthology*, pp. 104-05.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Is consensus the same as the majority opinion? Why or why not?
2. What problems arise from a system based strictly on consent? Does Louis Jaffe provide a workable role for consent in international law?

G. U.N. Resolutions

Reading Assignment: *International Law Anthology*, pp. 105-07.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. When states vote for resolutions but "don't mean it," are they developing international law, or frustrating its development?
2. How important is the expectation-forming power of resolutions and declarations?
3. Once a nation supports a resolution or declaration how effectively can it later claim that it did not really mean it? Does its effectiveness depend to some extent on how *we* (as part of the international interpretive community of lawyers) interpret its support of the resolution?
4. The Israeli precedent discussed by Anthony D'Amato (*Anthology*, p. 107)—including the way we interpret the UN resolution condemning Israel for its attack upon the Iraqi nuclear reactor—may loom very large in the near future if North Korea continues to develop an independent nuclear weapons capability in contravention of the Treaty on the Non-Proliferation of Nuclear Weapons,⁴ which North Korea ratified in 1985. That Treaty provides:

Article 2

Each non-nuclear weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

5. How *should* we view the UN condemnation of Israel's strike upon the Iraqi nuclear reactor? Do you agree with D'Amato that the lack of imposition of reprisals by the UN against Israel means in effect that the UN resolution did not condemn Israel (although it said it did), but rather tacitly approved of Israel's action? Why? Why not?

H. Protests and Special Custom

Reading Assignment: *International Law Anthology*, pp. 107-15, 157-61.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. How do protests affect the development of customary international law? What could satisfy the quantitative element? When is the critical period for the formation of customary international law?
2. What are special customs? How do they apply to persistent objectors?
3. How does Anthony D'Amato explain the Court's decision in the Fisheries Case as consistent with his theory on persistent objectors? What was Michael Akehurst's view? How does Jonathan Charney come out?
4. Would Charney apply the persistent objector rule? When?
5. How might protests have an effect which is the opposite of what was intended?
6. How is the persistent objector rule different from the accepted rule that states may vary rules of international law through multilateral and bilateral agreements?

7. Do you agree that a rigorous approach to the notion of persistent objector would ultimately destroy international customary law and replace it with a system of international law built entirely upon the consent of each state? If not, why not? If so, what would be so bad about it?

8. According to D'Amato, the most important thing about special custom is to distinguish it from ordinary (general) custom. Do you agree? Is the importance, if any, of the distinction methodological, or substantive, or a combination of both?

FOOTNOTES Chapter 8

1 [Editor's Note: This is somewhat similar to "adverse possession" in domestic law.]

2 [Editor's Note: Is this the majority's answer to Judge Alvarez' individual opinion, below?]

3 See, for instance, *The Anne* (1818) Prize Cases in the United States Supreme Court, page 1012; *The Heina* (1915), Fauchille, *Jurisprudence française en matière 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.

4 Done at London, Moscow, and Washington, July 1, 1968. Reprinted in 7 I.L.M. 811 (1968).