DISSENTING OPINION BY JUDGE WINIARSKI.

[*Translation.*]

I cannot accept the first part of the Judgment, because I do not agree with the juridical foundation given by it to Albania's responsibility.

I, like the Court, cannot admit the first argument of the United Kingdom : that Albania had direct knowledge of the existence of the minefield, if it is not first established that she had knowledge of the minelaying. I agree with the Court's reasons for rejecting the second argument, that Albania laid the minefield, and for considering that the indirect evidence produced by the United Kingdom Government is not decisive proof either that mines were laid by Yugoslav vessels in Saranda Bay, or of collusion between the two Governments.

In finding that Albania was responsible, the Court accepted the United Kingdom's third argument, to the effect that the mines cannot have been laid without the Albanian Government having knowledge ; if that be admitted, then, as Albania did not give notice of the existence of the minefield and did not warn the British warships that were approaching, her responsibility is involved.

This conclusion does not seem sound, for the same reasons that prevented the Court from admitting collusion : such an exceptionally grave charge against a State, as the Court has rightly said, would require a degree of certainty that has not been reached here.

To reply to the question whether Albania really knew of the minelaying, the manner in which the events occurred must be considered.

The secret operation could have been seen by the inhabitants of Saranda ; but the town is rather far from the spot in question, and it would be difficult to admit that the operation could have been noticed and recognized as such, if it had been carried out during the night, and if the most elementary precautions had been taken. It could have been seen by the coastguard. Very naturally no evidence was produced on this subject. The experts of the Parties appeared to be in agreement on the general conditions under which the operation could have been seen and heard ; but they did not agree in determining with some accuracy the influence of the conditions under which the operation must have taken place, having regard to the probable place and date (night of October 21st-22nd, 1946). An Albanian expert declared that the

author might be certain of not being noticed, still less identified. In particular, if there was no look-out post at Denta Point, this would render the secret minelaying operation not only practicable, but safer and more easy. The Court's Experts, after going to the spot, stated that the vessels and, under certain conditions, the operation itself, must have been seen, especially from Denta Point, if a normal watch was kept over territorial waters.

But was the operation really seen ?

The possibilities of observing minelaying from the Albanian coast are shown in the Judgment. But while supervision of this sector seems relatively easy and not beyond the means at Albania's disposal, the evidence of the three Albanian witnesses showed how insufficient it was. The coastal defences had just been reorganized at the time of the incident, May 15th, but they were manifestly inefficient. During the critical period, immediately after and before October 22nd, the commander of the coastal defence was absent ; the harbour-master, who replaced him, judging from his evidence, seemed not to be particularly efficient. He was instructed only to watch ; but his posts could not even watch at all effectively. It was said that, during the night, this imperfect watch was further reduced, and that there was no post at Denta point.

Whatever be the importance that it is desired to give to this evidence, it does not seem to be definitely proved that the local authorities had knowledge of the operation ; and further, it would be difficult to show how far they would have been able to inform their Government and to stop the British warships in sufficient time.

This hypothesis was also put forward by United Kingdom Counsel under a different form : it does not matter whether the local authorities knew; it might be arranged that nothing should be seen. What is important is that the Albanian Government knew.

But if the Albanian Government knew—and according to this conception it must be supposed that it knew beforehand—that was not knowledge, but collusion. In short, it seems difficult to assert that Albania knew *in abstracto;* if she knew, she knew in a concrete manner : when, under what conditions, and no doubt by whom the mines had been laid. She therefore knew, for instance, that the minelaying had been done during the night of October 21st-22nd, with Yugoslavian material ; we are now faced once again with the hypothesis of collusion, and it has not been suggested that the operation was carried out in collaboration with another party possessing governmental means of performing it effectively.

If the Court considers that it is not proved that the minefield was laid by the two Yugoslav vessels, it would also seem difficult to admit, as judicially proved, Albania's knowledge of the mines laid by an unknown party. To declare Albania responsible for the operation or for its result, on the basis of abstract and, so to speak, immaterial knowledge, would be in reality to base that responsibility on a presumption derived from the mere fact that Albania is the territorial Power and has sovereignty over the place where the unlawful act occurred.

If the two United Kingdom contentions (collusion and knowledge) cannot be held to be proved, the only ground on which Albania could be considered responsible would seem to be the fact that she did not use the due diligence required by international law, to prevent and repress the unlawful act of October 22nd, 1946.

But two preliminary objections would have to be examined.

(*a*) United Kingdom Counsel admitted that if Albania did not know of the minefield she cannot be held responsible. Can the Court take a different view on this subject ? It is not a matter of a *petitum* of the Parties, beyond which the Court has no jurisdiction, but of an interpretation, or a conception of a rule of international law. Here the Court is not limited by the views of the Parties, as was recognized by the Permanent Court of International Justice in the case of the Free Zones (P.C.I.J., Series A./B, No. 46, p. 138) :

> "From a general point of view, it cannot lightly be admitted that the Court, whose function it is to declare the law, can be called upon to choose between two or more constructions determined beforehand by the Parties, none of which may correspond to the opinion at which it may arrive. Unless otherwise expressly provided, it must be presumed that the Court enjoys the freedom which normally appertains to it, and that it is able, if such is its opinion, not only to accept one or other of the two propositions, but also to reject them both."

If therefore a judge was convinced that Albania must be held responsible for other reasons than those given by the opposite Party, the opinion expressed by the United Kingdom Counsel should not stop him.

(*b*) In virtue of the Agreement of November 22nd, 1945, responsibility for Medri route 18/32 and 18/34 was, by the unanimous decision of the four Great Powers on the Medzon Board, entrusted to Greece. It is true that, as a United Kingdom expert remarked, the Channel had been swept, checked and declared safe for navigation, and that Greece's responsibility was more or less nominal. Still, Greece was responsible for the maintenance of a certain state of things entrusted to her, and it is well-known that she

immediately consented that the British Navy should take the necessary measures in the Channel that had been handed over to Greece.

But this aspect of the affair concerns only Greece, on the one hand, and the United Kingdom, if not the four Great Powers or the Medzon Board as such, on the other hand. For Albania, the Agreement of 1945 was a *res inter alios acta ;* and it seems certain, from the whole of the Albanian statements, that Albania never recognized the decision placing on Greece the responsibility for the Albanian sector of Medri Route 18/32 and 18/34. We must therefore reckon that there were two distinct responsibilities : that of Greece, purely the result of a treaty, for the Medri channel, a matter completely foreign to Albania ; and that of Albania, a responsibility under ordinary international law, as territorial Power. It is only this latter responsibility that the Court is called upon to consider.

The Special Agreement does not limit the Court to considering and determining whether Albania laid the mines, or helped to lay them, or knew they had been laid in sufficient time to warn the British ships. The Court is asked to say whether Albania is responsible in international law. The Court's task is to consider every ground of responsibility recognized by international law, and corresponding to the circumstances of the case.

In international law, every State is responsible for an unlawful act, if it has committed that act, or has failed to take the necessary steps to prevent an unlawful act, or has omitted to take the necessary steps to detect and punish the authors of an unlawful act. Each of these omissions involves a State's responsibility in international law, just like the commission of the act itself. This general principle is naturally capable of applications that differ according to the infinite variety of facts accompanying the act contrary to international law ; but doctrine and jurisprudence recognize it, and it may be well to refer on this subject to the opinion of the Committee of Jurists appointed by the Council of the League of Nations in connexion with another Corfu Case, a quarter of a century ago :

> "The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners, if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest, and bringing to justice of the criminal."

The Albanian Government asserts that : "A government cannot be held responsible for damage caused by mines merely because the mines were found in its territorial waters. To involve the responsibility of the State, it must be proved either that the State caused the mines to be laid, or that it knowingly allowed them to be laid.... The State cannot be held responsible for everything that

happens in its territorial waters.... It is not responsible for watching over the safety of that navigation" (in its territorial waters).

It is true, as the Court rightly said in speaking of knowledge, that the responsibility of a State cannot be held to be involved solely because of the supervision it exercises over its territory, including its territorial waters, and independently of other circumstances. On the other hand, it would be too easy to say that a State cannot be held responsible for any occurrence on its territory, or that a State cannot guarantee that an act contrary to international law will never happen on its territory. To allege such a responsibility would be absurd ; international law has never been held to impose such a burden on States. It is equally clear that there can be no question of a breach of a rule or of a principle of international law, save in so far as that rule or that principle exists. But in this case, such rules and principles do exist. Three passages, which seem to formulate existing international law exactly, may be quoted on this subject.

M. Max Huber, former President of the Permanent Court of International Justice, in the Arbitral Award in the Palmas case, 1928, said :

> "Territorial sovereignty .... involves the exclusive right to display the activities of a State. This right has as corollary a duty : the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other States ; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian."

M. D. Anzilotti, former President of the Permanent Court of International Justice, said in his *Course of International Law* (p. 490) :

> "The duty of a State cannot consist and does not consist in the exclusion of the possibility of the committing of acts that harm or offend foreign States by persons subject to its authority ; a State can only be bound to take suitable measures to prevent these acts happening or, when they do happen, to take criminal proceedings against the guilty : such is the duty of a State and only within these limits is an unlawful international act possible."

Lastly, in his dissenting opinion in the *Lotus* case (P.C.I.J., Series A., No. 10, p. 88), Mr. J. B. Moore, former Judge of the Permanent Court of International Justice, said :

"It is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people." (United States *v.* Arjona, 1887, 120, U.S. 479.)

Each particular case must be considered and judged with regard for the circumstances peculiar to it. The zone of Albanian territorial waters in question extends from the point where the Albanian-Greek frontier reaches the Strait, up to a point somewhat to the north of Cape Kiephali, where that part of the sea recognized as dangerous ends, and the mine-free space of the Strait of Otranto begins. Throughout the length of the North Corfu Channel, up to a straight line drawn from Cape Kiephali to Cape S. Katerina, there is no free sea, the maritime frontier between Albania and Greece following the median line of the Strait. The navigable channel, starting from the South, goes very close to the Greek coast; it then occupies the whole width of the Strait for a few kilometres, and finally follows the Albanian coast very closely, as far as Cape Kiephali. That part of the navigable channel that follows the Albanian coast for less than fifteen kilometres was the theatre of events that gave rise to the present case.

The Judgment has sufficiently shown what was the attitude of the Albanian Government in regard to the right of passage of foreign warships through Albanian waters during the period between May 15th and October 22nd, 1946, and even after. The Judgment refers to the Albanian Government's wish to keep a jealous watch over its territorial waters. In fact, from May 15th onwards it is clear that the Albanian Government was determined to refuse a free passage to foreign ships and boats through that part of the Medri route 18/32 and 18/34 that was in Albanian waters. In that way, it rendered any supervision that the Greek vessels might have desired to exercise in the name of the International Mine Clearance Organization impossible. The reasons for this attitude were given by Albania in her diplomatic notes and in her Counter-Memorial and Rejoinder, and during the arguments. They were: the vulnerable frontier with Greece; the territorial claims of that country; the "state of war" of which the Representative of Greece spoke at the Security Council; the "piratical incursions" of Greek boats, eight of which were mentioned in the note of May 21st, 1946, not to mention the other "innumerable piratical incursions" and a number of cases in which foreign vessels entered Albanian waters on patrol, without showing their flag and without permission; passages of British warships; removal of property and of Albanian citizens; infiltration of hostile elements; the Bay and the Port of Saranda seem to play an important part in the Albanian Government's anxieties. The result was, in the opinion of that Government, the "exceptional circumstances in the North Corfu Channel" stressed in the Counter-Memorial. "The

question of free passage is, for Albania, necessarily connected with the problem of the country's security."

The Albanian note of December 21st, 1946, expressly set out another aspect of the problem. The Albanian Government "desires to declare that it respects the principles of international law concerning maritime navigation .... ships have the right of innocent passage in straits which form an international highway of communication. But this principle of innocent passage, so far as it can be applied to the present case, was flagrantly violated by the ships of His Majesty, on the occasion of their passage through the northern part of the Corfu Channel. It is evident that there was no innocent passage when British ships were sailing demonstratively very close to the Albanian coast." And further on: "If Great Britain really wishes to apply the principle of innocent passage and to provide for the safety of commercial shipping, she should undertake the sweeping of the middle of the North Corfu Channel, which is the safest for shipping, in such a way that navigation through the Channel would be more in accordance with the principle of innocent passage mentioned in the United Kingdom note."

It seems certain—and this is confirmed in the Rejoinder—that from the month of May, 1946, Albania considered this part of the swept area a critical place and wished to move the sector towards the West. In this way, according to Albania's view, the channel coming from the South should bend north-westward somewhat to the south of St. George's Monastery, and not at Denta Point, as it does at present, and would pass at an equal distance from either coast; in this case, it would be moved about two kilometres.

It would be natural that this attitude of the Albanian Government should lead it to take special measures of vigilance in the sector mentioned above during the period in question (May—October, 1946); and the Albanian delegate at the Security Council spoke of these. None the less, the Albanian Counter-Memorial and Rejoinder took great pains to show that Albania was not in a position to keep an effective watch over her coast-line and territorial waters; that she had no means of knowing what happened there and, in particular, could learn nothing of the minelaying operation, however close to the coast it may have been. The Albanian Government resisted the idea that she had been watchful in the way her representative at the Security Council stated during the discussion of the matter; and the Counter-Memorial insists upon this. The Albanian witnesses depicted the coastal defence organization and the watch over the territorial sea as absolutely inadequate.

What then does the situation in the Saranda sector appear to have been? It would seem that in the organization of the watch over the coast and the territorial waters, there was nothing

that corresponded to the protests and energetic reaction against the passage of foreign vessels through Albanian waters; nothing that could be considered as measures of appropriate protection against alleged danger of incursions, infiltrations, and abductions, by which the Albanian Government endeavoured to justify its attitude towards foreign shipping. This contradiction was characteristic of the Albanian Government's attitude throughout the proceedings. Her attitude shows another contradiction: it is not possible to proclaim one's rights as a territorial Power, to exalt and exaggerate them in such a way as to refuse to allow other States to use one's territorial waters, and at the same time to neglect the organization of one's public order and security services intended to guarantee to States allowed to use the navigable channel that minimum of security to which they are entitled according to the most modest international standard. The "exceptional circumstances" relied on by Albania ought to have guided her conduct and dictated to her her duties, which would not have exceeded her capacities, however limited.

Still more, if Albania had decided to set international action in motion in this sector of her territorial waters, an action whose purpose might be perfectly legitimate (shifting of the navigable channel), she ought, especially at that moment, to have made certain that effective surveillance would enable her to avoid any additional complications.

After the explosions of October 22nd, and even after the notification of October 26th, Albania evidently omitted to open an enquiry to discover the facts; nor did she propose that the Medzon Board or the United Kingdom should take part in any investigation of the causes of the explosion; she did not protest against the laying of the minefield in her territorial waters, which was truly a serious violation of her territorial sovereignty; she seemed to remain indifferent to the grave breach of international law committed on her territory, and to the dangers to which shipping quite close to her coast was exposed; nothing is known of an enquiry for the pursuit and bringing to justice of the authors of the act which also constitutes a crime from the viewpoint of domestic law. Such an attitude on the part of the Albanian Government has been held to be an indirect proof of Albania's knowledge of the minelaying; it would seem more reasonable to hold that it can and must be considered as an independent ground for her responsibility.

For these reasons, but for these only, Albania might be considered responsible under international law for the explosions that occurred on October 22nd, 1946, in her territorial waters.

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I would add that I cannot agree with the Court's decision on the question of its jurisdiction to assess the amount of compensation due to the United Kingdom. When they signed the Special Agreement, the Parties put an end to the proceedings instituted by the unilateral application ; this was in accordance with the wish constantly expressed on the Albanian side. The Special Agreement is therefore a new instrument and, as regards the submissions of the Parties, to be treated as independent of the Application, and intended to replace it. There is no request for the Court to assess the amount of compensation in the Special Agreement ; yet such a request has become almost a *clause de style*, in special agreements of this nature, and I have not been convinced by the interpretation adopted in favour of jurisdiction on this point.

(*Signed*) B. WINIARSKI.