THE BASELINE OF THE TERRITORIAL SEA

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I

The question of the limit of the area of water along a state's coasts that is subject to its sovereignty and belongs to its territory (the territorial sea) has for centuries been of importance in the practice of states. It has, moreover, received much attention from writers on international law. Yet considerable uncertainty still prevails concerning this subject. The question of the breadth of the territorial sea has been answered differently at different times and different places. Considerable divergences of opinion have appeared; and the repeated attempts to solve the problem by international agreement have not borne fruit. At the codification conference arranged by the League of Nations in 1930 at The Hague two divergent positions emerged. One view upheld primarily by the principal sea powers (with the Anglo-American states in the lead) was that the three-mile limit was the only one recognized by international law. The other view (supported by a large number of states, with Sweden among them) was that international law allowed a certain variation, so that even claims of territorial waters extending to a distance of, e.g., four or six miles from the coast were legitimate. The only conclusion that could be drawn from the work of the conference was that no unitary rule of international law in regard to the breadth of the territorial sea existed, and that variations within a moderate extent (3, 4, 6 miles) were considered admissible by a great number of states.

In legal writing, as in the practice of states, different conceptions of the limits of the territorial sea have been expressed. An opinion that was dominant (although it was not the only one) in scholarly works on international law throughout the 19th century was that the limit of the territorial sea is determined by the range of a cannon shot; and the three-mile limit, which by many authors (especially Anglo-American ones) was declared to be the generally governing rule, was said to be the range of a cannon shot applied as a linear measure. On closer investigation, this

assertion has been found to lack a substantial basis. It is uncertain whether any considerable number of states (or even any at all) used the range of a cannon shot as a measure for their territorial sea. When the cannon shot's range has been used as a limit for the purpose of the application of the rules of neutrality, it has been in relation to coast fortifications, etc., with cannons actually in place, within the firing range of which captures were not considered to be permissible. This, however, is something entirely different from using the range of a cannon shot as a measurement for the territorial sea along the entire coast. It is doubtful whether the range of a cannon shot at the time when the three-mile limit first emerged in state practice, viz. at the end of the 18th century, really was approximately three miles (5,556 metres). It has been demonstrated in a convincing manner by Raestad (*La Mer Territoriale,* 1913) and Walker ("Territorial Waters; the Cannon Shot Rule", XXII *British Yearbook of International Law,* 1945) that in reality both the three-mile limit and the four-mile limit had the same origin, i.e., the unit of measure used at sea. In the 18th century this, in countries along the Atlantic coast and the Mediterranean, was a sea league (*lieue marine* in French), corresponding to three miles; and in Scandinavia, a German league, corresponding to four miles. When, at the end of the 18th century, efforts began to state the limits of the territorial sea in linear measurements instead of the measures used earlier, e.g. the range of vision, possibly the range of a cannon shot, etc., the ordinary measurements for the determination of distances at sea or multiples thereof were naturally used; and, therefore, there gradually developed a four-mile limit in the Scandinavian countries and a three-mile limit in the countries along the Atlantic coast (and in the Mediterranean countries ordinarily a six-mile limit, corresponding to two sea leagues). In legal writing, two contrary standpoints were taken, similar to those taken by the powers at the Hague Conference: some authors asserted that the three-mile limit should be generally upheld, whereas other declared that states could apply different, though reasonable, limits.

It was extremely unfortunate that a general agreement regarding the territorial sea was not reached at the Hague Conference in 1930, at a time when the conflicts were as yet relatively minor and the claims presented relatively moderate. In retrospect it can be said that it should not have been impossible to reach an agreement on the basis of the status quo: that is to say, through the recognition of the three categories of limits to the territorial

sea that had actually been in use for a considerable length of time, i.e., the three-mile, four-mile, and six-mile limits. When the question of codification of the international rules of the sea was taken up again after the Second World War, the defenders of the freedom of the seas found themselves in a considerably worsened position. At the end of the war, there was a belief that the world was entering upon an era of internationalism. A number of large agencies were established in order to carry on international co-operation in different fields, and a world organization with a more extensive competence than any earlier institution had ever had was created in order to safeguard peace and security through international solidarity. The actual development was entirely different. The United Nations became a seat of virulent nationalism, and (especially among the many new states) there appeared a tendency to overemphasize state sovereignty and to refuse to recognize the binding force of the old rules of international law. These tendencies involved, among other things, a danger to the freedom of the seas.

An impetus to this unfortunate development was also given by two proclamations issued by the United States in 1945. In the first, the United States declared that it regarded "the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control". The second proclamation declared that it was proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities had been or might in the future be developed on a substantial scale. In these regions, measures for control would be taken by the United States, either unilaterally or in agreement with other states whose nationals fished there. Both proclamations explained that the character of the areas in question as part of the high seas was in no way affected. By this reservation the United States sought to prevent the interpretation of these proclamations as involving an expansion of its territorial sea or an extension of its sovereignty over the high seas. Presumably it was also hoped thereby to prevent the proclamations from serving as bad examples to other states; but (as might have been foreseen from the beginning) their effect was, to say the least, extremely dubious. The proclamations inaugurated a general race among states for the extension in various ways of their dominion over the high seas. In many cases, as in regard to Britain's Atlantic

possessions and a number of countries in the Middle East, action was limited to imitating the United States' Continental Shelf Proclamation; but a large number of other states (especially in Latin America) went considerably further, in that they laid claim to exclusive fishery rights in the waters above the continental shelf or treated these waters in effect as territorial sea. The most extensive steps were taken by Chile and Peru, which, although they lack a continental shelf, nevertheless invoked the continental shelf theory to extend their territorial seas out to 200 miles from the coast. At the same time various states (notably the Russian satellites and certain states in Africa and Asia) extended the breadth of their territorial seas to twelve miles.

When the international conference on the law of the sea organized by the United Nations convened at Geneva in February 1958, the state of affairs concerning the territorial sea and the regime of the high seas consequently appeared rather chaotic, at any rate in regard to the question considered as the most important at the conference, i.e., the breadth of the territorial sea. The differences that had appeared since 1945 manifested themselves to the full extent at the conference.

A large number of states, including the Soviet Union and its satellites and many Latin American and Afro-Asian states, presented claims for a twelve-mile limit. A strong motive for the Afro-Asian countries was the idea that great economic benefits could be reaped by maintaining exclusive fishery rights within a rather broad maritime belt along their coasts. In the face of this large-scale attack, the United Kingdom gave up the view it had always held that three miles was the greatest breadth for the territorial sea allowed under international law, and proposed that the states should have the right to extend the limits to a maximum of six miles. This became the line of defence behind which those states took their stand who held a more restrictive view of the question of the territorial sea (primarily the Western European nations). However, the conviction was then arrived at that no proposal could obtain the necessary two-thirds majority if the demand presented by many nations for a relatively extensive zone for exclusive fishery rights were not acceded to. Great attention, therefore, was attracted by a Canadian proposal for a three-mile breadth for the territorial sea in combination with a twelve-mile zone for exclusive fishery rights, measured from the baseline of the territorial sea. A variant of this was the proposal, presented by the United States, for a six-mile territorial sea and

a twelve-mile fishery zone with the retention of fishery rights by foreign nationals who had earlier conducted fishing operations within the area in question. No proposal regarding the breadth of the territorial sea obtained the necessary majority during the final voting. However, the conference approved four conventions: I, The Territorial Sea and the Contiguous Zone, II, The High Seas, III, Fishing and Conservation of the Living Resources of the High Seas, and IV, The Continental Shelf. The convention concerning the territorial sea had detailed provisions on the baseline for measuring the breadth of the territorial sea and on the right of innocent passage, but exhibited a lacuna regarding the point that was considered the most important, i.e., the breadth of the territorial sea. On this matter the same confusion reigned as before; but now the chaos was somewhat worse, as a new type of claim had appeared, viz., for a zone of exclusive fishery rights outside the territorial sea.

Nor could a solution be reached by the second United Nations conference on the law of the sea, which met in 1960 with the sole aim of reaching an agreement on the territorial sea's breadth. Now the absurdity of trying to create international-law rules by a majority decision was fully apparent. Attention was mainly focused on an American proposal which was largely in accordance with one already presented by the United States at the previous conference, for a six-mile territorial sea and a fishery zone of twelve miles measured from the baseline of the territorial sea. The work of the United Nations towards codification of the rules of international law concerning the sea ended, however, in an almost farcical manner. The American delegation had, after intensive efforts, succeeded in getting together so many votes for its proposal that the required two-thirds majority appeared secured, but it depended on a single vote. As the chief American delegate, Mr. Dean, relates the matter,[1] the representative of a Latin American delegation came to him the evening before the decisive voting and subjected him to regular blackmail. Mr. Dean did not see his way to meet the representative's demand, and the Latin-American delegation voted against the American proposal; the result was that this time, too, no decision on the breadth of the territorial sea was adopted by the conference, whose work accordingly ended without result.

[1] Dean, "The Second Geneva Conference on the Law of the Sea", 54 *American Journal of International Law*, 1960, p. 751.

One can now ask oneself: What was the situation under international law after the second conference on the law of the sea? The conference had, of course, no law-making competence. All it could have done was to approve one or several international conventions, and even these would be binding only on the states that were parties to them. In fact the conference had not even adopted a convention in regard to the breadth of the territorial sea. That a majority was in support of certain proposals was of no importance. Not even the states that had supported these proposals were bound by their votes, because in many cases these had been given in the hope that thereby an agreement would come into existence; and when this did not materialize, those states that had voted for the proposal had full freedom to return to their earlier standpoints. The United Kingdom could again assert that three miles was the greatest breadth allowed, according to international law, for the territorial sea; Sweden could assert that states were justified in extending their territorial waters to six miles, but no farther; and so on. The question was, however: What prospects had these states of successfully upholding these standpoints? We can disregard the fact that the chances of a state's managing to vindicate a legal standpoint are, since the coming into existence of the United Nations, in practice extremely small. But even an international court would presumably encounter certain difficulties in establishing what was correct according to the international law concerning the breadth of the territorial sea. As stated in the Statute of the International Court of Justice, the Court applies, in the absence of treaties, international custom as evidence of a general practice accepted as law. Therefore, the general practice of states constitutes international customary law. But as we know, the practice of states in regard to the territorial sea has hardly ever been uniform and has, moreover, undergone great changes in recent times. Claims for a twelve-mile limit, which before the Second World War were extremely rare, had since the war become quite common. One may now ask: In what way is international customary law altered; how do new rules that are legally valid arise? Obviously through the practice of states; therefore, through actions of different states. Technically speaking, of course, an action taken by an individual state is, if it conflicts with the established general practice, an international delinquency. But in so far as it is imitated by other states and does not meet with protests, such an action may be regarded as the first step in the creation of a new rule of customary international

law. It is conceivable, though perhaps not certain, that this is now the case with the twelve-mile limit of the territorial sea.

Fishery zones beyond the territorial sea had certainly in some cases occurred in national practice, but could hardly be regarded as recognized in international law. Such a fishery zone, therefore, could not become established otherwise than with the support of a convention. To establish such a zone unilaterally would have been contrary to international law, and the zone would not have to be respected by foreign states. In comparison with the twelve-mile territorial sea, the fishery zone shows the crucial difference that in it the coastal state would have rights without the corresponding obligations to provide for protection and safety for sea traffic, etc., that are incumbent upon it in the territorial sea. It can be noted that the establishment of a zone for exclusive fishery rights outside the territorial sea would be in direct conflict with the entire body of conventions that were adopted at the 1958 conference. In the Convention on the High Seas, it is expressly stated that the freedom of the high seas comprises, *inter alia,* the freedom of fishing both for coastal and for non-coastal states (art. 1). The Convention on Fishing laid down that the unilateral measures of conservation that the coastal state was justified in taking in an area of the high seas adjacent to its territorial sea must not discriminate against foreign fishermen (art. 7). From the Convention on the Continental Shelf, it clearly appears that the coastal state's right to the continental shelf does not include any exclusive fishery rights in the waters above the continental shelf. To the Convention on the Territorial Sea is added an article (art. 24) whereby the coastal state is assigned certain rights in a zone of the high seas contiguous to its territorial sea, but these rights do not include exclusive fishery rights. From this one must draw the conclusion that the Convention did not allow the establishment of fishing zones beyond the territorial sea.

Nevertheless, both conferences on the law of the sea appear rather to have strengthened the tendencies to increase the territorial sea's breadth and to establish special fishery zones. Especially significant is a convention that was signed in London on March 9, 1964, by all the Western European states, including the United Kingdom. In this convention the Contracting Parties granted one another the right to establish zones for exclusive fishery rights extending up to twelve miles from the baseline of the territorial sea, while their nationals would be allowed to keep

certain traditional fishing privileges in the outer six miles of the zone. International conventions, of course, have binding force only upon the states adhering to them; but it was obviously the intention of the parties that the aforementioned exclusive fishery rights would obtain even in regard to states that were not parties to the convention—a claim that has a very dubious legal foundation. Unless one assumes that the recognized principles of international law have undergone a change in recent times, a power not adhering to the convention, e.g. Japan, should be able to assert the right of its subjects to fish inside the limits of the fishery zones of the powers adhering to the London Convention. However, so far as is known no protests have been heard against the London Convention. It is clear that the many states who have already enlarged their territorial sea to twelve miles, or are establishing fishery zones outside their territorial sea, or are planning some similar enlargement, do not think themselves justified in raising objections to the London Convention. On the other hand, it is also clear that henceforth those states who are parties to this convention could hardly raise objections against other states widening their territorial seas to twelve miles or establishing zones for exclusive fishery rights outside the territorial sea. This is all the more important in that it was precisely those states who are parties to the London Convention that adopted the most restrictive attitude at the conferences on the law of the sea. One can, therefore, hardly avoid the conclusion that international customary law has now been altered to the effect that the twelve-mile limit for the territorial sea and exclusive fishery rights outside the territorial sea are now permitted. If one adds to this the new rules concerning the continental shelf, it must be admitted that the work of the United Nations for the development of international law has led to certain results. One may, however, doubt whether these results are satisfactory from the point of view of the international community. Essentially, they involve a serious weakening of the time-honoured principle of the freedom of the high seas.

II

Irrespective of what extent one wants to give the territorial sea, it is clear that the outer limit of the territorial sea (at least if one fixes the territorial sea in units of length) must always be stated as a certain distance from the *coast*. This should be in-

disputable, since the territorial sea is defined as the area of the sea outside a state's coast or around a state's coasts that is subject to its sovereignty. "The coast" is, of course, the place where the land and the sea meet, and where the area of the sea that will be subjected to the state's sovereignty consequently begins. When one expresses the proposition: "The territorial sea is an area of water outside a state's coast (or coasts), etc.", one hardly thinks of the expression "coast" as involving any problem. The situation of the coast is a geographical fact. The coast lies where it lies (apart from any gradual rising or sinking, etc.).

Nevertheless, the proposition is not entirely free from problems. The coastline may, for example, undergo substantial changes due to tides, where these occur. From which coastline, then, is one to begin measuring the territorial sea? In general the choice has been for the coastline at the ebb (at spring-tide), the "low-water line" or "low-water mark", in French *"la ligne de basse mer"*, and this baseline has also been accepted by the 1958 Geneva Convention on the Territorial Sea. In Sweden the tide lacks practical importance, but other fluctuations of the water level occur; and therefore in Sweden, also, a low-water mark is taken as the baseline at coastal land areas. The matter is of importance above all in regard to rocks and banks that at high tide lie below the surface of the water and at low tide emerge above it. In so far as such rocks or skerries (corresponding to the "low-tide elevations" and *"hauts-fonds découvrants"* of the Geneva Convention) can be regarded as "land", they could naturally be thought of as influencing the extent of the territorial sea. That islands and skerries are "land" just as much as is the mainland, is, of course, clear; but how far a skerry that is sometimes above and sometimes under the water is "land" can, of course, be debated.

This example demonstrates that the seemingly simple and obvious proposition, "The territorial sea extends to a certain distance (in Sweden four miles) from the coast", is not entirely free from problems. But in other respects also the expression "the coast" can invite different possibilities of interpretation. People say, for example, that "the Swedish coast is surrounded by islands and skerries" or that "a number of islands and skerries lie around the Swedish coast". By this, they seem rather to imply that "the coast" means the mainland. But islands and skerries are, of course, also land, and every island or skerry therefore has its own "coast". The Swedish four-mile limit could accordingly be calculated partly from the mainland, partly from each island or skerry in

itself. But when approaching Sweden from the sea, a traveller sees, more often than not, no mainland, but only islands and skerries that appear to form a single coherent mass, called by Swedes the "skärgård" and by Norwegians the "skjaergaard"; and consequently he will indubitably regard the outer line of this "skjaergaard" as "the Swedish coast". And, conversely, if a person finds himself inside the skjaergaard, in many places he cannot see the open sea at all, but is on all sides surrounded by land. The inner parts of Stockholm's skjaergaard do not in this regard differ from an inland lake. If one defines "the coast" as "the place where the land and the sea meet", so, in a "skjaergaard", that place is to be found, not at the coast of the mainland, but farther out at something that is called "havsbandet" (the outermost fringe of the skjaergaard). In its judgment in the Anglo-Norwegian Fisheries Case, delivered on December 18, 1951, the International Court of Justice expressed its feelings when confronted with this phenomenon, which was obviously foreign to its members, with the words: "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."

How shall the territorial sea be determined in such a case? If the baseline for the calculation is "the coast", and the coast consists of the outer limit of the "skjaergaard", this means something different and something more than the obvious circumstance that the territorial sea in that case will be measured, among other things, from the outermost islands and skerries. It means that the "skjaergaard" is regarded as a unit, and that what lies within its outer limits therefore also lies within "the coast" and pertains to the land. And to the "skjaergaard", regarded as a unit, pertain not only islands and skerries but also the waters situated within it, which are thus internal waters, just as much as are inland lakes, etc. This is a natural result of the geographical circumstances and stands out as quite clear in regard to "skjaergaard" waters that are surrounded on all sides by land. The situation is more doubtful in regard to "skjaergaard" waters that are mainly surrounded by land but have one side open to the sea. These waters are, as seen from a geographical standpoint, most nearly comparable to bays, and should thereby be susceptible of being considered as internal waters in the same degree as in the case of bays.

The expressions "land", "coast", "coastline" and "internal wa-

ters" denote geographical phenomena. If international law attaches certain rules to these phenomena (rules that are dependent upon their geographical character), it is clear that whatever from a plain geographical standpoint pertains to any of these phenomena, e.g., "land", "internal waters", etc., should also be regarded as being subject to the rules in question. If internal waters (whether they are situated within the land, as lakes, etc., or inside the coastline, as bays and "skjaergaard" waters), geographically belong to the land areas, the same regime prevails for these waters in international law as prevails for the land regions (as a purely geographical phenomenon). This means that in fact internal waters situated within the coastline should, equally with land areas of the coast, serve as the baseline of the territorial sea. The territorial sea should, in other words, be measured not only from land (including islands, etc.) but also from the outer limits of internal waters situated within the coastline and open to the sea.

This is, indeed, what is said in the Swedish statutes that touch upon the question (concerning sea traffic, customs, neutrality, the admission of foreign warships, etc.), where the prevailing formulation (though it may vary slightly) is that Swedish territory or the Swedish territorial sea extends to four miles from the kingdom's land areas or from lines that constitute seaward limits for waters characterized as internal waters. As such are normally classified Swedish lakes, watercourses, and canals, Swedish harbours, the mouths of harbours, and bays, as well as waters lying within and between Swedish islands, islets and skerries that are not permanently covered by the sea.

The standpoint expressed in the Swedish statutes is really an obvious one, inasmuch as it signifies that the baseline of the territorial sea is the mainland, islands, etc., as well as the outer limits of internal waters situated within the coastline. As these waters are included in the land regions, their outer limits are included in the coast, and what is stated in the statutes constitutes only a realization in detail of the proposition that the territorial sea extends to a certain distance (in Sweden four miles) from the coast; it would be true even if it were not stated in the statutes.

One may now ask: What does the doctrine of international law say concerning these matters? If, as is reasonable, we mean by "the doctrine" the opinions of leading international jurists writing in the great world languages, we find that it says next to nothing concerning the measurement of the territorial sea close to a "skjaergaard", simply because, by and large, these are phe-

nomena unknown to the authors concerned. The statement from the judgment of the International Court in 1951, cited above, reflects the Court's amazement in regard to the Norwegian "skjaergaard" which, with considerable exaggeration, it describes as an almost unique phenomenon. The ignorance of the phenomenon, shared by the Court with writers on international law, is also demonstrated by the fact that the Court was unable to find any term for it either in English or French, but was compelled to appropriate the Norwegian word "skjaergaard". Some writers speak, in connection with the question of the territorial sea, of island groups and state that they should be regarded as a unit;[1a] but the question is whether these writers do not in reality refer to isolated island groups in the high seas (*archipels océaniques*), e.g., the Faroe Islands, rather than groups lying close to the coast (*archipels côtiers*), viz. "skjaergaard". Obviously, *archipels océaniques* are referred to when writers set forth the view that the territorial sea should be measured from the islands that lie farthest from the island group's centre.[2] This view appears to imply that the waters inside the island groups should be regarded as internal waters and that the territorial sea should be calculated from the baseline drawn through the outermost islands; but this has not been clearly expressed, and no conclusions have been drawn regarding a coastal archipelago or "skjaergaard". At the meeting in Stockholm in 1928 of the Institut de Droit International, the question of the "skjaergaard" was introduced from the Swedish side (Professor Reuterskiöld); and the result was that one of the Institute's proposals declared that the territorial sea adjoining an island group situated along the coast should be measured from the islands and skerries situated farthest from the coast, provided the distance between the islands and skerries did not exceed twice the breadth of the territorial sea. Nothing was said concerning the calculation of the territorial sea from baselines drawn between the outermost islands, although such a method of measurement

[1a] See, e.g., Higgins and Colombos, *The International Law of the Sea*, 1943, p. 76.

[2] So Alvarez in a proposal presented to the International Law Association at its meeting in 1924, as well as Jessup in the work, *The Law of Territorial Waters and Maritime Jurisdiction*, 1927, p. 457, and also the American Institute of International Law in a proposal published in the *American Journal of International Law*, supplement, 1926, p. 318. See also J. Evensen, *Certains Aspects Juridiques de la Question Relative à la Délimitation des Eaux Territoriales des Archipels*, Doc. préparatoire no. 15 of the 1958 Conference on Sea Law.

appears to be implicit in the proposed text. There is perhaps no reason to take the learned gentlemen cited above too seriously, since it is probable that most of them had never seen a "skjaergaard".

Although the skjaergaard received attention at the Hague Conference in 1930, and in connection therewith, by Gidel in his well-known work *Le Droit Public International de la Mer,* the skjaergaard continued to be a subject largely unknown to writers on international law. In a prominent work appearing as late as 1948 (Guggenheim's *Lehrbuch des Völkerrechts*), not a word is said concerning the skjaergaard. The book merely repeats the old clichés that genuine islands have their own territorial sea and that bays are internal waters if they are at the most ten miles in breadth or are "historical bays".[3] It was the International Court's 1951 judgment in the Anglo-Norwegian Fisheries Case that first brought the skjaergaard into the limelight. That writers still felt a trifle unfamiliar with the problem is demonstrated by Rousseau's *Droit International Public,*[4] which mentions the 1951 judgment of the International Court under the title "Condition Juridique des Baies", and declares that according to that judgment the territorial sea should be measured from straight baselines in the case of something which, in the absence of another word, he calls "le skjaergaard".

As has already been mentioned, attention was drawn at the 1930 Hague Conference to the problem of the boundary of the territorial sea at a skjaergaard, although the result was not very remarkable. Naturally enough, the initiative came from the Scandinavian countries. A committee appointed by the League of Nations, which was to prepare for the conference by establishing "bases de discussion" for it, had sent the governments a questionnaire regarding their respective standpoints on the question of the territorial sea. In regard to the baseline of the territorial sea, the Swedish government, referring to a number of Swedish statutes, answered that it should be composed of lines drawn between the outermost points on the coast, including islands and skerries, which at bays extended across the mouth of the bay and, at harbours, across the mouth of the harbour. In regard to a coast that, like Sweden's, had numerous deep indentations and was surrounded by skjaergaard (*archipels*), this method of measurement

[3] Vol. 1, pp. 350 ff.
[4] Vol. 1, 1953, p. 444.

would be the only one which could produce satisfactory results, and a prospective convention should permit its application in countries having the kind of geographical configuration to which it was suited. In the Norwegian government's reply a similar standpoint was presented, and it was pointed out that it was based upon an old Norwegian legal tradition which had also been expressed in certain Norwegian decrees. It was also pointed out that no maximum length was established in Norway for the baselines from which the territorial sea should be calculated. In the appraisal of the question of which points on the coast should be regarded as the outermost ones, the special circumstances for each stretch of coast should be taken into consideration. Notice should be taken of the historical, economic and geographical circumstances, as, for instance, a traditional opinion as to the outer limit of the territorial sea, an undisturbed possession since time immemorial of a right to fish exercised by the coastal population and necessary to their livelihood, as well as the fishing grounds' natural boundaries. Both the Swedish and the Norwegian governments asserted that the indicated coastline was the dividing line between internal waters and territorial sea, in other words, that the waters inside the baseline were internal waters.

The Swedish and Norwegian viewpoints met with little understanding from the Hague Conference, as also from the preparatory committee. The latter, which had received various divergent answers besides those of the Scandinavian states, proposed as a compromise solution in regard to island groups a "base de discussion",[5] which in the first place referred to groups of islands situated out in the sea, but would have corresponding application to island groups situated near the coast; the proposal declared that if the islands in an island group belonged to one and the same state and the islands in the group's periphery did not lie at a greater distance from each other than twice the breadth of the territorial sea, the territorial sea would be calculated from the outermost islands in the group. The waters within the island group would be considered as territorial sea, not as internal waters. This proposal, which to all appearances arose from the committee members' total lack of familiarity with the phenomenon called a "skjaergaard", overlooked the main point, namely the geographical character of the skjaergaard waters as internal waters. At the conference, the Swedish and Norwegian delegations

[5] No. 13.

presented a common amendment, concurring with the views presented in the above-mentioned declarations of their governments. Of course, the conference did not lead to any result on the question of the territorial sea, but a subcommittee proposed certain rules in regard to the baseline of the territorial sea. What the subcommittee proposed on the question of island groups merely bears witness to its inability to handle the problem. It said that in regard to a group of islands (*archipel*) and islands situated along the coast, the committee's majority was of opinion that a distance of ten miles between the islands should be accepted as the baseline for measuring the territorial sea in a direction out towards the open sea. Owing to the lack of technical precision, however, they were compelled to abstain from formulating a text. The subcommittee stated that it did not express any view on the nature of the waters situated within an island group.

III

If consequently the skjaergaard on the whole was *terra incognita* for writers on international law, and (as is not least evident from Gidel's large work, *Droit Public International de la Mer*),[6] continued to be so even after the Hague Conference, there was another problem that for a long time had received much attention from legal scholars, just as it had also played an important role in state practice, namely the question of the measurement of the territorial sea at bays.

That bays (or at least narrow bays) belong to the land areas within which they are embraced (or, in other words, are internal waters) is an opinion that can be traced far back in time—naturally enough, since this opinion in reality represents a factual situation. This must have appeared fairly obvious both to governments and authorities and to seafarers. The latter had no reason to enter into a bay unless they were bound for a port situated therein. Sea traffic along a country's coast took place outside the bays, so that a natural difference developed between the bays and the waters beyond the outer limits of the bays, where maritime traffic passed by. Vessels only needed to appear within the bays

[6] Vol. 3, 1934, pp. 507 ff., 706 ff.

in case of distress; this was of course permitted.[7] This conception also appeared very early in the writings of legal scholars. In his work *Mare Liberum* (1609), wherein the doctrine of the freedom of the seas was developed, Grotius explained that the question whether the sea could be occupied—something that Grotius denied—only concerned the open sea. On the other hand, he excluded from his reasoning inland seas, bays and straits, and as large a part of the sea as can be sighted from land ("in hoc autem Oceano non de sinu aut freto, nec de omni quidem eo quod e litore conspici potest controversia est"). Similarly he declares in *De Jure Belli et Pacis* (1625) that bays and straits can be occupied by the state that owns the land on both sides, unless they are so large in relation to the surrounding land areas that they cannot be considered to constitute parts of them. Thereafter a long line of writers whose works are usually ranked among the classics of international law, such as Pufendorf and Vattel, expressed similar views, Vattel emphasizing that only bays of limited size belonged to the coastal state.

The above-mentioned older writers did not directly express views on the juridical nature of the areas of water within bays, on the questions whether the right to passage existed for foreign vessels and whether a line drawn across the bay could serve as the baseline of the territorial sea—questions that are more or less connected with the question of whether the bay's waters shall be regarded as internal waters or territorial sea. They scarcely had reason to take up a position on these questions. The doctrine of the "territoriality" of bays was, if anything, older than the doctrine of the territorial sea in its modern form, i.e., the doctrine that the territorial sea is a belt of open sea extending to a definite distance from the coast expressed in units of linear measurement.[8]

[7] Meyer, *Sjøgrænsespørsmålet belyst av statspraxis og folkeretslære,* Stortingsdok. no. 17–1927, pp. 24 ff.

[8] Like most other things, areas of water can be classified in several different ways. Among these, the geographical and the juridical ways are of special interest here. From a geographical point of view, we speak of the internal waters and the open sea. From a juridical point of view, the same areas of water are divided into internal waters, the territorial sea and the areas of water which are situated outside the outer limit of the territorial sea and which often, e.g. in the Geneva Convention of 1958, are called "the high seas". "Internal waters" is at the same time a geographical and a juridical term, a natural consequence of the rules of international law pertaining to internal waters being entirely dependent on the geographical character of these waters. "Territorial sea" is of course a purely juridical concept. Geographically the territorial sea is open sea, and there is, in this respect, no difference at all between the territorial sea and the immense area of water

The writers mentioned did not at any rate expressly distinguish between internal waters and territorial sea; in both cases they spoke of the possibility of occupying or establishing dominion over the regions of water, etc., and there was little reason to use lines drawn over the surface of the water as a base for measuring the territorial sea at a time when the range of a cannon shot or the range of vision was used for this purpose, at least if this measure was realistically conceived. On the other hand, the strong emphasis on the connection of bays with land areas seems to point to a conception whereby in present-day terminology bays would be classified as internal waters; and it is usual to cite a dictum of the prominent 17th-century English jurist Lord Hale, wherein such a view is considered to be clearly expressed: "That arm or branch of the sea which lies within the *fauces terrae* where a man may reasonably discerne between shore and shore is, or at least may be within the body of a county and therefore within the jurisdiction of the sheriff or coroner."[9] In accordance with this a bay would be considered to lie within the county and to be subject to the proper jurisdiction there, in contrast to the open sea, which was under the jurisdiction of the admiralty.

In modern doctrine and national practice, and, one can say without hesitation, also according to the international law now valid, it is indisputable that the water areas of bays are internal waters and that consequently no right under international law to passage through bays exists for foreign vessels, and that similarly the territorial sea must be measured from a line drawn across the bay's mouth or possibly, where the mouth is considered too broad, from one drawn between two points situated some distance inside the bay. Where dissension prevails it is in regard to the question of how broad a bay can be before ceasing to rank as internal waters, or (which is really the same thing) how long

outside it, the limit being purely imaginary. The difference is, of course, that the latter area, in contradistinction to the territorial sea, is not subject to the sovereignty of any state—a purely juridical difference. There ought to be, therefore, a juridical term denoting this area of water, since in common parlance the expression "high seas" is, if I am not mistaken, often employed in a geographical sense, and as equivalent to "open sea". The expression "high seas" is, if I may, with all respect, venture to express an opinion, not very suitable as a term intended for legal or scientific purposes. In order to correspond to the juridical character of the area of open sea situated outside the territorial sea, the expression "the free sea" might perhaps be more suitable.

[9] Quoted from Sir Cecil Hurst, "The Territoriality of Bays", III *The British Yearbook of International Law*, 1922–23, p. 44.

can be the line that is to serve as the base for measuring the territorial sea. It is clear that it is the geographical factor, or the bay's connection with the land in an entirely physical sense, that is decisive; but it has further been argued that, through a weighing of interests, justification may be found for the bay's character as internal waters and especially for the absence of a right of passage for foreign vessels. It has been alleged on the one hand that the coastal state's interest in control over the area of water is stronger in regard to areas of water penetrating into the land than in regard to the territorial sea, and, on the other hand, that the interest of foreign vessels in passage is smaller in regard to bays, which one only needs to enter if one is on the way to one of the country's ports (which, of course, could in any case be closed), than it is in regard to the territorial sea, which one can cross on the way to another country. (This circumstance is adduced, incidentally, as the reason why the rule concerning the character of bays as internal waters is valid only for bays that lie within a single state's territory.) As examples of the reasoning presented above, we may cite, first, a statement in the well-known arbitral award made in 1910 in the dispute between the United States and Great Britain concerning the North Atlantic fisheries, and, secondly, a dictum of Sir Cecil Hurst. The tribunal said that:

> admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. The conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast-line. This interest varies, speaking generally, in proportion to the penetration inland of the bay. . . .

Sir Cecil Hurst declared:[1] "There is no scope for the exercise of the right of passage through a land-locked bay. All that it affords is a right of access to the ports situated on its shores, and apart from treaty no state can claim a right of access to the ports of another state."

It is obvious that it is the bay's geographical character as an area of water surrounded by land that determines that within a

[1] "The Territoriality of Bays", III *The British Yearbook of International Law*, 1922–23, p. 53.

bay there exists no room for the rule of a foreign vessel's right to "innocent passage" (*passage inoffensif*), which from a juridical standpoint constitutes the most important distinction between territorial sea and internal waters. It is the geographical connection of the bay with the land regions that determines that legally it is assimilated to the land. In other words, the rules of international law that govern internal waters apply to those areas of water that are internal waters from a geographical point of view. From this apparently obvious proposition one can conclude that an area of water must fulfil certain geographical criteria in order to be considered as internal waters, with the legal consequences following therefrom. Although it is true that, in general, bays are internal waters, it does not follow from this that an area of water is internal water simply because it is called a bay.

The principle that narrow bays and inlets are internal waters, whereas wide and open bays rank as territorial sea up to the ordinary outer limit of the territorial sea and as free sea beyond it, was really obvious, but it had not reached mathematical precision. This first occurred at the 1958 Conference on the Law of the Sea, and one should be able to assume that the rules adopted there will be determinative in the future. The rather lively earlier discussion on the subject, consequently, is only of historical interest, but this does not mean that it has no light to throw on the position of internal waters situated on the coastline.

That a bay is "wide" can mean two things. It may mean that at its mouth the bay has a large width in relation to the depth to which it penetrates into the land, or that at its mouth it has a large width expressed in units of linear measurement, e.g., miles. With both definitions, of course, the width can be thought to be of importance for the question whether the bay is internal waters or open sea. These viewpoints were already intimated by the older authors, Grotius, Lord Hale and Vattel, cited above. During the preparation for the 1930 Hague Conference, the British Government expressed it as its view that, for a bay to be acceptable as the baseline for the territorial sea, it must be "something more pronounced than a mere curvature of the coast. There must be a distinct and well-defined inlet, moderate in size, and long in proportion to its width", and during the proceedings before the International Court in the Anglo-Norwegian fisheries case the British Government declared that "a bay for this purpose is any well-marked indentation of the coast whose penetration inland bears a reasonable proportion to the width of its mouth". This

definition lacks full mathematical precision, but its general correctness is thought to be indisputable. It should certainly be capable in most cases of giving sufficient guidance for a reasonable judgment of the question whether a bay is internal waters, although naturally it is possible to conceive of marginal cases that might give rise to differing views. The arbitral tribunal that decided the 1910 arbitration on the North Atlantic Fisheries declared that a bay in a geographical sense "is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally".

In this connection it should be noticed that the tribunal did not consider that it should look for possible existing general rules of international law regarding the requirements for an area of water to be considered as a bay, or for a bay to be regarded as internal waters (with the result that the territorial sea, or the three-mile fisheries limit at issue in the case, would be calculated from the bay's outer limit). The tribunal conceived its task to be, among other things, to interpret the expression "bay" in the treaty concluded in 1818 between Great Britain and the United States, according to which the latter country's inhabitants would not possess the right to fish within a distance of three miles from the Atlantic coast of British North America, described as "the Coasts, Bays, Creeks, or Harbours of His Britannic Majesty's Dominions in America". The tribunal was of opinion that the expression "bays" here was to be understood in its everyday meaning. "The negotiators of the Treaty of 1818 probably did not trouble themselves with subtle theories concerning the notion of 'bays', they more probably thought that everybody would know what was a bay. In this particular sense the term must be interpreted in the Treaty." The tribunal continued, however:

> The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of the penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance by which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.

The observation quoted above cannot be interpreted as if, according to the tribunal's opinion, the coastal state's economic or

military interests should have independent importance when it is a question of deciding whether an area of water is a bay. The geographical viewpoints are the primary ones, and it is apparent from a statement made earlier that the tribunal considered that the special economic and military interests that for the coastal state are connected with the bay or with internal waters as distinct from the open sea along the coast depend precisely upon the geographical character of the area of water in question and vary in proportion to the depth by which the water in question penetrates into the land. The tribunal obviously did not intend that the coastal state's economic interests should be able to make a bay of something that is not a bay, or that the coastal state by reason of its economic interests should have the right to transform into internal waters an area in the open sea situated outside the bay (e.g., in order to be able to draw a baseline in the open sea that would move the territorial limit out so that a fishing ground that otherwise would have lain outside the territorial limit would lie within the territorial sea). It would have been superfluous to point out this obvious fact if another standpoint had not been taken by the International Court in its judgment pronounced in 1951 in the Anglo-Norwegian Fisheries Case and, in adhesion thereto, by the 1958 Geneva Convention on the Territorial Sea.

That the arbitral tribunal in 1910 attached decisive importance to the geographical factor appears from the conclusion it drew from its reasoning in its award: "In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay." By the bay's configuration is meant primarily "the relation of its width to the length of the penetration inland", which the court had earlier mentioned as an important factor. On the other hand, the tribunal does not mention the bay's, so to speak, absolute width as a factor to take into consideration. This does not mean that this factor may not sometimes be of importance, in so far as a bay with a very wide mouth, seen geographically, does not appear as internal waters but as open sea. The tribunal was of opinion, however, that no fixed rules in this regard existed in the international law of 1818 and it refused to take notice of rules, such as the ten-mile or twelve-mile rules, concerning territorial sovereignty over bays that were based upon international documents later than 1818. In particular, the tribunal denied that certain fishery treaties (wherein the ten-mile limit was accepted as a baseline for the area reserved

for the fishing of the coastal state near bays) could make this a rule of international law.

However, the doctrine of international law had begun during the 19th century to occupy itself vigorously with the question of the maximum width for bays that could be considered as internal waters (or as "territorial") and various rules were proposed, such as twice the breadth of the territorial sea, or variants thereof, twice the range of a cannon shot, or six or twelve miles, a breadth of three or six miles being assumed for the territorial sea). The ten-mile rule won many adherents. It has been introduced into certain fishery conventions concluded by Great Britain, first in a bilateral convention with France in 1839 and later in, for instance, the multilateral 1882 North Sea Convention, which of course was of considerable importance since it was concluded between a number of very important maritime powers. In these conventions, a distance of three miles from the coast was adopted as the limit for the fishery zone reserved for the respective states, but at bays the distance would be calculated from a line drawn across the bay between the points nearest the mouth where there was a breadth of not more than ten miles.

These different maximum lengths were accordingly defended by different authors and were also taken up in various codification proposals. At the Hague Conference in 1930 the ten-mile line was proposed as a basis for discussion. The meaning of this was that the line in question would constitute both the outer limit of the bay's internal waters and the baseline for the territorial sea at the bay. The tribunal of arbitration that pronounced the 1910 award was, however, undoubtedly correct in that the ten-mile line could not make claim to any general validity in international law. The Swedish Government also denied on several occasions (among others at the Hague Conference) that any rule of international law concerning the maximum width for "territorial" bays existed, and the Swedish authorities took a similar stand before the Swedish Supreme Court in the case of the "Heinrich Augustin" (1927).

One can regard the doctrine of "historical bays" as a consequence of the various doctrines of the maximum width for territorial bays. In my opinion this widely debated doctrine, which at the 1958 Geneva Conference was still considered to demand fresh examination, developed in the following manner. Before the pronouncements and proposals on the maximum width for bays appeared, the bays that are now regarded as "historical"

were in no way distinguished from any other bays. All bays that were not altogether too open and wide (this condition not being more closely defined) were considered to be included in a state's territory (as internal waters, in so far as any distinction was made between internal waters and territorial sea). When, therefore, the theory concerning a maximum width for territorial bays gained ground among legal writers and was thought to have prospects of winning a firm footing through conventions and codification proposals, it appeared that various bays that had always been regarded as being included in their entirety as constituent parts of the territory of the state in question were so wide that they must fall outside the category of bays that according to the new doctrine were territorial. They would rank as free sea beyond the territorial limits as measured according to the standard distance from the coast. The courts and authorities of the respective coastal states, however, continued to apply to these bays the traditional conception of territoriality, which their governments were interested in preserving. Those authors who asserted that there existed a maximum width for territorial bays, as well as codification proposals that laid down a maximum width, had to take this situation into consideration and recognize the bays in question as exceptions from the general rule. The exceptions were explained as being based on a documented ancient tradition; these bays were consequently "historical". Which bays became historical in this way could depend upon a variety of factors: on the one hand on the accidental circumstance that the status of a bay had been the object of a court decision, a stipulation in a treaty, or some other public-law manifestation which demonstrated that it had earlier been regarded as in its entirety "territorial", and on the other hand on which maximum width for territorial bays it was desired to establish as the general rule. If the maximum width desired was six miles, bays more than six miles wide became "historical"; if it was ten miles, bays more than ten miles wide fell into that category, and so on. If the Geneva Convention's provision on the maximum width of twenty-four miles for territorial bays becomes generally accepted, all bays that are less than twenty-four miles in width will cease to be "historical", even if they have been regarded as such up until now. They now fall under the general rule. If nobody had had the idea of establishing a rule fixing a certain maximum width for territorial bays, we should never have heard of "historical bays".

The above-mentioned discussion concerning the length of base-

lines at bays is, as stated, now of predominantly historical interest since the 1958 Geneva Convention has determined the geographical prerequisites for the characterizing of a bay as internal waters. In art. 7 of the convention, the following is stated in this regard: 1. The article relates only to bays whose shores belong to a single state. 2. For the purposes of the Convention, a bay is a well-marked indentation whose penetration is in such a proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not be regarded as a bay unless its area is as large as, or larger than, that of the semicircle whose diameter is a line drawn across the mouth of the indentation. 3. . . . 4–5. The waters within a line not more than 24 miles long, drawn across the mouth of the bay, if the width of the mouth does not exceed 24 miles, and otherwise drawn within the bay, shall be considered as internal waters.

These provisions are only partly to be found in already existing international law and the convention is as such only binding on those states that adhere to it. But there is reason to expect that a state that followed the convention's provisions in drawing up the limit of its territorial sea and the boundaries of its internal waters would hardly risk encountering protests or having its standpoint rejected by an international court. The convention's stipulations on this point are moreover fairly acceptable. One finds that the rule that bays must penetrate the land to a depth that is in a reasonable proportion to the width at the mouth is complemented by a rule that the bay's area must be in a certain proportion to the width at the mouth. A certain maximum width has been set for bays (or parts of bays) that are to be considered as internal waters, but this maximum width is so sizable (24 miles) that it must be thought to fill all reasonable demands, particularly as the provision is complemented in clause 6 by the traditional provision for "historical bays". Moreover, the provisions do not apply to bays situated within a skjaergaard region.

In the foregoing historical survey of the international-law position of bays, one feature stands out as especially clear, namely the decisive influence that is exercised by "the nature of the case", which in this instance means the bay's character as internal waters in a geographical sense. Like other internal waters, the bay is included in the land area, with the result that no right of passage for foreign vessels exists there and that the territorial sea is measured from a baseline at the outer limit of the bay facing

the sea. But if this is the case, if in other words the international-law rules concerning bays are not linked to the name or the concept "bay" but to the bay's character as internal waters, whatever applies to bays should apply to other internal waters situated within the coastline, i.e., skjaergaard waters. These, however, have been in effect a phenomenon unknown to writers on international law outside the Scandinavian nations. The waters within a skjaergaard are surrounded by land just as much as are the waters in a bay, and what has been said in regard to them (namely, that the coastal state's interests in control over the area of water are greater in regard to bays than in regard to the open sea, and conversely that foreign vessels do not necessarily need to use bays for passage, as they do the open sea) applies to a skjaergaard with at least as much force as to a bay.

IV

That the waters of the skjaergaard are subject to the authority of the Swedish state in the same degree as the land is doubtless a notion held since very early times, as is also the idea that there exists no right of passage through such waters for foreign vessels. From the 17th century there are a number of decrees prohibiting traffic by foreign vessels in the skjaergaard except along certain channels and with the use of a pilot (prohibitions made with a view to customs control, military security, etc.).

No reason for drawing the baselines for the territorial sea at the outer limit of the internal waters existed before states began to define their territorial sea as extending a certain linear distance from the coast. When this first happened in Sweden, in a royal ordinance of October 9, 1758, it was declared that "a distance of three leagues from the Swedish ramparts out into the open sea should indisputably be considered as Sweden's *dominium*". What was fixed here was the outer limit for Sweden's territorial sea, which was set in this manner at a distance of three German leagues or twelve nautical miles from the coast. Nothing was said of straight baselines or the like, but it is clear that the Swedish territorial sea was thought to be constituted of open sea and that by "Swedish ramparts", as a baseline for measurement, was meant the outer limit of the skjaergaard. In the document in which the

current Swedish four-mile limit was first fixed as the limit for neutrality purposes (the King's instructions for the protection of the outgoing Swedish merchant navy, promulgated May 28, 1779), it was declared that "our *dominium* extends one sea-league, or so-called German league, beyond the farthest rocks and skerries, within which no hostilities are allowed". From this it appears that the waters that lie within the outermost skerries are not included in the distance from the coast of one German league, or four miles, that constitutes Sweden's territorial limit.

Definitions of the "Swedish internal territorial waters" that were identical in tenor were introduced into the royal decree of December 20, 1912, concerning Sweden's neutrality and the decree issued on the same day concerning the admission of foreign warships. According to these definitions, the term means "harbours, harbour mouths, roadsteads and bays, as well as waters situated between and within islands, islets, and skerries that are not permanently submerged under the sea". The new decree on admission of warships that was promulgated November 21, 1925, contained a somewhat different definition. The term "internal territorial Swedish waters" therein means: (a) Swedish lakes, watercourses and canals, (b) Swedish harbours, harbour mouths, and bays, as well as (c) those parts of Swedish territorial waters that are situated within and between Swedish islands, islets and skerries that are not permanently submerged under the sea". The differences between this definition and the foregoing were not of fundamental importance. That "roadsteads" disappeared from the definition was an improvement, since it is highly doubtful if roadsteads as such are internal waters. In all these regulations an exception was made for Öresund, where only harbours and mouths of harbours were said to be internal Swedish waters. No provision concerning the extent of Sweden's territorial sea appeared in these decrees. This, at least as concerns the neutrality decree, can be explained by reference to the fact that the outer limit of the territorial sea was of relatively limited importance, since only internal waters were closed to belligerent warships. These should be allowed to pass through the territorial sea, but naturally not to undertake any warlike acts there.

Complete provisions concerning the Swedish territorial sea, stating both its extent and the baseline for its measurement, first appeared in the 1927 customs statutes. There "Sweden's customs area" is defined, but since this area is said to consist of Swedish state territory, the provisions on the customs area are likewise

provisions on the extent of the national territory. The customs area is said to include (a) the land territory of the Kingdom, (b) lakes, watercourses and canals within the Kingdom, (c) harbours, mouths of harbours and bays, situated at the coasts of the Kingdom, and waters belonging to the salt sea that are situated within and between those islands, islets and skerries lying along the coasts that are not permanently submerged under the sea, as well as (d) those waters belonging to the salt sea which extend up to a distance of four miles, or 7,408 metres, from the land territory of the Kingdom or from lines that constitute the seaward limits for the waters mentioned under (c). If one compares these provisions with the decrees cited earlier and also takes into consideration "the nature of the case", one easily realizes that the waters mentioned under (b) and (c) are internal waters. These consequently include, besides lakes, etc., also waters situated within the coastline, namely harbours, the mouths of harbours and bays, as well as waters situated within and between islands, islets and skerries situated near the shore, this obviously refers primarily to skjaergaard waters but also covers other waters that can be said to lie within Swedish islands, such as Kalmarsund. Provisions materially consistent herewith subsequently occurred in a number of other Swedish statutes, such as the 1938 neutrality decree, a decree of October 21, 1938, amending the regulations on admission of warships, the ordinance of February 9, 1945, regarding sea traffic within the Swedish territorial waters (now replaced by the ordinance of May 25, 1962, with special provisions for sea traffic), and finally the sea traffic ordinance of May 18, 1962.

The significance of these regulations is that the four-mile-wide Swedish territorial sea is measured from a baseline coincident not only with the coasts of the Kingdom's land areas, including islands, etc., but also with the outer limits of internal waters situated within the coastline, such as bays, skjaergaard waters, etc.—a natural consequence of the fact that these waters, as internal waters, are included in the land area and therefore juridically also are assimilated to it. This method of measuring the territorial sea is not only natural, but the only one possible. If one were to draw the baselines for the territorial sea inside the outer limits of the internal waters, one would get an area of water which was at the same time territorial sea and internal water and consequently was subject to mutually inconsistent rules of international law. If, again, one drew the baselines outside the outer

limit of the internal waters, one would get an area of water that was neither territorial sea nor internal waters and was legally indefinable. The baseline must, therefore, coincide with the outer limits of the internal waters, where such waters are to be found within the coastline. When the Swedish statutes declare that the territorial sea shall be measured from lines that constitute seaward limits for internal waters, they thereby confirm a situation that already existed before the appearance of the statutes and would exist even if the statutes had not been promulgated. Consequently they did not constitute a legal innovation.

One may wonder how such a thing should be possible at all. To what extent can a state determine the baseline of its territorial sea? The baseline must, of course, be "the coast" and the coast's extent is a geographical fact, which can hardly be influenced by laws and decrees. That in certain cases the baseline is composed of the outer limits of areas of water instead of land areas is due to the fact that these areas of water are internal waters, which as such are included in the land area as parts thereof, and their outer limits are constituent parts of the coastline. The state cannot, of course, change the coast's direction by decree when it consists of a relatively straight and level land contour. Can it then change the coastline when internal waters are included therein? The coast is by definition that place where the land and the sea meet, and no state, however powerful, is capable of reproducing the feat that was performed on the third day of creation, when the land and the sea were separated. Nor can it, by issuing ordinances, transform the open sea into internal waters, because it cannot, of course, alter geography. The contour of the land can be changed by constructing, e.g., a pier for a port or by reclaiming land from the sea, but otherwise it appears that a coast's extent can only be changed as a result of natural events, of gradual accretion and sinking, earthquakes and volcanic eruptions, etc.

Various states besides Sweden had already before the 1958 Geneva Conference fixed by legislation lines drawn between islands situated near the coast as the baseline of the territorial sea.[2] In many cases there appeared in such connections a tendency to apply a maximum length for these baselines corresponding to twice the breadth of the territorial sea; this may be regarded as

[2] See Evensen, in Preparatory Document no. 15 of the 1958 Geneva Conference.

following the opinion expressed by legal writers in regard to the line that should set the seaward limit of the internal waters in bays and island groups. This tendency appears clearly in Finland (the act of August 18, 1956) where the maximum extent of the baselines was established at twice the breadth of the territorial sea, i.e. eight miles, and presumably this holds true also in Yugoslavia (a maximum length of 12 miles, at least at bays, according to the law of December 1, 1948), in Saudi Arabia, and in Egypt (12 miles according to laws of May 28, 1949, and January 18, 1951). A maximum length has never been recognized by Sweden and no such length was applied to the lines that were drawn in 1934 on the so-called customs charts. The drawing of these lines was intended exclusively to follow the basic principle, expressed in various Swedish statutes, that the lines that form the seaward limit for internal waters should be the baseline of the territorial sea. The lines were, however, rather short in all cases (the longest was thirteen miles). In Denmark, where, through statutes concerning the admission of foreign warships (the latest dated July 25, 1951), fjords and waters situated between Danish islands were declared to be internal waters and substantial areas of water between the Danish islands were made closed channels, it is clear that no maximum length is envisaged. In regard to fishing, however, Denmark has applied the North Sea Convention's rule of a maximum length of ten miles for baselines at Danish bays.

The Norwegian legislation in the field is of the greatest interest; partly because it has its roots rather far back in time, partly because through the intermediary of the International Court's judgment of December 18, 1951, it came to exert a decisive influence on the provisions of the Geneva Convention on the subject.

This legislation was initiated with the Norwegian Royal Resolution of October 16, 1869, by means of which a single line, 25.9 miles in length, drawn between the offshore islands of Storholmen and Svinö was made the base for calculating the four-mile-broad territorial sea off the district of Söndmöre. The occasion of this measure was that strong protests had come from the local coastal population because foreign (Swedish) fishermen had begun to take part in the highly profitable fishing at certain grounds situated off the coast. These fisheries had since time immemorial been regarded by the inhabitants of the coastal region as being more or less their own property and as something upon which they depended for their livelihood. Consequently the coastal population demanded that the authorities undertake

measures to exclude foreign fishermen from these fishing grounds. It was in order to meet these demands that the decree just mentioned was issued. The same thing occurred again, twenty years later, when demands for the extension of the Norwegian fishery boundary were presented by the coastal population living farther north in the district of Romsdal. This resulted in the promulgation of the Royal Resolution of September 9, 1889, through which a continuous sequence of four baselines of 14.7, 7, 23.6, and 11.6 miles respectively were drawn from Storholmen (the northernmost point of the line drawn in 1869) to the outermost point of the Jevle islets.[3] It is noteworthy that in both cases the coastal population (with the aim that the areas where they had since ancient times carried on fishing should be brought within the territorial sea) had requested that the boundary be drawn farther out to sea than became the case through the respective resolutions, but that for reasons of international law the Norwegian government did not feel able to meet these demands to a greater degree than it did. Thus, the government did not consider itself to have a free hand in the fixing of the baseline of the territorial sea, but felt itself bound by certain rules of international law. The purpose of both decrees was indubitably to reserve for the coastal population certain profitable areas, where it had, since ancient times, carried on fishing; but the Department of the Interior pointed out in its report of 1869 that the circumstance that Norwegian fishermen had since ancient times carried on fishing at grounds lying off the Norwegian coast without encroachment by foreign fishermen was not sufficient to make these fishing grounds Norwegian territory, and in 1889 the proper Norwegian authority declared that the baseline claimed by the population in the area would lie too far outside the farthest islets and skerries. Though the expression "internal waters" does not appear in this connection, the obstacle to acceptance of the baselines claimed by the local population was presumably that they extended over open sea. Even those points that were actually used for drawing the baselines lay rather far from the coast of the mainland, but a number of islands and skerries were situated between them and the mainland. Accordingly the baselines were drawn on the outer side of a skjaergaard region. In Norway, it has always been asserted that the resolutions of 1869 and 1889 involve simply the

[3] Concerning this legislation, see *Indstilling fra Sjøgrænsekommissionen af 1911*, I, *Almindelig del*, pp. 1 f., 11 ff.

application of the fundamental documents for the limit of Norway's territorial sea (the Royal Resolution of February 22, 1812, and the Chancellery memorandum of February 25, 1812, issued in connection therewith), wherein it is declared that "the limit of our territorial sovereignty toward the sea" is to be reckoned at the traditional distance of one marine league (four miles) from the outermost islands or islets that are not perpetually covered by the sea.

A series of 47 baselines beginning at Norway's frontier with the Soviet Union and ending at a point immediately south of the mouth of the Vest Fjord was established as the baseline for the Norwegian fishery limit in northern Norway through a Royal Decree of July 12, 1935. The longest of these baselines (drawn over the so-called Lopphavet) has a length of 44 miles, and the lines over the mouths of the Varanger fjord and the Vestfjord are respectively thirty and forty miles long. Of the other baselines, one (at Sværholthavet) is 38.6 miles long, while a great number are between approximately fifteen and twenty miles long. The decree had a preamble setting out the considerations on which its provisions were based, in a manner indicating that it was not expected to go unchallenged. It is declared therein that the decree was issued (1) on the basis of well-established national titles of right, (2) in conformity with the geographical conditions prevailing on the Norwegian coast, (3) for the protection of the vital interests of the population inhabiting the northernmost parts of the country, and (4) in accordance with the earlier resolutions of 1869, 1881 and 1889 (of these, the resolution of 1881 concerned a baseline drawn over the mouth of Varanger Fjord). It was the 1935 resolution on the fishing limit in northern Norway that gave rise to the dispute between the United Kingdom and Norway which was decided by the Hague Court on December 18, 1951.

There is one point in the preamble that requires a special comment, namely that which speaks of the vital interests of the coastal population. If this has any independent importance for the drawing of the limit, then it must mean that, in consideration of the interests of the coastal population, the limit of the territorial sea was drawn differently from the limit otherwise applied, presumably by setting the baseline of the territorial sea farther out with a view to securing to the coastal population the exclusive right to fish over a wider area than before.

It may then be asked: To what extent can a state widen its

territorial sea in order to serve its economic interests, e.g., in order to reserve to its own inhabitants a fishery area that is situated in the open sea? It is clear that it can always do this to the extent it has in general the freedom to widen its territorial sea. If the question of the breadth of the territorial sea stands open (if, e.g., the question of the breadth of the territorial sea is dealt with at an international conference), it may be urged that a wider breadth should be given to the territorial sea in general or to the territorial sea of certain states in order to protect the coastal population in carrying on its fishing industry. To maintain such a standpoint is in any event entirely legitimate. It is equally clear that the state is free to decide the breadth of its territorial sea within certain limits, e.g., up to a maximum of six miles; thus, it can always take advantage of the opportunity to meet the needs of its population by widening the breadth of its territorial sea from, say, three or four miles to six miles. The question here is consequently that of the territorial sea. On the other hand, a widening of the internal waters hardly seems to be a proper way of advancing this interest. If, as is natural, the baseline of the territorial sea is already set at the factual limits of the internal waters, then it lies where it lies and there is nothing to be done about the matter. The state cannot convert open sea into internal waters by issuing a decree. In the first place, this is physically impossible; and in the second place, the legal rules that are tied to different kinds of areas of water are connected too closely with their physical character for the state to be able to alter them, since it cannot change geography. The most important legal difference between territorial sea and internal waters is, of course, that foreign vessels have the right of innocent passage through the territorial sea but not through internal waters. But the right to passage through the territorial sea is due to the fact that it is open sea, not to the fact that in its capacity as territorial sea it is subject to the coastal state's dominion; and the absence of the right of passage in internal waters is due to the fact that these are so closely linked geographically to the land domain that there is no scope there for any right of passage. The dividing line between internal waters and territorial sea is a geographical line, while the dividing line between territorial sea and free sea is an imaginary line that cannot or should not constitute any hindrance to maritime traffic, which on the other hand does not necessarily need to use internal waters for the purpose of passage. Consequently, the rules of international

law concerning the right of passage through the territorial sea for foreign vessels can be formulated as follows: The vessels of all nations have the right to navigate the open sea, even where it is subject to the dominion of the coastal state. The coastal state is, therefore, prevented by international law from extending the regime it applies to internal waters to those areas of water that are open sea.

If one looks at the other and most topical side of the matter, namely the use of internal waters as the baseline of the territorial sea, one finds that here also (as has been sufficiently demonstrated above), the geographical factors are decisive. It is because the internal waters are included in the land area and their outer limits are consequently included in the coastline that these outer limits are baselines for the territorial sea. It would perhaps be theoretically possible to draw imaginary lines through the open sea and measure the breadth of the territorial sea from there, but such a procedure would be entirely foreign to generally accepted views. As long as the territorial sea has been regarded as an area of water of a certain breadth surrounding the coastal state, the outer limit of the territorial sea has been described in terms of a given linear distance from the coast; and the fact that the internal waters have been taken as a baseline in this connection is due to the fact that their outer limits are included in the coastline. Lines drawn in the open sea could never be classified as "the coast", and, so far as I know, such a thing has never been contemplated. At least one serious difficulty would be attached to this, namely the question of the character to be assigned to the area of water lying between the baselines drawn in the open sea and the real coast. It is not internal waters, since it is open sea; and it is presumably not territorial sea either, since the territorial sea is measured from it. If it were categorized as territorial sea, one would get a territorial sea of varying breadth, since it must be combined with the territorial sea measured to its ordinary breadth.

One can also ask the question: Why should a coastal state whose coast is penetrated by bays or surrounded by skjaergaard have the right to serve the interests of its coastal population by drawing baselines for the territorial sea out in the open sea, when no one has even suggested that such a possibility could exist for a state that has a plain and even coastline? It would be reasonable to answer the question by saying that any such right for the state first mentioned appears extremely difficult to justify. How then

has the idea arisen that such a state should be able to use the drawing of the baselines in order to set the limit of its territorial sea farther out from land than would result from the plain geographical facts? If the geographical factors are decisive, the baseline of the territorial sea is, of course, given by nature and consequently conclusively defined. The matter seems to stand in this way in those Swedish statutes that simply declare that the territorial sea is to be measured from lines that form the limits of internal waters out toward the sea. Something similar is presumably true in regard to the baselines that were drawn in the Norwegian decrees of 1869 and 1889. Similarly one can assume that the states just mentioned, which in drawing baselines applied a maximum limit (e.g., twice the breadth of the territorial sea), intended to abide by what were thought to be the rules of international law concerning internal waters. In none of these cases is the drawing of baselines thought to have been due to the free choice of states.

One may then ask: What purpose do all of these ordinances serve?

It should be possible to answer this in the following manner. The baseline of the territorial sea is certainly *in principle* conclusively defined, but in practice it does not always work out in that way. In many cases it is not completely clear where the boundary between internal waters and open sea runs. It is, e.g., conceivable that sometimes—on good grounds—different interpretations could be advanced concerning the location of a bay's mouth. Further, we know that very wide and open bays are open sea, and narrow bays are internal waters. But it is not always easy to say whether a bay is "narrow" or is "wide and open". A bay can be wide and open at its outer part, but narrow at an inner part. Where is the borderline? These questions have given rise to the establishment of rules on the maximum length for baselines at bays, such as in the earlier proposals of ten-mile or twelve-mile lengths, and now in the Geneva Convention for a length of twenty-four miles. These measurements are somewhat artificial, but at least the twenty-four-mile length is perhaps a useful way of coming to grips with the problem.

However, the same problem can naturally also appear where the skjaergaard and the open sea meet. It appears clear that a water area which lies "within Swedish islands and skerries" (and therefore is surrounded by land on all sides) is internal waters, but how do matters stand in regard to a water that lies "between

Swedish islands and skerries", if on one side the area of water is open toward the sea? One then gets a formation very similar to a bay, and it may be appropriate to apply the same view to these areas of water as to bays, i.e., they are internal waters if they are narrow but open sea if they are wide and open. But then, naturally, marginal cases appear. Should one, then, apply in regard to such areas that are open towards the sea the same criteria as in regard to bays—among other things the requirement that the depth by which they penetrate the land (i.e., in this case the skjaergaard) must be relatively large in proportion to the width of the mouth? Or can one consider that even relatively broad and open areas of water that lie within one and the same skjaergaard region belong to the skjaergaard and accordingly are internal waters? And, in that case, how is one to decide whether such an area of water lies within a single skjaergaard region or separates two different skjaergaard regions? Sometimes, in a specific case it should be possible to give several different answers to these questions, each in itself approximately as correct as the others. One recalls the dictum of the International Court in the Anglo-Norwegian Fisheries Case that in Norway it is not the coast of the mainland that constitutes the dividing line between sea and land, but that the real coastline is the outer line of the skjaergaard. The same, of course, is true for other countries besides Norway that are surrounded by a skjaergaard. But the dividing line between sea and land, or between open sea and internal waters, is not always completely clear at the outer line of the skjaergaard. When one finds oneself in the outermost fringe of the skjaergaard, with its countless skerries and rocks that sometimes rise above and sometimes lie below the surface of the water, it is understandable that one feels uncertain whether one is inside or outside the outer line of the skjaergaard. It is consequently conceivable that the outer limits of internal waters (which are baselines for the territorial sea as well) could be drawn in different ways, without its being possible to say with certainty that one way is more correct than the others. One could, for example, draw a line from one skerry to the one lying nearest to it, then from that skerry on to the next, etc. One would then presumably get a rather spiky zig-zag line. One could also draw a line from one skerry that bypassed the nearest skerry and went to one more distant, or a line that bypassed two or more skerries and went to one yet more distant, etc. In this way one would get, depending upon the circumstances, shorter or longer baselines, a

series of lines that were more jagged or more straight and even, etc., but in all cases the waters falling within the lines would lie "between" Swedish islands, islets and skerries and rank as internal waters.

From the reasoning above it follows that, although "internal waters" is a wholly geographical concept and the limits of internal waters exist in nature, these limits are not always conclusively defined. The coastal state has, consequently, a certain freedom of choice (extremely limited, of course) in constructing the baselines of its territorial sea. It is excusable that considerations of interest should enter into this choice, and that the coastal state in considering several alternative solutions (each of which is plausible in itself) should choose the solution that best serves its interests, e.g., its defence interests, its interest in an effective customs control, its coastal population's interest in having the fishery waters off the coast reserved for its benefit, etc. There is nothing to be said against this, so long as the waters enclosed behind the baselines can in good faith be regarded as internal waters. On the other hand, in my opinion, it cannot be considered as permitted by international law for a state consciously to draw baselines through waters that according to a conscientious appraisal must be considered as open sea, with the purpose of advancing any of the interests mentioned above.

At any rate, this was the situation until the conference on sea law, held in Geneva in 1958.

V

The convention concerning the territorial sea and the contiguous zone that was adopted at the Geneva conference did not solve the problem of the breadth of the territorial sea, but it contained detailed provisions on the baseline of the territorial sea. This question is already touched upon in its fundamental provision. In art. 1, clause 1, it is declared that: "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea". From this it appears that the "coast", adjacent to which the territorial sea lies, includes not only land areas but also internal waters. This conception, of course, accords exactly with the Swedish statutes in the matter, where it is provided that the territorial sea shall be measured from a baseline composed of the

Kingdom's land areas, as well as of the outer limits of internal waters situated within the coastline. In fact, the question of the baseline of the territorial sea is hereby comprehensively answered; and it should not be necessary to waste more words on the matter, if only it is clear what are internal waters. In principle this should be clear, since "internal waters" is a purely geographical concept.

The convention has not, however, stopped at this, but has some special provisions concerning special cases: bays (art. 7), which have already been discussed, and harbours (art. 8) and roadsteads (art. 9), on which we need not dwell here. Concerning islands it is declared in article 10 that an island is a naturally formed area of land surrounded by water, which is above water at high tide, and that the territorial sea at an island shall be measured in accordance with the provisions of the foregoing articles. The term "low-tide elevations" means (according to art. 11) a naturally formed area of land that lies above water at low tide but is submerged at high tide. A low-tide elevation may be taken as the baseline of the territorial sea if it is situated at a distance from the mainland or an island not exceeding the breadth of the territorial sea. Otherwise it may not. It is clear that a place where a "low-tide elevation" is to be found can reasonably be regarded as water or as land, and the standpoint adopted in the convention is a compromise.

From the Swedish viewpoint, however, by far the most interesting provision in the convention is art. 4, which deals with the skjaergaard. The reason why this phenomenon (which was practically unknown to legal writers earlier) had now come into consideration was, of course, the judgment of the International Court of December 18, 1951, in the Anglo-Norwegian Fisheries Case. The International Law Commission clearly points out that the article (art. 5 in the Commission's draft) is based primarily upon that judgment and it can in reality be described as a paraphrase of the judgment. The description of the coast, the nature of which is the prerequisite for application of the article, is taken from the International Court's description of the Norwegian coast. The article reads:

> 1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
>
> 2. The drawing of such baselines must not depart to any appre-

ternal waters—something that indicates that baselines according to art. 4 could conceivably be drawn through open sea. These peculiarities make it necessary, in order to understand art. 4, to return to its origin, the judgment of the International Court in the Anglo-Norwegian Fisheries Case.

The case concerned the fishery limits in northern Norway established by the 1935 resolution, the validity of which as against the United Kingdom was challenged by the British government on the ground that it would be in conflict with international law. As the fishery limit was considered to coincide with the limit of the territorial sea, the case concerned the limit of Norway's territorial sea; but since Britain (in relinquishing the standpoint it had taken earlier) recognized Norway's claim to a four-mile breadth for the territorial sea, the dispute in fact concerned the baselines of the territorial sea, the baselines established in 1935. As it has always been assumed that the baselines should consist of the outer limits of the internal waters—a view also adhered to in the Geneva Convention—one would have expected that the question of what was internal waters on the Norwegian coast would have been the main issue in the proceedings, but strangely enough this question fell almost entirely into the background. The Norwegians, for obvious reasons, would not hear of internal waters at all and insisted that the question of what was or was not internal waters should be entirely disregarded, since the boundary between internal waters and the territorial sea lacked relevance for the purpose of fisheries—an attitude that appears rather unreasonable in view of the fact that the breadth of the territorial sea was undisputed and the outer limit of the territorial sea consequently depended exclusively upon the baselines. The baselines were, of course, the primary factor that must decide the limit of the territorial sea, not the contrary. The British pointed out that the Norwegian fishery waters consisted of Norway's territorial sea, and this indisputably had a breadth of four miles, which according to unbroken international practice must be measured from the limits of the land areas and internal waters. "The so-called baselines of its territorial sea are nothing but the limits of the coastal State's land territory and internal waters and, as such, are a cardinal factor in determining the total extent of its exclusive fisheries."[4] The correctness of this stand-

[4] Reply of the U.K., International Court of Justice, Pleadings, etc., Fisheries Case, vol. 2, p. 424.

point (which, of course, is in agreement with the Swedish statutes as well as with art. 1 of the Geneva Convention) can hardly be disputed. Since during the proceedings the British gave up certain attempts at maintaining the maximum length of ten miles for the baselines at bays and between islands in a skjaergaard, the difference between the British and Norwegian standpoints appears to have reduced itself to the fact that the British demanded that the baseline for the four-mile-wide territorial sea of Norway should be the coast in the sense of the land area and the internal waters situated within the coastline (whereby the baselines would be relatively short), while the Norwegians wanted the recognition of the baselines fixed in 1935, which to a large extent were drawn between skerries lying a long way out and far apart from one another, whereby, according to the British, areas of water appeared between the baselines and the real coastline that were not internal waters but open sea. The Norwegians claimed that the coastal state had a fairly wide freedom in the choice of terminal points for its baselines on a skjaergaard coast and consequently could take into consideration circumstances other than purely geographical ones—among others, traditions and interests. It is, of course, obvious that these viewpoints referred to the outer limit of the territorial sea rather than to the baselines. The Court seems to have been strongly influenced by these views, and the judgment indicates that it concerned itself predominantly with the baselines with regard to their function as baselines for the territorial sea and very little with regard to their character as the outer limit for the internal waters.

The judgment is characterized by the Court's amazement at the (until then) unknown phenomenon called the "skjaergaard", which was thought to require a special method for measuring the territorial sea. Consequently this judgment, which was to be so important for the development of international law concerning the skjaergaard, was strongly influenced by the almost total ignorance hitherto displayed by established authorities on international law in regard to the subject matter. The Court expresses itself in the following manner:

> 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 *tracé parallèle,* 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 baseline becomes independent of the low-water mark, and can only be determined by means of a geometric construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, viewed as a whole, calls for the application of a different method. 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.

It must be added to this that no one, not even the British, had wanted to draw an outer limit of the territorial sea that followed all the sinuosities of the coast (the contour of the land) and made a true copy of it, according to the method that Gidel has denoted by (and condemned under) the designation *tracé parallèle*. When one says that the territorial sea follows the coast, one means a coastline that comprises land and internal waters included therein. The low-water mark naturally only exists in the case of land, while the baselines at internal waters are their outer limits, which have the character of straight baselines. Measurement from such straight baselines is not exceptional, but is just as normal as measurement from the land area, in which, of course, the internal waters are included. The difference between a coast deeply indented and surrounded by a skjaergaard, like the Norwegian coast, and a straight and even coast, such as, e.g., the west coast of Jutland, is only that internal waters situated within the coastline of the latter are rather uncommon, while in a skjaergaard coast they follow closely upon one another so that one finds an unbroken succession of straight baselines. Then it may often be a matter of opinion as to the points between which these baselines should be drawn, how long a baseline should be, etc.; but there is no difference in principle. Nor is there any difference between a Norwegian fjord, like Sogne Fjord, and bays on another coast, e.g., Jade or Dollart, in the relevant respect, namely that they are internal waters. The peculiarity of the Norwegian coast in comparison with other coasts does not appear to be such that it calls *in principle* for a divergent method for measurement of the territorial sea.

The Court thereafter touches upon the method of delimitation of the outer limit of the territorial sea proposed by the

English, designated as the "arcs-of-circle method", also called by Gidel the "*courbe-tangente* method". This consists in drawing circles centred on all the projecting points on the coast and with radii equal to the breadth of the territorial sea. In this manner one gets an unbroken series of arcs, in which those based on the less salient points disappear behind the arcs based on the more salient ones. At least where there exist internal waters of somewhat greater width, the outer limit of the territorial sea will obviously run parallel with a straight line outwardly limiting the internal waters. The whole series of arcs will be characterized by the fact that all points are situated at a distance equal to the breadth of the territorial sea from the nearest point on the coast. The method is somewhat precipitately rejected by the Court on the grounds that it is new and not obligatory according to international law. It was recommended, however, by the International Law Commission and it is in accord with article 6 of the 1958 Convention. In this regard, one must, of course, reckon with the fact that, as Waldock points out, when internal waters lie within the coastline the baseline of the territorial sea becomes a straight line.[5]

The Court has, as can be seen, spoken the whole time of the methods for drawing up the limit of the territorial sea and has touched upon the question of internal waters from that viewpoint alone. The same holds true when the Court develops its primary thesis, which appears in the following passage:

> 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-baselines 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.

This passage contains certain statements which must be queried. Where has the Court acquired its conviction that "the principle" that the outer limit of the territorial sea at a skjaergaard shall

[5] Compare Waldock, "The Anglo-Norwegian Fisheries Case", XXVIII *The British Yearbook of International Law*, 1951, pp. 132 ff.

follow the general direction of the coast (in contradistinction, for example, to the "arcs-of-circle method", just mentioned) is accepted by international law? So far as is known, this principle was not encountered before the judgment of the Court. In support of its opinion, the Court alleges that a number of states, "with the aim of applying this principle", considered it necessary to apply a method with straight baselines and that they did not meet with objections from other powers. The states in question have been mentioned above, but in regard to none of them does one find that the use of straight baselines between islands situated off the coast was justified by reference to the necessity of applying the principle of the general direction of the coast. The principle that provides the reason for the straight baselines is, so far as one can see, an entirely different one—namely that the territorial sea shall be measured from internal waters situated within the coastline. This principle is clearly expressed in the Swedish statutes, and to all appearances it lies at the foundation of the various provisions from other countries that restrict the length of the baselines to twice the breadth of the territorial waters. Whether this is an appropriate method for realizing this intention certainly appears doubtful. In any case these provisions have nothing to do with the general direction of the coast. In addition, it does not appear that straight baselines need necessarily depend upon the so-called principle of the general direction of the coast. They are, of course, traditionally well known as the baseline for the territorial sea at bays, and are widely discussed in this capacity in the literature of international law. But no doubt exists that the reason for drawing a baseline over the mouth of a bay (or possibly within the bay where it narrows) is the bay's character as internal waters. The case is altogether the same with a skjaergaard.

On its way from Svinesund to the mouth of the river Torne the direction of the Swedish coast changes several times, and what is to be regarded as "the general direction of the coast" in each special case depends upon how one chooses and delimits the stretch of coastline into the direction of which one is inquiring. The coast (along which the territorial sea, of course, will indisputably stretch) is made up of islands and skerries as well as of intervening waters which are internal waters. If, as is prescribed by the Swedish statutes, islands and skerries and the outer limits of internal waters are taken as the baselines of the territorial sea, then presumably in each particular skjaergaard region the outer limit of the territorial sea will follow (or at least will not to any

appreciable extent depart from) the coast's general direction *at that place*. However, this result is somewhat secondary in relation to the drawing of baselines, and "the general direction of the coast" is not an independent factor in the drawing of the outer limit of the territorial sea. The method recommended by the International Court consists in drawing straight baselines between "appropriate" points on the coast. Appropriate for what? Apparently for getting the desired outer limit of the territorial sea, that which follows the general direction of the coast. Thus, the outer limit of the territorial sea is regarded as the primary factor and the baselines as something secondary. But there remains the question how one is to find and demarcate the "coast" or stretch of coast whose general direction is to be followed.

Though it is for the coastal state to establish the delimitation of the territorial sea, the Court declares that there are certain criteria according to which one can judge the validity of such a delimitation from the viewpoint of international law.

The first of these considerations refers to the close dependence of the territorial sea upon the land domain: it is the land that gives the coastal state a right to the waters off its coasts.

Hence it should follow that, although the state must be allowed the latitude necessary to enable it to adapt its delimitation to practical needs and local requirements, the baselines may not depart to any appreciable extent from the general direction of the coast.

To this it can be added that the territorial sea obviously depends upon the land and is an appurtenance to it. Consequently its limit must in one way or another follow the contour of the land. But if the geographical factor has this dominant role, one may ask how much room can exist for the coastal state's freedom of choice in drawing baselines. Naturally this question can be debated, and it appears to be equally debatable whether the geographical factor really means that the baselines may not depart to any appreciable extent from the general direction of the coast.

The second of the Court's fundamental considerations concerns the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The Court correctly points out the special importance of this consideration in the case at issue, and declares: "The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently linked to the

land domain to be subject to the regime of internal waters." One needs only to query the expression "to be subject to the regime of internal waters". Does the Court mean that it depends upon the coastal state (and principally upon the manner in which the baselines for its territorial sea are drawn) whether an area of water shall be internal waters? Can an area of water be subject to the regime of internal waters if it is *not* internal waters? And if the Court does not mean this, why does it not state that the areas of water lying within the lines *must be* internal waters? If the Court had said this, it would indisputably have found itself in agreement with international law and international practice, and it would hardly have needed to overemphasize the unique character of the Norwegian coast, as it does in the following statement: "This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied to the case of a coast, the geographical configuration of which is as unusual as that of Norway." It is obvious that the use of straight baselines at bays is well known to the Court, whereas the skjaergaard is something new and foreign to it. In reality, we have here a single rule that simply states that the outer limits of internal waters constitute baselines for the territorial sea. This rule was of course applicable to the Norwegian coast in the same way as to all other coasts.

In the considerations referred to above, the Court has retained the decisive importance of the geographical factors. This view is abandoned in the third of its considerations, which states that certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage, should be taken into consideration.

This is an entirely new viewpoint. Its significance must be that the economic interests of the coastal population may result in either the drawing of baselines outside the outer limits of internal waters (and consequently over open sea) *or* the conversion of open sea into internal waters. The latter appears physically impossible, and the former certainly lacks any support in international law.

The Court's opinion on this point refers, to all appearances, to a single one of the baselines which were disputed in the case and which had been fixed in the Norwegian decree of 1935, namely the line drawn over the indentation in the northern Norwegian coast that is called Lopphavet. What the Court says here is of very great interest, not least because of the importance it came to have for the tenor of art. 4 of the Convention adopted at Geneva.

Here the question whether Lopphavet is internal waters or not may be left open. What is of interest is the Court's reasoning. The Court seems, in any case, to have had its doubts concerning the character of Lopphavet as internal waters. It declares that Lopphavet cannot be regarded as a bay. It then discusses the objection that the baseline as drawn would deviate from the general direction of the coast and concludes with somewhat laboured arguments (which glaringly illuminate the lack of clarity in the principle set up by the Court as the fundamental rule, namely the principle of "the general direction of the coast") that this would not be the case in any substantial degree. Obviously feeling its reasoning to be somewhat weak, the Court resorts to a further argument, adduced from the Norwegian side, namely that Norway has an historic right to the area of water in question. Through a concession granted in the 17th century by the Danish–Norwegian government, a person by the name of Lorch had acquired exclusive fishing rights on certain banks that extended a substantial distance from this section of the Norwegian coast. Of these fishing grounds, only a portion lies within the limit of the Norwegian territorial sea, whereas the rest lie outside it. The Court says, however: "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."

The fact was, as the Court indeed points out, that the breadth of the Norwegian territorial sea, at the end of the 17th century when the concession was granted, was fixed at the range of vision, which gave it an extent of between fifteen and twenty miles. When the breadth was reduced to four miles, the reserved Norwegian fishery area was in the same way decreased along the entire Norwegian coast. The attitude that the Norwegian government took in 1869 and 1889 towards the demands of the coastal population illuminates the fact that Norway's exclusive fishing rights depend upon the extent of its territorial sea and are *ipso facto* altered in the same way as the territorial sea. How in such circumstances a concession granted at the end of the 17th century can be of any importance for appraising the drawing of the four-mile limit established in 1812 or the correctness of the baseline fixed in 1935 is incomprehensible. However the baseline was drawn, the result would have been the same: one part of the fishing grounds would have been within and another part outside the limit of the Norwegian territorial sea. How far out to

sea the Norwegians continued to fish is of no importance in this connection, since there is nothing to prevent the population of the coastal state from fishing outside the territorial sea, although it does not have an *exclusive right* to fish there. Nevertheless, the Court comes to the conclusion that the fishing rights that Norway exercised under the range-of-vision rule have created a sort of prescriptive right to fish within the limits of the territorial sea fixed in 1935. "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."

What the Court says at the end of the statement quoted here, represents, of course, a subjective view that does not exclude other conceptions. In any case it does not remedy the logical defects in the reasoning that allows a fishing monopoly, exercised in the remote times when Norway made claim to sovereignty over the water extending as far as the range of vision, to become an "historic title" to exclusive fishing rights at a time when these claims had long since been relinquished and the limit of Norway's territorial sea fixed according to entirely different grounds.

I wish to point out that my criticism is not directed against the baselines drawn in Norway in 1935, but against the Court's method of reasoning. The greatest interest of the judgment, in any case, lies in its being the first occasion when the question of the territorial sea outside a skjaergaard was examined by an international authority, so that the problems connected therewith became known outside those countries that had direct cause to occupy themselves with the matter. Even if, in adherence to the Swedish statutes, one considers that the solution to the problem should be sought rather in the geography of the coastline itself (namely in the character as internal waters of the areas of water included therein) than in the desired ends one wants to accomplish by fixing the outer limit of the territorial sea, the judgment is of some value inasmuch as it gives support for a practice that, at least in the Scandinavian countries, has long been applied, but has been practically unknown to legal writers outside Scandinavia. First and foremost, one can conclude from this judgment that the waters of the skjaergaard are to be regarded as internal waters in the same way as bays penetrating into the mainland. Furthermore, one can conclude that it is not necessary to reckon with any maximum lengths for the baselines from which the

territorial sea shall be measured outside the skjaergaard, and that it is equally unnecessary, in regard to formations similar to bays that open up between the islands of skjaergaard, to reckon with the requirements in regard to the configuration of the area of water that have been established in relation to bays. Also, one does not need to draw baselines between all the islands or skerries but can make them somewhat longer, so that the baseline does not become a zig-zag but is a fairly even line. All this is based on the idea that the skjaergaard, with all islands, skerries, and waters situated therein, constitutes one continuous unity.

It was the judgment of the International Court in the Anglo-Norwegian Fisheries Case referred to above that was transposed into art. 5 of the International Law Commission's draft, which became arts. 4 and 5 of the Geneva Convention. No compelling reason existed to make a Convention provision out of the judgment. Art. 59 of the Court's own Statute declares on good grounds that the Court's decisions are binding only on the parties to the dispute and only in respect to the particular case. They are thus not legal precedents, and the pronouncements of the Court made in regard to a particular dispute cannot simply be generalized without further ado to make rules of international law. The same is true in regard to its pronouncements in the Fisheries Case; these, naturally enough, were concentrated entirely upon the dispute before the Court, which according to its own opinion involved circumstances of a very special nature. The International Law Commission declared, however, that the judgment was an expression of valid international law—a rather debatable opinion—and therefore made it the basis of its draft, which with certain modifications was inserted into the convention adopted in Geneva in 1958.

According to clause 1 of art. 4, the method of straight baselines may be employed at coasts that are deeply indented *or* surrounded by a fringe of islands. According to the International Court, the Norwegian coast had both these characteristics, even if not on the same stretch of coast. Although the article in the International Law Commission's draft had the title "Straight Baselines", straight baselines occur also in other articles of the Convention, such as that about bays; and the use of straight baselines must as a matter of fact become general already on the basis of article 1, since there the territorial sea is said to extend both from internal waters and from land, both being included in the coast. This must obviously result in the outer limits of the internal waters

serving as baselines of the territorial sea. Why did not the drafters content themselves with this? The description of the coast with which art. 4 deals obviously relates to the phenomenon of the skjaergaard, known only through the judgment of the International Court. In reality a skjaergaard is distinguished from other coasts only by the circumstance that in it internal waters are unusually frequent, but it has been considered to require special rules in accordance with the judgment of the International Court. The baselines need not coincide with the closing lines of the internal waters, but are drawn between "appropriate" points. Two conditions are established, however, and are set forth in clause 2.

The conditions are (1) that the baselines may not to any appreciable extent depart from the general direction of the coast and (2) that the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. According to the wording, both conditions must be fulfilled. What happens if in an actual case the two conditions are found to be incompatible? Logically this should result in the state in question abstaining from the use of the system with straight baselines; but this was hardly intended, and the conditions are so elastic that it should be possible to bring about a compromise of one kind or another. Obviously, the general direction of the coast need not be followed strictly. Moreover, it seems to appear from the Convention's wording that the baselines from which the territorial sea shall be measured are not intended to coincide with "the coast", from which the territorial sea extends according to art. 1 (and according to all that has been heard hitherto, at any rate before the judgment of the International Court). If the baseline and coast coincide, the provision that the baseline may not depart to any appreciable extent from the general direction of the coast is, of course, meaningless. In clause 2 of art. 4, it seems, however, to be assumed that areas of water can "be subject" to the regime of internal waters even though they are not internal waters in the ordinary geographical meaning of the term. If by "areas sufficiently linked to the land domain to be subject", etc., is meant areas of water that *are* internal waters in the real meaning of the term, then why is this circumlocution used? Moreover, if the baselines should coincide with the outer limits of real internal waters, art. 4 would be superfluous, since this rule governs in any case, independently of the prerequisites established in art. 4.

According to clause 3, baselines may not be drawn to or from so-called "low-tide elevations", i.e., skerries that rise above water only at low tide, provided that no lighthouse or other installations that permanently rise above the surface of the water are erected upon them. The reason for the stipulation is, according to the International Law Commission, that it was desired to prevent the drawing of baselines at distances from land that were altogether too great.

Clause 4 says that, when the method of straight baselines is applicable according to clause 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage. This provision originates from the passage in the judgment of the International Court that concerned the Lopphavet, a passage that by reason both of its faulty argumentation and of its obvious reference to a certain special case is unusually ill-suited to conversion into a rule of international law. The provision is obviously in the nature of an exception; one may, therefore, ask, an exception from what? Not from clause 1: the coastal state is to have a right to use the baselines in order to expand the limit of its territorial sea (with the aim of advancing the economic interests of the coastal population) only in cases where the coast is deeply indented or is bordered by a fringe of islands—a rather remarkable provision. Consequently, it must be an exception from clause 2, an exemption from the conditions that the baselines may not to any appreciable extent depart from the general direction of the coast and that a sea area lying within the lines shall be sufficiently closely linked to the land domain to be subject to the regime of internal waters. Here it seems to be quite clear that the baselines could be drawn in the open sea (something that to a certain, although limited, degree should already be possible according to clause 2). That this is something new to international law and that this innovation has curious consequences appears in art. 5 of the Convention.

In art. 5 it is declared first and foremost (clause 1) that waters on the landward side of the baseline form part of the internal waters of the state. It is consequently the baseline that makes the area of water situated behind it internal waters. The baseline is the primary factor and the character of the area of water as internal waters is a consequence of the drawing of the baseline. Hitherto, it had been believed that, quite contrary to this conception, the water's character of internal waters (for example, in

a bay) had the effect that its outer limit, as an integral part of the coastline, would be the baseline of the territorial sea. This was the ordinary way of regarding the matter and was the only natural meaning of the normal usage whereby the territorial sea is said to be measured at this or that distance from the coast. The proposition "Sweden's territorial sea extends to a distance of four miles from the coast" implies starting from the coast (which consists of the land areas and internal waters included therein) and measuring four miles out to sea. When one gets that far out, one finds there the outer limit of the territorial sea. According to the Convention, one should proceed in the opposite way: certain criteria concerning the limit of the territorial sea (such as, that it shall follow the general direction of the coast or that it shall meet the economic needs of the coastal population) determine the baselines, and these make the areas of water lying within them internal waters. According to the earlier, natural way of looking at matters, the baseline must be known before one can know the location of the outer limit of the territorial sea and it must be independent of the latter; this, of course, becomes the case if one adopts a purely geographical phenomenon, "the coast", as the baseline. That a straight line can be used as the baseline of the territorial sea depends upon its character as the outer limit of internal waters, and the character of an area of waters as internal waters depends upon its connection with the land domain, which makes it an integral part of the land and its outer limit a part of the coastline. But according to the method of the Convention, an area of waters becomes internal waters whether or not it is internal waters from a geographical viewpoint.

That this really is so is confirmed by clause 2 of art. 5. For it is declared therein that where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23 of the Convention, shall exist in those waters. It is beyond doubt that this is an innovation in international law. Hitherto it has always been considered that an essential difference from the point of view of international law between internal waters and territorial sea is that foreign vessels have the right of innocent passage through territorial sea but not through internal waters. There exists, besides, a clear connection between the circumstance that no right of innocent

passage through a certain area of water exists and the circumstance that this area can serve as the baseline of the territorial sea. Because the area of water is included, as internal waters, in the land domain, there exists no right of innocent passage, and for precisely the same reason its outer limit can be the baseline of the territorial sea. Whence, then, comes that strange hybrid—an area of water that is classified as internal waters and resembles internal waters in that its outer limit is the baseline of the territorial sea, yet nevertheless is subject to the rule of the right of passage valid for the open sea? The explanation is obviously that the provisions in the Convention's art. 4 allow the possibility of drawing baselines through open sea, but that it was not desired to make such a great departure from international law as to close to innocent passage waters situated between the baseline and the coast. The area of water is really open sea, and it is not possible to change its character, since a stipulation in a convention cannot alter geography. This area of water is internal waters only in name.

But then, again, an explanation is required of why those who made the Convention—in the first hand the International Law Commission and then the Geneva Conference—came to give a misleading name to such areas of water. The explanation can hardly be any other than that they had a feeling that it was in conflict with well-established usage (perhaps against international law) to draw baselines over open sea and so they called the areas of water in question internal waters, even though they are not.

If this explanation is correct, the conclusion seems to be unavoidable that art. 4 of the Geneva Convention deviates from what has until now been the practice of states and presumably also from valid international law, in so far as it allows the drawing of baselines of the territorial sea over open sea. Of course states can introduce into conventions provisions that deviate from international law, but these naturally have binding force only for the signatories.

In clause 1 of art. 4 of the 1958 Geneva Convention, it is said that with coasts of the nature mentioned in the article, "the method of straight baselines joining appropriate points *may* be employed in drawing the baselines from which the breadth of the territorial sea is measured" (my italics). It seems to be evident from the wording of the article that this is not mandatory but optional. The Special Rapporteur for the Law of the Sea, M. François, declared before the International Law Commission that

the provisions that later became art. 4 in the Convention were "concerned with the exceptional cases in which a State, because of its deeply indented coast, was allowed the special privilege ... of drawing straight baselines as an artificial substitute for the normal baseline" (26th meeting of the Commission, July 2, 1954). Since no one is obliged to take advantage of a special privilege if he does not want to, it is clear that not even states that have adhered to the Convention are bound to apply article 4. What rules, then, are to be applied by a state that does not wish to apply art. 4? The answer must be that a state that has not adhered to the Convention should apply general rules of international law, and a state that has adhered to it should apply the other provisions of the Convention, which, as a matter of fact, are to a large degree in accord with international law.

In its draft the Commission, presumably under the influence of the opinion of the International Court concerning the unique character of the Norwegian coast and the exceptional system of baselines that was occasioned thereby, had furnished the article that later became art. 4 of the Convention with the title "Straight Baselines". Although the title was dropped in the Convention adopted at the Geneva Conference in 1958, it appears to have given rise to the entirely erroneous conception that "straight baselines" is a technical or juridical term that denotes the baselines that are dealt with in art. 4 of the Convention and that this article is in some way determinative of the manner of drawing up "straight baselines". In a bizarre manner, this notion finds expression in art. 6 of the 1964 London Fisheries Convention, where it is declared that any straight baseline or bay-closing line drawn by a contracting party shall be in accordance with the rules of general international law and the Geneva Convention of 1958 on the territorial sea, etc. Now, bay-closing lines are, of course, straight baselines, well known as such long before anyone outside Scandinavia had heard of straight baselines at deeply indented coasts or of a skjaergaard. As I have already pointed out, the 1958 Geneva Convention on the territorial sea contains many provisions concerning straight baselines other than art. 4—above all, of course, art. 1, where it is declared that "the sovereignty of a State extends beyond its *land territory and its internal waters* to a belt of sea adjacent to its coast, described as the territorial sea" (my italics). How would it be possible for the territorial sea to lie beyond the internal waters of the state if the outer limits of the internal waters did not constitute baselines for the terri-

torial sea? In accordance with this fundamental and indeed self-evident rule, art. 3 and art. 6 of the Convention must be interpreted in such a way that the breadth of the territorial sea outside land territory is measured from the low-water line and, in the case of internal waters situated within the coastline, it is measured from straight baselines coinciding with the outer limits for these internal waters.[6] It is in this manner that the breadth of Sweden's territorial sea has been measured from ancient times until the present day.

This treatise is an amended version of a report written at the request of a committee of experts appointed by the Swedish Government in order to prepare legislative measures concerning the Swedish territorial waters. It was delivered to the committee in 1962. A Bill was laid before the Riksdag and in the spring of 1966 a statute concerning Sweden's territorial waters was adopted; it was promulgated on June 3, 1966. The statutes and ordinances mentioned in the treaties are of earlier date. In introducing the Bill, the Minister of Justice stated that it aimed at maintaining the traditional Swedish principles concerning the limits of internal waters and the territorial sea, and that these limits should be determined solely by geographical factors.

[6] Cf. Waldock on the "arcs-of-circles method" in XXVIII *The British Yearbook of International Law*, 1951, p. 134.