DISSENTING OPINION BY JUDGE AZEVEDO.

[*Translation.*]

1.—The purpose of the following observations is to explain the reasons which compel me, to my regret, to differ from certain of the grounds and certain of the findings of the Judgment.

Taking as a starting-point for considering the facts of this case the month of October 1944, it will be remembered that at that time Italy had been beaten and the Allies' advance in the Mediterranean gave them free play to follow after the Germans in the Mediterranean.

At this time the situation in the Balkans was very chaotic; there were intestinal disputes of great complexity and there was no unity among the different groups of resistance to the Axis, which were also fighting one another.

In Albania, one of these groups assured the direction of public affairs and contact with the Allies, mainly the British and Americans, who had military missions attached to this Provisional Government. But after the general elections in December 1945, relations between the Government, which the popular vote had confirmed, and the military missions were not always harmonious. However, steps were taken with a view to the establishment of diplomatic relations between the United Kingdom and Albania in May 1946, in spite of the postponement of Albania's admission to the United Nations as the result of the vote of certain countries, among them Great Britain.

2.—At the end of 1944, one of the chief problems of the Allies was the clearance of maritime routes in order to facilitate the advance of the naval forces; in the Adriatic this was mainly, if not entirely, the task of the British. The minesweeping forces were moving southward, and at the beginning of October they proceeded to clear the Corfu Channel while the Germans were making their last efforts by laying a minefield at Salonika as late as October 23rd.

The end of hostilities led to a need for intensifying work on opening up sea communications, and certain international bodies were created for that purpose.

Thus, in May 1945, the Central International Mine Clearance Board and the Mediterranean Mine Clearance Board (Medzon) were formed, and this was followed in July by the creation of the International Routeing and Reporting Authority.

The work of these various bodies led to the publication, beginning in October 1945, of two series of navigational documents, the Medri pamphlets and charts.

It should on the other hand be remembered that Albania knew of the existence of the Medri channel, No. 18/32, at any rate as shown in the charts and pamphlets supplied up to a certain date by the general who was head of the British military mission at Tirana.

It has been alleged that in October 1944 the United Kingdom had merely reswept a former German channel. However, it was only in May 1945 that the German charts were available, and these only gave the direction and not the boundaries of the channel. It must be said that subsequent verification has not shown that there was much difference between the two channels, though it must be admitted that the new channel keeps somewhat closer to the coast.

It is also noteworthy that the green line of the channel on almost each successive edition of the Medri charts was gradually moved. though the pamphlets retain the co-ordinates mentioned in the radiotelegram of November 7th, 1944, which is said to have been intercepted by chance. It is not clear why these changes were made, for there is no allusion to minesweepings after February 1945. It is further to be regretted that more exact details of the minesweeping had not been kept for the Court to see, though it is understandable that the urgency of the work led to its being regarded as more important than the preparation of reports.

It must be added that during the minesweeping operation on November 13th an error was noted in the position of the Albanian coastline South of Cape Kiephali on the Admiralty chart No. 206 ; this error was at once marked on the map.

3.—More than a year after the mineclearance operations, two British cruisers, coming from the North, passed through the Channel ; they were fired on by a coastal battery, but they were not hit by the projectiles and continued on their way towards Corfu.

A controversy arose on this subject ; it remained at first in the legal sphere. It was interrupted between June 21st and the third British note on August 2nd. However, relations between the two countries did not improve. Albania considered even the United Kingdom to be an ally, or at least a faithful friend of a neighbouring nation which had announced to the United Nations its intention to claim a part of Albanian territory.

But, in reply to the United Kingdom's assertion of a right of innocent passage, Albania had said that she was opposed to the passage of any vessel through the Corfu Channel without previous request and without her authorization. Furthermore, on May 17th, 1946, Albania informed the United Kingdom and certain other

countries at the same time that its Government prohibited the passage under the conditions mentioned above.

Briefly, the United Kingdom was not content with a platonic attitude and with mere reservations. Although the commander of the naval forces had not replied to the shots on May 15th as he might have done in legitimate defence, the United Kingdom took energetic action as soon as the strange prohibition was made known.

It should be noted that Greece, which was the country most concerned in free navigation in a channel which led chiefly to its ports and to waters over which it had rights, had preferred the course of keeping away from the passage so as to avoid increasing the frontier incidents.

Great Britain had given a similar order, but it was cancelled, at first, on August 21st, and was then limited so as to allow of a passage if it should be found necessary. Another change resulted from the Admiralty telegrams of September 15th and 22nd ; though indirectly, they invited the Commander of the Mediterranean Fleet to try to make a passage through the North Corfu Channel, even if it was not necessary.

The last words in the previous British note of August 2nd was a threat to return fire. How could a test be made of a change of attitude of the party to whom this challenge was directed ? In order to ascertain whether the Albanian authorities had acquired a certain standard of diplomatic conduct, they were to be warned of the experiment, at any rate so that they might understand the steps taken expressly to give the appearance of a friendly passage, such as the direction in which guns were to be trained, etc.

4.—The autumn cruise of the Mediterranean Fleet was ending. As early as August 15th, the commander had arranged the programme which was to terminate with an assembly of all the units at Argostoli on October 23rd ; this programme had therefore to be changed, in order that four of the ships might pass through the Channel.

The result of this experiment was most lamentable ; the explosion of two mines led to the practical destruction of one destroyer, which had to be abandoned, and serious damage to another, besides killing 44 men and wounding 42.

In regard to the circumstances of this passage, a certain number of divergencies have been gradually smoothed out, after explanations and verifications, and still more after the correction of a number of errors some of which were rather serious. Even the logs, which are universally considered trustworthy, contained some serious inaccuracies.

In regard to the spot where the accidents occurred, there were errors which led to discussion, and in regard to the time of the second explosion, there were various data which required additional information before they could be reconciled. One last circumstance

must be noted : the order to change course in front of Denta Point was given a little late, and this led to a departure from the axis of the Channel and a closer approach to the coast.

The combination of all these errors, and of other circumstances already referred to, would have left a residuum of serious doubts if one fact had not been incontestable and if the details could have obscured the main picture. We are therefore compelled to admit that the two explosions occurred within the limits of the Channel. But we cannot be sure that at that time Albania had all the information necessary for reaching the same conclusion.

5.—Once certainty was arrived at in regard to the damage —which is the first element to be considered—it is necessary to ascertain the fact that produced the damage by determining the indispensable link of causation between antecedent and consequence, so that the two may not merely be connected in time by a relation of simple contiguity.

What caused the damage in this case ? It is to be observed, first, that the Germans had already laid some mines ; on the other hand, the view of the Court's Experts must be accepted that a sweep of moored mines, when properly executed, gives an assurance that the mines were cleared 100 %. For technical reasons the hypothesis that the mines were laid by submarines or by aeroplanes, or that they were magnetic mines, had to be abandoned. One must also reject the hypothesis that they were floating mines, owing to the striking coincidence of the two explosions occurring practically in the same circumstances of time and place, without these facts being attenuated by the circumstance that other vessels passed through without injury.

Lastly, eloquent evidence was provided by the nature of the damage, showing considerable violence, as is definitely proved by the documents filed in the case, although we do not know what explosive charge was used in the Italian mines which were employed in the enemy minefields.

We have thus eliminated all other possibilities than the explanation that a minefield was laid after the end of enemy action : we thus succeed, by a process of elimination, in isolating a single antecedent, which is thus transformed into a veritable cause, according to the classical rules of JOHN STUART MILL.

This solution is impressive in itself. It was decisively supported by the discovery of a new minefield on November 13th, 1946.

However, while admitting, at the last, that a new minefield was laid, Albania only changed her position ; for she still denies that it was these mines that caused the damage. She demands, in fact, that it shall be proved that the minefield was laid before October 22nd, and she puts forward the hypothesis that they were

only laid after the events in order to make difficulties for the coastal State.

But, if the laying of a minefield in time of peace is almost inconceivable, the Albanian suggestion would involve the successive laying of two minefields at short intervals, and that would be even more extraordinary.

6.—When one has to appreciate the unlawful character of the act causing the damage, one is obliged to take into account certain considerations by which a judge must be guided in this connexion and also in the problem relating to imputability, which is so closely linked to it. This preliminary statement seems to be called for when one is taking a different road to arrive at the same goal; because in such a case a previous exposition of a definitely doctrinal character becomes unavoidable.

For instance, the Parties strongly emphasized the necessity of demonstrating, in this case, the existence of a breach of an international obligation. That notion is of such importance that many writers have accorded it the foremost place in a theory of responsibility, now in such high favour.

7.—But this formula, though so greatly lauded by its adherents, does not help to eliminate difficulties which are also encountered in municipal law.

Though operating solely on a limited plane, such as the infraction of a rule of positive law, this doctrine seeks to claim advantages which could only be gained by the application of another principle. Thus, the divergencies as to the necessity of specific clauses concerning preexisting obligations have nothing in common with the parallel action of another principle which makes, or does not make, imputability conditional on the moral element of culpability.

It follows that the doctrine of a breach of international obligations can only claim to be regarded as objective by a confusion of terms, except in so far as it reinforces its basic principle by another principle, involving the exclusion of the notion of *culpa*.

But the fact that the doctrine cannot derive support from the latter element is proved by the fact that its champions are themselves divided into three different groups: one which does not discard the requirement of *culpa*, one which sees no need for that requirement; and a third which maintains both possibilities, according as international law, in a given case, does or does not require recourse to the notion of *culpa* (omission, indirect responsibility, etc.).

The weak point is found in the very core of this theory, i.e., in the foremost place accorded to the nature of the violation. The result is a restriction of the practical application of responsibility.

In endeavouring to judge of the conduct of States, this conception leads to an alternative, towards two opposing tendencies: either definite obligations must be laid down, or on the contrary a general line of conduct without precise marks must be admitted. And the choice between these two forces of expansion or contraction may be fatal to the doctrine itself.

If, for instance, it was required that the violation of an obligation shall be previously established in each case, the drawing up of a complete catalogue of cases of responsibility becomes inevitable. But this would correspond to a less advanced phase, the limitative enumeration of the sources of delicts and quasi-delicts, in accordance with the general tradition of Roman law. We should then be approaching the criminal law and end by accepting the principle *nullum crimen sine lege*.

But if, on the other hand, we prefer to abandon this rigidity, we may expose ourselves to another danger. Setting aside conventions and custom, and accepting the influence of general principles of law, we lose all control and are unable to stop halfway. We are compelled to go as far as the fundamental trilogy and to establish civil responsibility by the simple violation of *neminem lædere*, or else to draw, arbitrarily, precise corollaries from vague principles.

At this point, the new doctrine will have lost all purpose and will collapse.

8.—This criticism, which indeed is well known (see ROBERTO AGO, *Recueil des Cours*, Vol. 68, p. 483, GEORGES SCELLE, *Cours de Droit international*, publ. Paris, 1948, p. 912), may continue on the same footing if we examine in detail the pre-existence of a duty, disregard of which must involve responsibility, pecuniary or moral.

We observe first that the determination of these positive international obligations as sources of responsibility leads to difficulties which are not easy to overcome, especially when a judge is faced with a new case, not clearly foreseen.

If there is no convention or custom directly governing the question, must the judge pronounce a *non liquet* and thus hamper all progress in the theory of responsibility? Custom is made up of recognized precedents, and we must not prevent the formation of new precedents; an international lawsuit may give opportunities for such formation and for putting an end to uncertainties that previously prevailed.

9.—The existence of a conventional rule is not enough to dispose of the difficulties, and the present case is an eloquent

example of the need for departure from a very rigid rule. The facts considered are not in accord with any known precedents; there is no custom that can be relied on, nor can the difficulty be overcome by reference to a convention.

It is interesting to note that the United Kingdom did not merely invoke Hague Convention No. VIII of 1907, but recognized that it was also necessary to rely on general principles of international law and even on simple reasons of humanity.

For, indeed, the convention in question is not really applicable in this case, unless by an interpretation which would be carrying the method of analogy to an extreme limit. It had to be pointed out that it is declaratory, which would be equivalent to regarding it as superfluous. According to its text, the convention relates only to war and not to peace time; and it only deals with the direct laying of mines and not with their laying by a third party. Albania was not a signatory and never acceded to the convention.

Nevertheless, Albania admits strictly that it is forbidden to lay mines in peace time, so that it is sufficient to argue *a fortiori*.

But in spite of repeated assertions to this effect, it was at one moment put forward in Court that it was for the author of the minelaying, and not for a third party who learnt of it, to give the notification, so that if the latter party failed to do so he would not be disregarding an international obligation.

It is true on the other hand that an agreement between the parties on the facts is valid, even though an international court, having more freedom in regard to evidence than a municipal judge, might make reservations; such an agreement would be quite inadmissible in regard to the law to be applied.

Thus, even if an accession by Albania to the convention in question might certainly be considered as reasonable, this accession could not retroactively render unlawful an act already accomplished.

10.—The limitation of responsibility to the contractual sphere is also in line with the claim which has already been mentioned: that this doctrine abolishes the subjective element in responsibility; i.e., the non-execution of a contractual obligation connotes, by itself, the existence of *culpa*, so that a debtor can only clear himself if he can prove the existence of an external cause; yet one may still consider that *culpa* itself is absent.

But that is not the right road. We must re-establish in international law the two sources which are essentially one: contractual *culpa* and delictual *culpa*, even if we continue to distinguish, in both sectors, between cases of conduct definitely indicated in

advance and cases depending simply on a general rule of prudence (HENRI and LÉON MAZEAUD, *Traité de la Resp. civile*, Paris, 1948).

Attempts to reconcile these two criteria—that of precise rules and that of a general standard of conduct—will never succeed, as became evident at the Hague Conference in 1930, in spite of the interminable discussions which took place in the Third Committee.

Codes of obligations make no attempt to enumerate prejudicial acts ; but it must be recognized that men are subject to a standard of conduct and are responsible if it is disregarded. In the same way, States must respect a certain level of conduct among themselves, determined by the conditions of international life at any particular period of history.

Even in the absence of any convention one could not admit that such an act as secret minelaying in time of peace does not involve the responsibility of the State concerned, for it is an abnormal and extraordinary act which would even constitute a crime when a world criminal jurisdiction has been organized. The community could not continue to exist if an act so definitely characteristic of criminality—whatever may be its conventional definition—were to go unpunished.

It would constitute a formal infringement resulting from the actual danger, and any country could demand the condemnation of the author of such an act, dangerous to shipping, even if it could not claim reparation for damage actually sustained. At the very least, in order to defend the interests virtually endangered, the judgment should order the clearance of the mines at the cost of the author, just as in domestic law a judge would order the demolition of a wall built in the wrong place.

11.—Again, one must take account of the subjective element, even if one is disposed to push international responsibility to the point of risk by giving it a truly objective character.

It is indisputable that a condemnation founded on moral elements of culpability, coexisting with the breach of an obligation, would be more in accordance with the promptings of man's conscience, and the conscience of humanity.

The notion of *culpa* is always changing and undergoing a slow process of evolution ; moving away from the classical elements of imprudence and negligence, it tends to draw nearer to the system of objective responsibility ; and this has led certain present-day authors to deny that *culpa* is definitely separate, in regard to a theory based solely on risk. By departing from the notions of

choice and of vigilance, we arrive, in practice, at a fusion of the solutions suggested by contractual *culpa* and delictual *culpa*.

And so, without prejudice to the maintenance of the traditional import of the word *culpa* and to avoid the difficulty of proving a subjective element, an endeavour has been made to establish presumptions that would simply shift the burden of proof as in the theory of bailment in which a mere negative attitude—a simple proof of absence of *culpa* on the part of a bailee—is not sufficient. The victim has only to prove damage and the chain of causation ; and that is enough to involve responsibility, unless the defendant can prove *culpa* in a third party, or in the victim, or *force majeure ;* only these can relieve him from responsibility.

This tendency has already invaded administrative law (notion of *faute de service*) and *a fortiori* must be accepted in international law, in which objective responsibility is much more readily admitted than in private law.

Accordingly, on the subject of territorial seas, even if a State is not bound to remove natural difficulties due to the accidents of geography, it is contended that it must have regard to what relates to human intervention, e.g., the maintenance of lighthouses, save in the exceptional cases mentioned above. On the other hand, it is for the defendant to show that the burden of proof has been shifted.

In spite of some doctrinal remarks in the opposite sense, the Italian Court of Cassation, reversing the decision of the Savona Court in its judgment of December 19th, 1906, held the State to be responsible for the imperfect functioning of the lights which it provides for shipping (*Rev. int. de Dr. marit.*, 1907, pp. 466 and 711).

12.—As regards imputability, in the present case one must begin by considering the hypothesis of a deliberate action, inspired by malicious intent, though it must be emphasized at the outset that, in spite of the gravity of the offence, it is not the penal law which is being applied.

It often happens in municipal law that a judge in a civil case has to find facts which are also of a criminal nature, without imposing penalties ; this accounts for the anxiety of legislators to reconcile the action of parallel tribunals, the criminal factor always prevailing over the civil factor. In the sphere of international law, there is no danger of encountering this contradiction.

Since the mines could not have been spontaneously produced, they must have been laid either by the Parties, alone or with the

help of others, or by other States acting on their own initiative and for purposes favourable or unfavourable to the Parties.

The United Kingdom accused Albania of having laid the mines and has never really abandoned this hypothesis. On the other hand, Albania at times made vague insinuations against the United Kingdom, but at the last moment abandoned any accusation of that nature.

The suggestion that the United Kingdom laid the mines, put forward without much conviction, was devoid of substance.

Next we have the suggestion, often made, that the mines were laid by a third State, an enemy of Albania which was trying to involve her in difficulties with a great Power.

This insinuation cannot find any explanation that satisfies the most modest requirements of common sense. Even if it be taken in a concrete way as referring to a country which was an enemy or adversary of Albania, the insinuation is no more comprehensible. There is not a single indication of the sort ; not the slightest rumour. But on the contrary, counter-indications such as the British supervision of the squadron of that country and the moral impossibility that that country should desire to cause serious damage to an ally or friend.

The imputation that the mines were laid by Albania would also, in principle, be hard to accept, although despair, or the desire for vengeance on the part of inexperienced persons, groups or peoples may lead them to forget their own interests and to adopt desperate methods, if such methods seem to them the only way of securing respect for measures which they regard themselves as free to adopt. Daily struggles against neighbours would certainly tend to increase the desire to take such action.

An act that endangered the shipping of the whole world, merchant and war vessels, friends or enemies, and that might affect nationals, would almost resemble self-mutilation. Perhaps, in view of the facts, the danger to coastal shipping or fishing boats would not be great, for only ships of 12 feet draught could hit the mines; but all the possibilities of every-day life can never be imagined.

13.—We must however reject the theory that Albania laid the mines herself because she not only lacked the means but also th mines. In the Security Council it was not believed that she could have done so ; the majority of the Members thought that the mines

had been laid with Albania's knowledge.

But the impossibility of laying the mines would not exclude all consideration of culpable intention, for the act may have been carried out by another country bound by ties of friendship to the Parties and acting as mandatory.

True, it is very difficult to accept the theory that a mandator can be responsible unless the mandatory is identified, especially when the number of possible authors of the act is extremely limited.

Yet, such a suggestion was made as against Albania and during the proceedings was transformed into an accusation : first, in the Reply, in the form of a question, then before the plenary Court with detailed particulars.

14.—Thus, it was alleged that the mines had been laid by a third State, not on its own initiative but in the interest of Albania.

Towards the end of the hearings, the United Kingdom considered a number of possibilities, but none of them would justify us in thinking that in doing so it admitted, even conditionally, that Albania was exculpated by the fact that her neighbours had laid the mines without her request, her connivance, or even her knowledge.

The situation of a country regarded as the *protégé* of another, and in its debt, owing to treaties and agreements, would not suffice to interchange the parts played by them if it were suggested that the mines were laid to serve the interest of the nation which, although the weaker State, would in this operation continue to be the mandator and never the mandatory.

A radical change in the presentation of the facts was brought about by the evidence of a former naval officer who emigrated in October 1947. He alleged that the mines had been loaded in a certain port on two small minesweeping vessels which were sent to Corfu a few days before October 22nd, 1946. This story, considered *in abstracto*, would be very relevant to the facts calling for explanation ; for GY mines are not a form of merchandise that could be ordinarily transported in the neighbourhood of Corfu.

However, the substance of the documents in which this accusation was made was brought to the knowledge of the third State, and the latter was content to publish a communiqué the text of which was filed with the Court by Albania. This downright refusal was not accepted by the United Kingdom, which proceeded to furnish new arguments and evidence in support of the witness's statement ; this made Albania periodically produce a number of other documents.

Of course, a State which abstains from intervening in a case and thus escapes the possibility of a decision adverse to itself could not thereby claim to be declared innocent ; nor even to enjoy a privileged position vis-à-vis the parties investing it with a right of veto in regard to the examination of documents which were in truth documents of the accused party.

True, the assertions made by States parties to the case or even by third States must be accepted whether supported by documents or not, provided that there is no proof to the contrary, for such assertions do not enjoy absolute immunity ; if they possessed an intangible character, international justice could not advance.

For instance, it must be considered regrettable that the existence of certain vessels was denied, though afterwards it was acknowledged that they existed, though with different names.

The introduction of such subtle denials is calculated to weaken the strongest arguments. A complete denial is always preferable to a series of statements giving partial explanations with a risk of contradictions ; as for instance, the evidence that certain ships were not in a condition to navigate at a particular date.

Moreover, the searching criticism to which the ex-officer's statement was subjected brought out, on the one hand, the improbability of almost all its elements : the contradiction between the details related and the ordinary data omitted ; and on the other hand the general explanation of the operation, coinciding with the possibilities of its accomplishment.

We are bound in any case to recognize the inadequacy of a proof based almost entirely on one witness whose statements were inadequate on many main points.

Other grounds for the rejection of this version were for example the insufficiency of evidence as to the possession of GY mines by the Power supposed to have been the mandatory. The statement made regarding the swastika mark on the mines is also not of a decisive character, because the Germans themselves may have made use of this mark, which was not as a fact mentioned in the reports of the British authorities and was only revealed by a photograph, without convincing evidence in its support.

Finally, it must be observed that a State with great experience would not likely risk provoking a *casus belli* with a great Power ; even if it felt resentment against the latter, it would have chosen more acceptable methods than that of allowing itself to be used for such a serious purpose, so easily discovered, for hundreds of persons would have been in the secret ; and advantage there would have been none, as is shown from the allusions of the Parties to the old saying *cui prodest*.

15.—And even if the participation of a third country was evident, the condemnation of the respondent could still not be founded on that fact.

A municipal court has jurisdiction over every citizen and can declare that a certain act has been committed by a third party, a stranger to the proceedings, though it is bound to act with caution and must always reserve the economic and moral rights of such a third party, as the decision will not affect him except in the case of complicity.

But an international judge cannot act in the same way ; for his jurisdiction is based on the will of the parties, either directly or indirectly, in virtue of Article 36 of the Court's Statute ; this renders a mere allusion to the acts of a third State inadmissible. A country which is not a party to the case and has not been summoned remains unaffected not only by the judgment itself, but by an incidental mention of it as mandatory or as performing an unlawful act.

No doubt the United Kingdom's position was difficult, for she could not, either at the beginning or during the case, bring before the Court a country which had not accepted the Optional Clause and was not at all in the same position as Albania, who was bound by the Security Council's decision to accept the Court's jurisdiction. It was also useless to suggest a special agreement to the third State, in the course of the procedure, especially if the said State, having obtained communication of the documents, took no steps to intervene in the proceedings.

In any case, the Court could not extend the limits of its jurisdiction, nor could it do so implicitly by expressing opinions *in concreto* regarding the conduct of a third State, no matter in what sense.

16.—Accordingly, after eliminating all the conceivable hypotheses, we are obliged to conclude that the laying of the mines was the work of an unknown author. But Albania could nevertheless have been aware of the existence of the mines, and a State which is informed of a prejudicial act committed by another and does nothing to prevent it incurs the same responsibility on the ground of the unlawful act, without any attenuation ; even if it was unable to prevent the dangerous consequences it was none the less obliged to make known the danger.

But how can we satisfy ourselves as to a fact which cannot be directly verified ?

A condemnation, even to the death penalty, may be well-founded on indirect evidence and may nevertheless have the same value as a judgment by a court which has founded its conviction on the evidence of witnesses.

It would be going too far for an international court to insist on direct and visual evidence and to refuse to admit, after reflection, a reasonable amount of human presumptions with a

view to reaching that state of moral, human certainty with which, despite the risk of occasional errors, a court of justice must be content.

17.—Certain other presumptions have been raised against Albania which are definite, though not of equal force. First, her passive attitude after the discovery of the mines, which ought to have led her to protest energetically. But she declared that these facts had nothing to do with her, and her immediate and reiterated complaints to the U.N.O. were a reasonable counter-indication; those who have something to fear do not generally ask help from the authorities.

The absence of signals on October 22nd may also be explained by the uselessness of a warning which had already been rejected in advance by the note of August 2nd.

In the same way, her opposition to the sweeping cannot be exaggerated into fear of discovery of the *corpus delicti*, Albania having raised objections only to protect her sovereignty over her territorial waters.

Here we come to an argument which the Parties had used for directly contrary purposes: the possibility that Albania might get rid of the mines before the operation of November 13th. But such a hypothesis is not admissible, for, besides the great uproar caused by the events of October 22nd throughout the whole world there would certainly have been the discreet watchfulness of the United Kingdom. Besides, the operation would have been much more difficult than the laying of mines, even if the exact number to be swept were exactly known.

18.—There are however other indications which can be regarded as definite, certain and concordant.

Thus, there is the possibility of the minelaying having inevitably been seen from the land; the Experts' last report has much increased the probability of this, whether there was a look-out post at Denta Point at the time, or even if there was not.

On the other hand, Albania claimed to prohibit strictly any passage of a foreign ship in the zone where the minefield was; and it might be admitted that the incident of May 15th was, by anticipation, an application of the doctrine publicly announced a few days afterwards, and applicable even to merchant ships, e.g., the U.N.R.R.A. tug. The application of the United States to send destroyers to take away its military mission which was leaving Albania was made the subject of a complaint by the latter to the U.N.O.

The existence of secret military orders, not communicated to the Court, might be considered as supporting this view; so might also the somewhat inexplicable remark in the note of

October 29th: "The Albanian Government will take no responsibility if this operation is carried out in its territorial waters."

Strictly speaking, it might be held that under ordinary circumstances, the Albanian Government could not have had no part in the laying of the mines, or at any rate could not have been unaware of the fact.

In spite of all, though the conclusions of the Expert enquiry covered a number of hypotheses, the author, the time and the method of the minelaying continue to be unknown.

The absence of any such explanations makes it very difficult to express a definite opinion regarding Albania's cognizance of facts of such uncertainty; we cannot therefore be regarded as overprudent if we hesitate to declare that in this case Albania manifestly acted in bad faith.

The existence of similar doubts was revealed in the Security Council when that body accepted the proposal of the French representative to replace the words "with the knowledge" by the words "without the knowledge"; although this was not a judicial decision, the alteration was something more than mere courtesy (122nd Meeting—March 25th, 1947, p. 596).

19.—Moreover, a declaration of such gravity is in no way essential for the success of a claim of an exclusively pecuniary character.

Once the inadequacy of the evidence enables us to refrain from stating that Albania was indisputably cognizant of the laying of the mines, the same rule of relativity applies as regards a statement that Albania was unaware of the fact. True, it is not possible to prove it, but nevertheless one can examine whether Albania ought to or could have had cognizance of the matter.

Even if it is not possible to clear up the mystery and to discover the authors of the act, or those who were aware of it but did not warn shipping, one must not give up hope of compensating the victim without having first considered every other method of giving him satisfaction, except on the ground of an intended wrong, first on the ground of unintentional *culpa* and finally on the ground of presumed or merely objective responsibility.

The victim retains the right to submit a claim against one only of the responsible parties, *in solidum*, in accordance with the choice which is always left to the discretion of the victim, in the purely economic field; whereas a criminal judge cannot, in principle, pronounce an accomplice or a principal guilty without at the same time establishing the guilt of the main author or the actual perpetrator of the offence.

20.—In examining the case from the standpoint of *culpa*, whether by action or omission, one is struck in the first place by the weakness

of the Albanian defences along a deserted coastline many kilometres in length, with a few centres of population which are unprovided with easy means of communication.

A long and detailed discussion took place on the efficiency of the coastguard and the possibility of minelaying being unobserved by the population and especially by the guards. Much was said of the facility of such an operation, the methods and the time taken ; but it would be difficult to reconstitute all the details of an event which might have taken place on an unknown day, or rather night.

The Experts endeavoured to clear up matters by trying to indicate conditions similar to those that might have been found in the district at that time ; but in the realm of the conditional there is always a risk of error.

To sum up, the slender arguments of the defence have in no way excluded the fact of a jealous and mistrustful watch over all that happened in the Channel ; events of minor importance were the subject of reports and international denunciation. Minelaying, however rapidly done, and however skilful the crew, would very probably have been observed.

It has been suggested on the other hand that the minelaying might have been carried out by a ruse, with all lights on. But that would surely have attracted attention ; on October 22nd the lights of the vessels were followed for a long time.

Even if we exclude all possibility for Albania to increase her defences in men or material, it ought to have been recognized that Albania, in any case, failed to place look-out posts at the spots considered most suitable when the coast defences were organized about May 1946. Albania must therefore bear the consequences. The Experts' last report made clear to the Court the accessibility of Denta Point from the sea, at any rate, and thus did away with the reasons for the absence of the look-outs which has been commented on.

The assertion by Albania that the watch was insufficient or ineffective or badly kept goes against herself, even if the purpose of this watch was something quite different, namely to stop incursions by neighbours. It should be noted, also, that this aim would be incompatible with the prohibition of passage to all other countries ; the general character of this announcement has certainly aggravated Albania's responsibility towards third States.

In this connexion, we must not risk contradicting ourselves ; the fact that the watch was normal, or even exceptional, was justly invoked as an argument favourable to the existence of *culpa*, i.e., cognizance of the mines ; but this circumstance would also serve as a proof of mere negligence if the presumptions were not sufficiently strong to warrant a more serious charge.

21.—This being so, the possibility of negligence on the part of the coastal Power, involving that Power's responsibility, cannot be set aside ; this responsibility would even be increased if we consider the facts in the light of the new principles concerning *culpa* referred to above.

Thus, for example, though the laying of the mines might be regarded as an event that could not be foreseen by the coastal State, it would certainly not fulfil the other condition that is requisite to comply with the description of *force majeure* or an act of God, that of inevitability.

It matters little that the guard maintained may have had other objects in view, once it is admitted that it would have sufficed to discover the operation and to drive off the perpetrators by the same means which were used with the object of driving off the British ships on May 15th, namely by firing with the guns facing the spot where the minefields were discovered.

No doubt Albania might have put forward one solid argument when confronted with the theory of *culpa* or even of risk : the fact that she had been excluded from the work of mineclearance in her territorial waters when she was refused a seat on the mineclearance boards and this security task was transferred to others. That was the ground for the vote of the Syrian representative in the Security Council, refusing to admit the responsibility of Albania which seven other Members had admitted. He stated that, in the particular case, the duty that every sovereign State had to possess the means and the capacity to protect its territory and to make its channels of communication secure was non-existent owing to the war.

But the case was presented to the Court under a different aspect, for Albania agreed that a new minefield had been laid. There was no longer a responsibility for failing to sweep mines—a task from which Albania had been excluded— but for the laying of a new minefield at a time when Albania was exercising full sovereignty and was herself guarding her own coastline.

Accordingly, in this case, there is no need to speak of risk ; the presumption of *culpa* is sufficient and is quite in its place in a case of recognized and admitted vigilance. If looked at *in concreto* or from the average standpoint of *bona res publica* the conclusion is the same.

The foregoing considerations lead us to conclude, although this is a case in which the author is uncertain, that, in international law, Albania is responsible.

22.—It is of small importance that this is a case of a quasi-delict ; for the argument *majus ad minus* would fully justify a conclusion

(quite in conformity with the *litis contestatio*, or rather special agreement) in which the purpose of the claim is compensation; this becomes even clearer when we compare it with the counter-claim.

No misinterpretation of the *causa petendi* could cause it to be given another legal name than that proposed by the Parties. The Court might give this name to the same facts as have been alleged and proved in these proceedings, either to reach the same conclusion as the Parties have proposed or, for instance, to reduce the amount of damages or of the penalty. Only if it kept to a form more rigid than that of the *legis actiones*, or similar system now abandoned, could the Court think of prohibiting such a solution.

The principles which, at this moment, govern the system of every procedure could only be interfered with if the applicant laid down, as a *conditio sine qua non* for the success of his suit, a finding of criminal intent. In that case, the *exceptio res judicata* would not operate in regard to a new claim founded exclusively on *culpa*.

In this case, on the contrary, Great Britain has not failed to allude to the doctrine of simple risk and has even claimed its application.

23.—If the existence of a culpable intention had been admitted, there would be no room for justification or attenuating circumstances; such a brutal act could not be justified on any pretext.

The disproportion observable in the reaction would persist even if something like a praeterintentional delict were involved, e.g., the author could not expect that the vessels would pass that way perhaps because he thought the minefield was outside the swept channel. Nor can much attention be paid to the fact that the mines would have been laid to damage particular individuals, while the risk of damage to a third party existed, as would be the case. Criminal law does not admit of a reduction of sentence in the case of *aberratio ictus*.

24.—But whether *culpa* or risk is the criterion, the conduct of the victim can be taken into account by reducing the degree of responsibility and consequently apportioning the damages.

Needless to say, damages are not in any way a penalty and cannot therefore be increased or diminished according as the conduct is estimated as *gravissima* or *levissima culpa*. Courts of justice always arrange to examine the *culpa in concreto*, in estimating the loss to be made good.

International justice also is subject to this moral influence which GEORGES RIPERT mentions several times.

As J. PERSONNAZ points out (*La Réparation du Préjudice au Droit international public*, Paris, 1938, pp. 106 *et sqq.*), international tribunals have often taken into consideration the degree of gravity of offences, negligence or the *culpa* of the victim, and have modified the damages accordingly. Arbitrators have several times made very clear declarations of principle on the point : e.g., the British Commissioner in the *Alabama* case (Rec. LAPRADELLE and POLITIS, II, 825), who considered that reparation should not only be proportionate to the loss caused by the *culpa*, but also to the gravity of the *culpa* itself ; or the arbiter in the Delagoa Bay case, who held that the *culpa* of the victim justified a reduction of the compensation (LA FONTAINE, *Pasicr. int.*, p. 307).

In this case, several circumstances mentioned above or recorded in the counter-claim might, if the case arose, reduce, to a certain extent, the amount of the reparation. This would no doubt be incompatible with a condemnation based on the wrongfulness of the act, but it would be applicable to any one guilty of an act in the nature of an error.

25.—As regards the assessment of the reparation, it must be remembered that the application was replaced by a kind of novation in the Special Agreement, which modified the normal course of procedure.

It is true that a renunciation cannot be presumed ; but in a case of novation, an express reservation must always be made, as in the case of a guarantee for a debt.

Moreover, the United Kingdom knew the two possible solutions exactly : the solution which it had proposed in the Security Council : a simple declaration of responsibility, reserving a subsequent settlement ; and that which it preferred in bringing the matter before the Court : a claim for a fixed sum in damages. Now, when drafting the Special Agreement, Great Britain chose the first method, and therefore cannot claim to come back to the second, and to rely on a mental reservation supported by vague references in the other documents, and set up again, at the last moment, by a definite allusion to the assessment of damages.

It is not exactly a question of competence, but of determining the content of the *petitum*.

A comparison between the claims set out in the Special Agreement also shows that, in both cases, a reference was made to responsibility and to reparation, only in order to point out the difference in their nature. The United Kingdom had in view only a monetary reparation, and Albania a different reparation of a purely moral character. Thus, the clause was not purposeless, but the giving

of a definite indication was deliberately avoided, both as regards the nature of the moral satisfaction, and as regards the amount of the material compensation.

Moreover, if any doubt subsisted, it would not be dispelled by an interpretation unfavourable to the debtor and in favour of the negligent creditor.

26.—One might also emphasize the necessity of adding something to the declaration of responsibility, in order to avoid an interpretation that would render the Special Agreement ineffective. In other words, an endeavour would be made to give practical effect to the clauses adopted by the Parties.

But it must be pointed out that the Special Agreement consists of a simultaneous filing of two claims, mutually submitted by the Parties, and of a purely declaratory nature.

In municipal law, awards are as a general rule executed by compulsion, and formerly a decision void of such effect would not be admitted—*campana sine pistillo*. But as procedure has developed, the existence of purely declaratory awards has come to be admitted, especially in Germany and the United States: the applicant is content—for some reason—to have his right declared, without desiring that it shall subsequently be rendered effective; at the same time, however, he retains the right to bring another action of a purely executory nature: *actio de judicato*.

But what is exceptional in municipal law is normal in international law. Decisions against sovereign States were not directly executory, and were founded only on their high moral value, calculated to secure a voluntary submission. It was the San Francisco Charter which first provided for giving effect to decisions of the International Court of Justice by a procedure *sui generis*, the extent of which will be determined in each case by the Security Council.

The adoption of a special agreement must not therefore be considered exceptional, or useless, or as involving merely the abandonment of a claim. Naturally, it presupposes mutual renunciations, limiting the effect of the Court's decision to the main fact of recognition of responsibility, and regarding essentially the purpose of international justice as being to declare the right.

Additional matters, such as the estimation of the loss and the method of payment, have been left by the Parties to other procedures, more favourable to their interests, and to be determined in the future.

27.—The origin of the counter-claim is Albania's contention in regard to passage through the North Corfu Channel. This claim concerns two different issues: the passage of a squadron through the Channel, and the subsequent minesweeping.

The fundamental nature of such a prohibition was certainly disavowed in the discussion in the Security Council ; and Albania asserts that she never intended to exclude merchant ships ; this would, however, involve a literal interpretation of the note, and even the incidents already mentioned.

After this withdrawal, it must still be considered whether the measure was lawful or not as regards warships.

The right of passage of foreign vessels through the territorial sea is founded on freedom of trade, which presupposes freedom of navigation as the principal means of its accomplishment. But an opposition between these two conceptions of freedom cannot be envisaged, even to justify the difference which certain writers proposed between a simple passage and an entry into ports. No doubt, any passage leads up to an entry into a port of some country. But it is undeniable that the two acts are treated differently, and involve greater or less restrictions on the riparian State. But this does not do away with the postulate that freedom of navigation flows from freedom of trade, a much wider economic concept.

From the time of the League of Nations, this problem has been of exceptional importance owing to the references to it in Articles 16 and 23 of the Covenant, and the setting up of the Committee on Communications and Transit, and the holding of the Conferences of Barcelona in 1921 and Geneva in 1923. The idea of the transit of merchandise is thus of special importance. In the present system, it is less important ; but it is undeniable that, since the San Francisco Charter, it has not been essentially modified.

But the position is quite different as regards the passage of warships, both as concerns the principle and, in many cases, its application.

No doubt, this transit is also founded on freedom of navigation ; but here the same means serves different ends. And in consequence we arrive at different conclusions. We must mistrust any hasty analogy, and reject explanations such as that of FAUCHILLE, who considered a navy as an accessory to a merchant fleet, just as in the days of corsairs and piracy.

28.—A number of writers hold that the right only amounts to what may be described as a tolerance, subject to regulations somewhat wider than those usually governing technical, health, and customs matters, and which are also applicable to merchant ships.

Others, however, favour the view that equality of treatment has to be accorded.

On the other hand, the United Kingdom, founding itself on Article 38 of the Court's Statute, has contended that custom prevails over doctrine, though it admits that this Article does not establish an order of precedence for the different sources of law.

But it is very doubtful whether a customary practice in this matter can be shown to exist, owing to the vagueness of the precedents. As in the case of possession, these uncertainties are a bar to the causative and confirmative action of time. And the mere lapse of time, according to customary law, does not suffice to establish a title by prescription : *in facultativis non datur præscriptio.*

A "lateral passage" through the narrow belt of territorial waters —as distinct from a passage through such waters on the way to or from the ports adjacent to them—is not a common occurrence even for merchant ships, and is exceedingly rare in the case of warships. Indeed, it may be said to arise only in canals or straits, a subject which will be examined separately. The notification of an intended visit to a port is not infrequently additional to the notification of a simple passage through territorial waters. Indeed, in the present case, we observe that, in the programme for the Mediterranean Fleet, separate notice of the intended movements was to be given, both to Greece and Egypt, while it was indicated that a simple visit to certain Egyptian ports might be paid by the Commander-in-Chief.

There would be no valid reason for imposing greater restrictions on the rights of the coastal State in the case of warships. It would of course be an abuse of this right if their passage were prohibited without proper reason, when no danger threatened, simply from a desire to injure, or even out of caprice or levity.

Permission to pass, something far more useful, which neutral countries almost invariably grant to warships in war time, has its origin mainly in the desire to be impartial towards belligerents and not to forbid acts which are harmless, on condition that they retain that character. The precarious nature of such permission is confirmed by the fact that, even in peace time, the passage of warships through certain straits in which transit is regulated by multilateral treaties is prohibited or limited.

In short, there are no significant or constant facts which could justify the assumption that States have agreed to recognize a customary right of freedom of passage for warships through the territorial sea. Thus, the vitalizing quality of repeated action, by means of which such a custom is established, is lacking.

The tendency towards freedom could not be admitted without reservation in the case of territorial waters, especially for defence reasons. Reference may be made to the extension of the rights of neutrals (*Annuaire de l'Instit. de Dr. int.*, Paris, 1910, pp. 37, 91, etc.), the creation by equidivision of adjacent or contiguous waters,

the protected zone under the Alcohol Laws, and the laws relating to oilfields (see BUSTAMANTE, *La Mer territoriale*, Paris, 1930, p. 156).

In its Opinion of December 11th, 1931, in the case concerning access or anchorage in the Port of Danzig of Polish war vessels, the Permanent Court of International Justice declined to admit an extensive interpretation of provisions—including those of the Treaty of Versailles—that were in derogation of general international law; it refused to read a right of free access and sojourn for warships into a clause which was only concerned with commercial traffic, imports and exports, matters which fall exclusively within the sphere of merchant shipping. And the Court declared in its finding that the Polish claim had not been established. (P.C.I.J., Series A./B. 43, pp. 145 *et sqq.*)

29.—The United Kingdom invoked the proceedings of the Hague Conference for the Codification of International Law; but in doing so, it was obliged to minimize a large part of the results of that Conference, on which Albania also relied.

Thus, the United Kingdom contended that the bases of discussion, approved by the Conference purely for the purposes of legal science, represented a sort of compromise, necessary for the future interpretation of the rule, and that, on the contrary, a simple observation, adopted at the last moment, had more weight than the "bases of discussion" to which it related. Whatever may be the justice of these conclusions, a study of the discussions and documents in the valuable Reports of that distinguished International Law Conference might lead to conclusions of a different character. The preliminary report, for instance, emphasized the confusion in the replies concerning existing law and those concerning *lex ferenda* (L.N., C.74, M.39, 1929, p. 7).

The first drafts prepared in 1926 by SCHÜCKING, former Judge at the Permanent Court, and an upholder of the right of free passage for warships, might leave doubts, when we compare Articles 7 and 12. The first of these reserves only the right of sojourn for warships, and Article 12 deals with all matters of passage (L.N., C.196, M.70, 1927, pp. 59, 62 and 72); the result of a second consultation of States by means of a questionnaire adopted by a Revision Committee, was the same (IX and X, L.N., C.74, M.39, 1929, p. 105). Only after further replies had been received was the clear difference between these two cases (bases 19 and 20) recognized (L.N., C.74, M.39, 1929, pp. 71 to 75). It was retained and accentuated during the discussion and approval of the draft by the Second Committee.

A study of all the replies to the two series of questions would not justify us in concluding, outright, in favour of equal treatment for both categories of ships. For very few States replied definitely in favour of that view.

For instance, there were not only two countries, Bulgaria and Latvia, that opposed the right of free passage of warships ; other States also expressed a similar opinion in their replies, or during the discussion. Great Britain felt it was necessary to destroy the radical and coherent attitude adopted by the United States at this Conference. Yet it is difficult to see how the written and spoken arguments of the American representatives, founded on the notion of menace put forward by ELIHU ROOT and upheld in the preliminary studies of the Harvard Law School, could be demolished by third parties, however excellent their arguments.

Great Britain's attitude was not very clear either : in the preliminary replies (doc. cit., pp. 67 and 74), Great Britain alluded to rules submitted to the Conference, the non-publication of which is regretted by GIDEL (*Dr. int. publ. de la Mer*, Paris, 1934, t. 3, p. 283) ; and in the discussion she asserted that the proposal for a mere tolerance, submitted by the United States, did not differ from the British proposal for the maintenance of the *status quo* (L.N., C.351, M.145 *b*, 1930, pp. 62-3). Such is the impression left in the minds of the writers who commented on the discussions at The Hague : e.g. BALDONI (*Il Mare territoriale*, Padova, 1934, p. 94, n. 1), and JAURÉGUIBERRY (*La Mer territoriale*, Paris, 1932, p. 92).

Differentiation between the two cases continued to be the basis of the Conference's work, and it reappears as a leitmotiv in the draft proposal ; the difference between the French and the English texts, though often referred to, was disregarded.

The rapporteur himself pointed out that Article 12, concerning the passage of warships, corresponded to what was generally recognized as the law at that time.

30.—Similarly, a study of the domestic laws of various States —although most of them make a distinction between simple passage, sojourn in territorial waters and entry into ports—does not convey an impression clearly in favour of freedom of passage for warships, even if a large margin is allowed for the always dangerous argument *a contrario sensu*.

To sum up, it is evident that all the arguments invoked are clouded in confusion, at any rate sufficiently to bar the recognition of a custom in accordance with traditional requirements.

In short, the passage of warships through territorial waters is subject to a precarious régime which may be modified, in a reasonable manner, by the coastal State.

It is a régime analogous to that adopted for air traffic, in which a passage over foreign territory, although more dangerous, is infinitely more necessary than a passage through a strip of terri-

torial sea of three miles. The tendency is to allow free passage for commercial aircraft, but to deny any such right to military planes, in regard to which the territorial State may act as it thinks fit.

31.—The terms of the basis of discussion approved at The Hague in 1930 also retain the reservation for exceptional circumstances, which is admitted by those who claim an actual right of passage for warships, or who place them on the same footing as merchant, ships. What may be an abuse in normal times is made lawful by circumstances.

Thus, insistence on authorization or prior notification, which is, in general, excluded from the text, would be justifiable in certain circumstances ; for instance, in a state of war, which in fact is a great handicap to the movements of merchant ships, as BRUEL has mentioned several times.

Then there are the cases of tension between neighbouring countries, to which GIDEL alludes, when frontier incidents are constantly occurring ; and these may well justify the action of a weaker State, alarmed by the territorial claims of another.

Similarly, absence of diplomatic relations must be recognized as sufficient ground for refusing leave of passage ; since this presupposes the existence of good relations. BUSTAMANTE has specially emphasized this point (*op. cit.*, para. 173). GIDEL supports him, in spite of the silence of the Hague Conference on this subject (*op. cit.*, p. 285).

The laws of certain countries only grant passage to countries at peace (France, October 29th, 1929, Art. 1), to ships of friendly countries (Bulgaria, November 4th, 1922, Art. 1), or even to vessels of recognized foreign Powers (Belgium, December 30th, 1923, Art. 2).

The United States established by proclamation a general prohibition of passage for French and English vessels, save in distress or with special permission, following on the rupture of diplomatic relations with France in 1793, and with England in 1815.

In the Landwarów-Kaisiadorys railway case, the Permanent Court of International Justice, in giving its Opinion of October 15th, 1931 (P.C.I.J., Series A./B. 42, pp. 108 *et sqq.*), took account of the existing abnormal nature of political relations between Poland and Lithuania in time of peace, having regard to the terms of the Barcelona Convention on the subject of the safety or vital interests of the countries which were bound to facilitate transit.

Belgian law (Art. 11) and Netherlands law (October 30th, 1909, Art. 14) allude to any other exceptional circumstance.

The United Kingdom stated that it would be willing to admit that certain events might prejudice what it regarded as an

undoubted customary right; but at any rate it refuses to admit that the coastal State should be the sole judge of the soundness of these reasons.

But the Belgian law (Art. 11) states definitely that the country entitled to benefit by the reservation is alone entitled to regulate its application; and the Italian law (May 28th, 1928, renewed in 1933) and that of Yugoslavia (June 20th, 1924) provided for abolition of the tolerance without reason given. BALDONI (*op. cit.*, p. 93) alludes to revocation *ad nutum*, and RÆSTAD (*La Mer territoriale*, 1913, p. 173) considers revocation as an unfriendly act, but not contrary to international law.

It does not matter that insistence on authorization is equivalent to prohibition; this is a consequence provided for in the laws that have been examined, in doctrine, and in Article 12 of the Hague draft. Regulation exists normally at all times, and it is opposed to the principle of exception, to which may be added previous permission; on the other hand, it would be useless to provide for modifications in abnormal circumstances.

Abuses may no doubt occur; but there are methods of judicial settlement of international disputes to overcome them.

In the present case, it is beyond dispute that Albania was not on friendly relations with her neighbours to the South, and that no diplomatic relations existed between her and Great Britain. But if Albania acted wrongly, it was a *fait accompli*, the withdrawal of which could only be sought by peaceful means.

Lastly, we need not concern ourselves with the form of the regulation; for it is not subject to any rule; only the Italian law (cit. Art. 9) indicates the method of publication. But if exception were taken to an anticipated application of the measure, an objection could only be made after the notification of the prohibition and its receipt. The same applies to the absence of grounds in the notification itself; for the grounds were made clear in the diplomatic correspondence, and were not disputed.

32.—Are the above conclusions affected by the fact that the territorial waters form part of a strait?

In the conflict between the interests of the community and those of special groups—a conflict which underlies maritime law—the balance has frequently wavered between argument and counter-argument: the controversy between *mare liberum* and *mare clausum* is not yet closed. And certain points have been left behind in the course of the evolution, such as the King's Chambers in the Stuart period, and, in our day, what are known as historic bays.

The predominance of the general interest weighs down the balance against the coastal State, when, by some geographical

accident, a part of its maritime territory constitutes a strait. For the advantage of the world as a whole, it has to suffer a sort of expropriation, for which no compensation is offered, but which is of course limited to what is essential for the public good. BRUEL speaks of an international mandate or of *negotiorum gestio*. (*International Straits*, Copenhagen—London, 1947, Vol. 1, p. 254 ; Vol. 2, p. 424.)

Law constitutes a system of adjustment, and in it motives are appraised by the same process within a single country and between different countries. As a result, there are frequent appeals from international law to the rules of private law, which are more precise and are technically very rigorous.

For instance, there has been much controversy in regard to this transfer of principles from the theory of rights in real property, and especially from the notion of servitudes. But the extension of their fundamental rules is not to be doubted. Take, for instance, the right of ownership ; it is only subject to limitations in cases of necessity (*enclave*, etc.). Consequently, the settlement of other cases—relating not only to the superfluous, but also to the useful—is left for agreement between the parties concerned. The field of exception, and consequently that of interpretation *civiliter uti*, still remains.

Similarly, one cannot with impunity restrict the rights of a State without adequate grounds, whether such rights are derived from the principle of sovereignty or not. The existence of public necessity cannot be deduced from the private interests of third States, whose requirements may be above the average—as has happened in history—but it must be founded on an impartial balancing of advantage and disadvantage in general, by which the burdens thrown upon the coastal State, by reason of a mere geographical accident, may be assessed.

33.—This shows the extreme importance of the problem of straits. Some writers consider that the wide differences between one strait and another prevent the adoption of any general rule. The situation of the chief straits and artificial channels is already governed by special conventions, and new measures will have to be framed to deal with cases that may be found to be of importance in the future. According to this theory, often referred to at The Hague, all other straits will be subject to the normal rules applicable to the territorial sea. Opposed to this is another rule, equally radical, that all straits are subject to common rules forming part of a general régime applicable to straits—a régime that is only supplemented by more detailed rules for individual straits in the more important cases.

The most reasonable solution is nearly always to be found in a middle course. The ideal would be the adoption of a general régime for straits of a certain kind, supplemented by special rules for individual cases ; while ordinary straits would be dealt with in

accordance with the general principles for the use of the territorial sea.

34.—But before reaching a conclusion, we must emphasize the connexion between the question of straits and that of the territorial sea. The passage of merchant ships through any strait is merely a particular case covered by the rule for the territorial sea, and no problem arises. Merchant ships can use a strait without having to show that they obtain advantages from the use of that route.

Decisive proof may be found in the fact that straits were not dealt with in the preparatory work of the Hague Conference, save as regards the method of dividing territorial waters between two coastal States. It is only when the distinction came to be drawn between merchant ships and warships that the need of settling the problem regarding the latter arose.

The question is not only one for warships. Here we are no longer dealing with the simple application of a general principle ; for the notion of freedom of transport is divorced from the commercial purpose with which it is normally related. And as this notion of freedom loses much of its significance and prestige when invoked for requirements of a different kind, we shall have to find some other criterion by which to measure it. The place of economic criteria will have to be taken by geographical considerations, and an endeavour must be made to find means of communication that are of reasonable utility.

For this reason, mention is generally made of Gibraltar, Bonifacio, Hongkong, etc., as being under a special régime, apart from the straits subject to conventional rules, differing from the ordinary rules applying to territorial waters.

First, it will be observed that the essential condition for placing a strait in an international category is that it should be used for international traffic ; but it would be over-simplifying the problem to consider only the fact that the strait gives access to the open sea, and not merely to places in interior waters.

It is essential to examine the circumstances in order to appreciate the intrinsic importance of each individual route.

Of course, every strait offers a passage that shipping may make use of ; but conversely, it might be argued that no strait was indispensable for shipping ; for it is always possible to find some other route connecting two seas, as happened, for example, before the Suez and Panama Canals were opened.

But we could not approve unreservedly a restriction of the rights of the coastal State in order to satisfy all the military requirements of third States, even if these requirements were ordinary

manoeuvres or mere courtesy voyages in which warships might economize a few hours' steaming. No other view could be admitted unless the closing of the strait rendered navigation impossible or very difficult—conditions which have led to the regulation of the more important straits and have justified certain other exceptions.

The notion of an international strait is always connected with a minimum of special utility, sufficient to justify the restriction of the rights of the coastal State—which rights must be assumed to be complete and equal to those of other States. To PILLET's doctrine of least sacrifice, we might add SÉFÉRIADÈS' maxim: "The greater the use of the passage .... the more extensive become the infringements of the rights of the coastal States." (*Rec. des Cours*, Vol. 34, p. 439.)

A classification of straits in the order of their importance may therefore be considered as irrefutable. This is shown in several ways by BRUEL, and a study of other writers leads to similar conclusions, expressed very clearly: main highway, independent route, shortest and most necessary way, communication between two free seas, two high seas, highways, only way, etc.

35.—At The Hague, in 1930, this problem was dealt with on current lines; but care must be taken lest, by a too hasty perusal of the terms there adopted, we should be led to include any and every strait—even those which would render the passage longer or more difficult—under the second observation relating to Basis 12.

The adoption of the observation to Basis 12 without opposition gives great weight to it; but we cannot forget the unexpected manner in which the question was put at the last moment. Stress must be laid on the words "serving for international navigation", added to the terms previously employed in a number of documents that referred merely to communication between two parts of the open sea.

At this point, SCHÜCKING referred to the exceptional case of ships which entered a strait and then found it impossible to return to their country! (*Proceedings of the Conference*, Vol. III, 1930, p. 171.)

BRUEL, who is otherwise favourable to the passage of warships, refers to the fluctuation that prevents any definite statement on the one side or the other (*op. cit.*, Vol. I, pp. 202-5).

But the notion of international strait and also the expression "highway", dear to great writers like Oppenheim, and introduced at the beginning of these proceedings by the United Kingdom, might be inserted in the 1930 clause.

36.—Can the Corfu Channel be deemed to be a "highway"?

A mere glance at the chart shows how difficult it would be to include it in such a classification, and indeed no qualified author has yet attempted to do so.

This Channel cannot serve the needs of international shipping, because it does not shorten the route, and offers no facility for manoeuvring. So far as the Port of Saranda is concerned, it is of no use, even for voyages southward. True, it is of value to the Port of Corfu for northward traffic; but the distance saved by using it is less than 100 miles. In a few hours, the *Leander* steamed almost round the island, whose southern shore is still fringed with mines round which she had to pass.

One of the British experts quite naturally told the Court of important international routes, particularly those leading to the Dardanelles and coming from Alexandria or Suez and the eastern Mediterranean.

The artificial Corinth Canal, which unites the Ionian and Ægean Seas, thereby saving a considerable détour, would be of far greater importance; nevertheless, all the authors who deal with it have described it as a secondary route in the few lines they devote to it.

After October 22nd, proposals were submitted to the Medzon Board for the establishment of new routes to Corfu, either by sweeping a channel to the North or by the clearance of minefield No. 530 to the South; and in point of fact, the North Channel has remained closed for more than two years without any serious prejudice to international traffic.

37.—We must examine whether one last consideration might not turn aside the normal line to be followed.

There is a sort of condominium over the waters of the Channel, because one of its shores is Greek and the other Albanian—though it is not the existence of one or of several coastal States which confers upon a strait an international status: the Sound is between two States and the Belts and the Dardanelles are between the coast-lines of a single State.

The method of dividing the waters of narrow straits is of small importance, for it does not concern third Powers. On the contrary, in this particular case, the situation of the Strait, on the frontier between two States, would justify further restrictions as against third Powers, unless the latter were able to prove the existence of special navigational interests.

A reference has been made to a statement by a North-American technical expert on the Mining Board in regard to the Corfu Channel; but it must be remembered that the United States declared at The Hague that they and Great Britain were the only States concerned in establishing the régime for the Strait of Juan de Fuca (which is certainly of greater importance than that of Corfu),

whereas they regarded the Strait of Magellan as essentially international.

HYDE held this doctrine to be abundantly justified, in comparing the Kiel Canal, which is clearly international owing to its vital interest to trade, with Long Island Sound or the Strait of Juan de Fuca, which are reserved for the interests of one or two States (*Int. Law*, Boston, 1947, Vol. 1, paras. 150 and 155). Sweden also, in the reply to the Hague questionnaires, claimed similar situations to that of the Kalmar Strait (L.N., C.74, M.39, 1929, p. 58).

We must not lose sight of proportion. We may, however, conclude that even the fact of its being a strait cannot be an argument for the United Kingdom claim; but on the contrary is in support of the prohibition of passage ordered by Albania, unless special permission be granted after notice, and having regard to the abnormal circumstances at the moment.

And as regards the facts—even well separated in point of time—any tolerance in times past might, by a sort of prescription, create a right against Albania.

It goes without saying that this solution could not be applied in the case of warships of the Power which possesses sovereignty over the opposite shore of the strait, since there is complete equality between the States directly interested in the passage of shipping—even of a non-commercial kind—through the strait.

38.—Even if we regard Albania's conduct as wholly or partly unjustifiable, we must disapprove of any intervention designed to end it, and of any employment of force against force, except in the heat of violent action as on May 15th.

As such a method of enforcing an erroneous doctrine was abnormal, one might have hoped that those who refused to tolerate it would refrain from acting in the same way. To answer: *vim vi repellere*, would amount to referring the solution of a purely juridical problem to the arbitrament of force. As the reason of urgency had ceased to apply, the proper course would manifestly have been to refrain from effecting the passage.

Apart from legitimate defence, a counter-stroke *confestim*, "hot pursuit", or an emergency, nothing justifies the use of force, not even the pretext of reprisals. One violation does not justify another, outside the *lex talionis*.

It would be absolutely contrary to the spirit of the San Francisco Charter and to several of its articles for a country to become judge in its own case. The coastal State also exercises power over its maritime territory; and if it adopts a new measure, this cannot be set aside by violence, even under the pretext of re-establishing the *status quo*. The passivity of the party that announced the prohibition constitutes a *fait accompli* and is under the protection

of the old rule : *in dubio melior est conditio possidentis.*

The forcing of an entry into the ports of a country would not be justified in the present day, although trade or civilization might profit thereby, as was the case in the nineteenth century ; still less is the forceful passage of a strait justifiable, as in the case of Shimonoseki, in 1864.

The toleration of an act of violence, on condition that its lawfulness were considered *a posteriori*, would lead to anarchy in international life.

On the other hand, a state of necessity, or even an irreparable injury, could not be invoked, merely because of the difficulty of carrying out naval exercises which, incidentally, had been arranged to take place elsewhere.

39.—National regulations often lay down restrictions as to the number and tonnage of ships, the repetition of visits, etc. ; this is evidence of the menacing character of warships, and serves to controvert the erroneous argument that if one ship is admitted, a second must also be allowed and then a third and a fourth, *ad infinitum*.

Moreover, if it is recognized that the right of admission to a port is influenced by the number of ships employed, we are led to conclude that the simple passage may be influenced by the same consideration.

Even in the case of straits, writers most favourable to warships, like FAUCHILLE, set limits on the right of passage, e.g. concentration of a powerful squadron (*Tr. de Dr. int. publ.*, Paris, 1925, t. I, Vol. II, para. 507[1]).

No doubt the memory of the first incident justified certain precautions ; but in any case there was a manifest disproportion between the forces employed and the object in view. That was the characteristic feature of this passage, from a purely objective standpoint, and without having knowledge of the instructions sent by the Commander-in-Chief.

Moreover, we cannot disregard the subjective aspect of the passage as several authors recommend, especially in cases where documentary evidence has been produced by the party accused of a passage not *inermis et innoxia*. In this case, there was a naval demonstration, which would not be admissible even as reprisals, as was said at the meetings of the *Institut de Droit international* at Paris in 1934.

40.—Turning now to the second operation, we note, to begin with, that Albania was not admitted to the Medzon Board when the latter was constituted, and that proposals for her admission,

merely as an observer, were unsuccessfully made on several occasions.

In spite of the predominant part naturally played by the United Kingdom on this Board, and on the Central Mine Clearance Board, owing to her greater experience and large navy, the failure of these proposals cannot be laid entirely at her door, though the reasons given, and repeated during the proceedings, cannot be regarded as satisfactory and are sometimes contradictory.

The assignment of Sector 18 A to Greece may be regarded as an unfriendly act on the part of the Board, seeing that this Sector (like Sector 17, which had not been allotted to any country) had already been swept, and Greece had not at the moment the means of carrying out the task, and even asked for assistance from the United Kingdom.

It has already been observed that at a critical moment the British had opened a channel which they thought to be in the same position as that maintained by the Germans during the war. In order to avoid undertaking larger sweeping operations, it was preferred to follow what was considered the easiest course, rather than the normal route, equidistant from both coasts ; though it must not be assumed that the enemy chose the easiest solution ; on the contrary, he preferred a route which would be the most difficult for his adversaries to observe.

But when, a year and a half later, a dispute had arisen between Great Britain and Albania, it would have been the duty of the former, if she was still interested in the passage after the end of hostilities, to restore the Channel to its normal pre-war condition. Though the enemy had disturbed the former equilibrium, there was no reason for persisting in a prejudicial course, after peace had been re-established. The exact situation of the mines was already known, and a sweep would only have required a few hours' work, as in the case of Operation Retail.

After the explosion, the United Kingdom Government did not delay a decision to sweep, and notified Albania.

Meanwhile, however, it endeavoured to obtain the support or consent of the Mine Clearance Boards, by proposing that it should itself undertake the operation, as a natural sequel to the sweep in 1944.

But, on October 28th, the Medzon Board did not approve, although it thought the sweep desirable, owing to the political character which such an operation would assume in case of a refusal by Albania. The Central Mine Clearance Board was also réticent : on October 31st, it recommended the sweep, subject, however, to suitable conditions, including the agreement of the coastal State.

41.—It had been said that the purpose of Operation Retail was to protect shipping and provide access to local ports, including Saranda, or even to relieve from responsibility the State that had carried out the first sweep.

But the requirements of navigation were not satisfied, and access to Saranda is not assured ; for the sweep was not finished.

But the main object of the United Kingdom is clearly defined in the Reply : collection of evidence, to ascertain the cause of the explosions and to reveal the guilty parties.

On the other hand, it was feared that any measure asked for from the United Nations and decided on by that body would be ineffective and slow.

But none of these reasons could justify such a unilateral action, the gravity of which would have been more evident if the results had been negative. Action for self-protection, decided on in cold blood, in contrast with the inactivity at the time of the explosions, would also be out of place. The publicity given to the case would have been sufficient to discourage any audacious attempt to get rid of the material evidence of the outrage.

42.—Instead of taking the law into its own hands in a case that was neither urgent nor, unfortunately, susceptible of adequate reparation, it would have been easier and certainly more appropriate for the United Kingdom to resort to a procedure of conciliation, or even to have had recourse to the United Nations, especially in view of the fact that Albania, though not a member, had already appealed to that body. One could not assume in advance that such a step would be met by a flat refusal by a country which subsequently had to accept an invitation with much graver consequences, e.g. that of entrusting the settlement of the whole dispute to the Security Council, although it later raised an objection to a reference to the Court. The minesweeping should have been done under the auspices of the United Nations, impartially and swiftly, in order to forestall any change in the state of the Channel.

If international justice does not yet possess satisfactory machinery, the responsibility rests on the Powers, the majority of whom do not consider the moment arrived to invest the Court with compulsory jurisdiction.

The Court cannot be blamed for the limited means at its disposal, nor for provisions such as that which allows a State to refuse to produce a document, as has happened in the present case.

In spite of its imperfections, we must not give up hope of seeing all disputes of a legal character finding their way to the International Court. In that connexion, we cannot fail to notice the anxiety which Great Britain has displayed on several occasions

to bring before the Court cases which, not long ago, would have perhaps been settled in another manner.

Be that as it may, the collection of evidence can never justify an act of intervention, such as has at last been frankly and finally admitted ; such an act is repugnant to the letter and the spirit of the San Francisco Charter. The world of to-day will no longer tolerate a practice which has never been sincerely regarded as lawful, and one which allows the noblest aims of humanity to be used, all too easily, as a cloak for the worst abuses.

A further use of force must be avoided, especially one carried out in spite of discreet hints conveyed by the international bodies immediately concerned—a use of force without great regard for the other party, which was not even invited to send observers or to enter into negotiations, after an initial protest by it, and a suggestion of a mixed commission.

The argument based on the absence of any claim in 1944 is insufficient, having regard to the conditions already mentioned, which prevailed in war time. Moreover, up to the end of 1945 at least, there was no stable government, recognized by other Powers, in Albania.

Albania might therefore claim to participate in the marking out of the Channel, which was to become the definitive route ; for she had regained her independence, which could not be presumed to be subject to conditions incompatible with acquired sovereignty.

On the other hand, Albania never showed a sincere intention of approaching Great Britain with a view to settlement, as was required by the fundamental duty of every State to co-operate in the interests of justice and international harmony, by means of direct negotiations. On the contrary, the more or less evasive tone of Albania's replies, though supported by legal arguments, makes it possible to attenuate the United Kingdom's responsibility and to lay less stress on her attitude of November 13th, than on that of October 22nd.

43.—In addition to the illegality of the operation, the means used were excessive ; so that at first even the Admiralty anticipated accusations of duplicity and of offence against Albania's sovereignty.

Nor can the method used to carry out the operation be forgotten, so far as the destruction of the mines was concerned ; for most of them were left to drift.

It is true that the Hague Convention lays down, as an essential condition of the use of such weapons, the adoption of an appliance rendering them harmless as soon as they have broken loose from their moorings. In any case, this legal guarantee does not entirely satisfy us, and everyone believes that there still remains a certain coefficient of danger. It is of small importance that experts in

general reduce the danger. We are entitled to mistrust even the most accurate scientific instruments, and this case has furnished many occasions of observing errors in apparatus and errors of the men in charge of such apparatus, or who rely on indications given by it ; cases of mines that have remained dangerous have also been mentioned, and others in which the release springs have ceased to operate, because of rust.

The mere desire of the United Kingdom to explain the measures taken to destroy the mines would show the desirability of such action, which however has been abandoned for other reasons.

These mines might be swept along by the current and found elsewhere, thus justifying complaints against Albania, as happened when an American destroyer, on November 14th, 1946, located a drifting mine off Durazzo, and reported it by signal, although it could not be established that the mine had been released by the sweep carried out some distance away the day before.

44.—We are thus led to conclude that the United Kingdom was responsible for the operations of October 22nd and November 13th, 1946, which involved violations of Albania's sovereignty.

No doubt, Albania does not claim reparation for material damage ; what she has in view is merely the application of a moral sanction.

In this domain, even more caution is required than in municipal law. Although premeditation has been found in the decision to carry out, and in the execution of the two measures held to be illegal, it would be difficult to draw a definite conclusion of evil intent, especially in regard to the second operation : there had been the previous incidents, and, more particularly, the recent memory of what was almost a massacre. Further, some hesitation is observed as to the method that the United Kingdom would take in order to reach a settlement which she considered as urgent ; whereas Albania took refuge in an unyielding attitude which only served to increase Great Britain's suspicions, founded as they were on the gravest presumptions.

On the other hand, we cannot lose sight of the unusual manner in which the above measures were carried out : even persons who claim to have had no intention to injure, who invoke the *qui juri suo utitur neminem lædit*, or even say they are not acting by caprice, are sometimes bound by the consequences of a wrongful act, to which the measure or standard of conduct required by a *bonus pater familias* (an old conception, still in favour) cannot be applied.

Albania did not specify any particular sanction. In the course of the hearing, she confined herself to an allusion to the French

practice of sometimes awarding a token payment of one franc.

But under the Special Agreement a pecuniary sanction has not been asked for and cannot be granted, even symbolically.

On the other hand, the Court should break away from the familiar mediaeval procedure, which is not employed nowadays even in schools, such as apologies, flag saluting, etc. All this is reminiscent of *ultimata*, which are becoming more and more obsolete.

45.—There remains only one moral sanction that can be applied without disregarding the absence of a claim for the assessment of damages.

The matter cannot be left to the future ; for the sanction must *re ipsa* be found in the Judgment. This will be purely declaratory, and will state that the United Kingdom's conduct was contrary to international law and in every way abnormal.

Within these limits, I give satisfaction to Albania and hold that the counter-claim put forward by her in the Special Agreement of March 25th, 1948, is well founded.

(*Signed*) PHILADELPHO AZEVEDO.