International Merchant Shipping Law

Development of Law for the Safety of Ships, Welfare of Seafarers, and Protection of the Marine Environment

By

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Dedication

With heartfelt thanks to my beloved wife Christina for her ongoing patience and support, and to my very good friend and mentor, Emeritus Professor Doctor Martin Tsamenyi, who introduced me to international maritime law

Introduction

This work complements the author's previous two books and completes a previously uncompiled trilogy dealing with flag State responsibility and with the development of national, customary and international law for ships and seafarers.

During the long day of the millennia that ships have traded internationally it is only within the last few seconds that international rules have been developed for safety of life at sea, prevention of marine pollution and a number of other internationally agreed standards.

The aim of this book is to provide seafarers, academics, maritime lawyers, maritime authorities and training institutions, and the general public with an authoritative account of the development of international law for merchant ships and seafarers and international organizations and institutions.

The starting point, in Chapter One, is an analysis of the imperfections and ambiguities in regulations for watertight bulkheads, and the carriage of lifeboats, introduced in Great Britain during the last decade of the nineteenth century that directly contributed to a large loss of life at sea aboard the ***Titanic*** in 1912.

The official inquiry into this disaster, as recounted in Chapter Two, was followed by a diplomatic conference in London, during 1913, that developed the first Safety of Life at Sea Convention (SOLAS 14), see Chapter Three.

In 1928 a British passenger/cargo liner was lost at sea off the East coast of America in an entirely avoidable disaster, with significant loss of life. The subsequent wreck inquiry was scathing in its criticism of the Master and crew in that, amongst other matters, the ship left port overloaded and in an unseaworthy condition.

The report of the Inquiry made a number of practical and detailed recommendations as to how the identified causes of the loss could be overcome; most of which were brought into effect internationally through introduction of the International Convention for Safety of Life at Sea, (SOLAS 29), and the associated Load Line Convention, 1930.

Fire at sea is a hazard dreaded by seafarers. In spite of the fire prevention standards included in SOLAS 14 there were a spate of serious fires aboard passenger ships during the 1920s and 1930s resulting in large losses of life. Of particular concern was the deadly, and entirely preventable, fire aboard the American flagged passenger ship ***Morro Castle*** in 1933 (recounted in Chapter Five) resulting in the loss of 137 passengers and crew. After an enquiry by United States authorities, American maritime law was re-written for standards of ship construction, firefighting, lifesaving appliances and crew conditions for all American registered ships.

Even as merchant seamen were enjoying a marked reduction U Boat activities towards the end of 1944, politicians and statesmen were looking to the most effective structures to regulate the shipping industry after the war. It had always been recognised that the best way of improving safety at sea was by developing international regulations that were followed by all shipping nations and, from the mid-nineteenth century onwards, a number of such treaties were adopted. Several countries proposed that a permanent international body be established to promote maritime safety more effectively, but

it was not until the establishment of the United Nations, in October 1945, that these hopes were realised. In 1948 an international conference in Geneva adopted a Convention formally adopting the International Maritime Consultative Organization.

The other pressing matter at this time, delayed by the long six years of worldwide hostilities, was to update SOLAS 29 and the attached International Regulations for Preventing Collisions at Sea. When it became possible to amend SOLAS 29 after the Second World War many lessons learned about safety of ships in general, including regulations for electrical installations and precautions against fire, were included in the International Convention for the Safety of Life at Sea, (SOLAS 48), as detailed in Chapter Six.

Chapter Seven; International Convention for the Safety of Life at Sea, 1960, (SOLAS), recalls that SOLAS 48 expressed concerns through a number of far-sighted recommendations about new technology; nervousness about the use of radar as a collision tool, and technical navigation standards which needed much more research before being considered in the next version of SOLAS, particularly Depth sounding apparatus, Lights on land, Medium frequency Direction finding and Radio Beacons, Radio aids to navigation, navigation of ships equipped with radar, and Radar; some of these concerns emanating from the collision between the passenger ships, the ***Andrea Doria*** and the ***Stockholm*** in 1956.

The most significant changes incorporated were the application of certain passenger ship fire safety requirements to cargo ships, and the inclusion of recommended standards for operation of nuclear-powered ships.

From time immemorial seafarers have cast unwanted items into the seemingly bottomless sea. With the advent of steam propulsion, ash

from boilers was disposed of through inbuilt ash ejection chutes. Until the mid-twentieth century the vast oceans of the world were littered with waste from ships; oily bilge water, tank and hold cleaning, garbage, sewage, galley waste and used dunnage.

Chapter Eight; Prevention of Pollution of the Marine Environment, recalls how it wasn't until the 1950s, when oily water discharges from tankers passing through coastal waters started washing ashore in Europe, that attention was paid to pollution of the marine environment. A conference in London, in 1954, developed the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, (OLIPOL 54) which came into effect in 1958 and was amended in 1962 and 1969.

As tankers increased in size, particularly during the seven-year closure of the Suez Canal, the risk of very large oil spills from collisions or groundings of tankers increased exponentially. The grounding, in 1967, of the large tanker ***Torrey Canyon***, resulting spillage of 120,000 tons of oil brought this home, as did a spate of oil spills during the 1970s totalling more than three million tons of oil. Responding to these issues IMCO adopted the International Convention Relating to Intervention on the High Seas in Cases of oil Pollution Casualties, 1969.

Chapter Nine; Standards of Training, Certification and Watchkeeping, addresses a resolution under SOLAS 60 calling upon Governments to take all practical steps to ensure that the education and training of seafarers in the use of aids to navigation, ships' equipment and devices was sufficiently comprehensive and was kept up to date. It also recommended that IMO and the International Labour Organisation (ILO) should cooperate with each other, and interested Governments, in achieving these ends.

Although IMO and ILO had produced joint guidance on these issues the IMO Assembly decided in 1971 that a conference should be convened to adopt a convention on the subject, resulting in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, (STCW 78).

Despite its broad global acceptance, it was realised by the late eighties that the Convention was not achieving its purpose. Since 1978 many changes had taken place in the structure of the world merchant fleet and in the management and manning of ships resulting in a complete revision of the Convention.

Chapter Ten recalls that an official enquiry into the capsizing of a ro-ro ferry in 1987, with the loss of 193 lives, revealed seriously dysfunctional and dismissive management by the shipping company; a problem compounded by inefficient and dangerous operational procedures by the ship's senior crew.

An IMO Resolution, adopted shortly after the disaster, on Safety of Passenger Ro-ro Ferries, recognized that ' the great majority of maritime accidents are due to human error and fallibility and that the safety of ships will be greatly enhanced by the establishment of improved operating practices' and resolved that IMO should give a high priority to its work aimed at enhancing the safety of passenger ro-ro ferries.

After consideration, IMO resolved to broaden the application of a new safety management system to all ships, and shipping companies, and introduced the role of a designated person ashore with direct access to the highest level of management.

Chapter Eleven recounts the development of one of the most important IMO instruments; the Safety of Life at Sea Convention,

1974, (SOLAS 74). By the 1970s, global trade had expanded dramatically; ships had become larger with more complex machinery, carrying new cargo types, e.g., chemicals, LNG, that required more robust and adaptable safety rules than SOLAS 60 could provide. There had also been a number of serious casualties resulting in large loss of life at sea, revealing flaws in SOLAS 60.

SOLAS 74, adopted on 01 November 1974, with entry into force on 25 May 1980, included the 'tacit acceptance' procedure, which provides that an amendment shall enter into force on a specified date unless, before that date, objections to the amendment are received from an agreed number of Parties. As a result, SOLAS 1974 has been updated and amended on numerous occasions. Accordingly, the Convention, still in force today, is sometimes referred to as SOLAS, 1974, as amended.

Chapter Twelve, Flag State Implementation, recalls that the concept of the State, and the link between the flag of nationality and the State, has been firmly established in international law and is at the heart of the work of the International Maritime Organization (IMO). Individual member States of IMO have equal voting powers regardless of the size of their fleet and have the right to grant their nationality to ships flying their flag upon the high seas and to exercise jurisdiction over them as flag States in administrative, technical and social matters, and environmental protection.

As stated in the Law of the Sea Convention; 'the absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of freedom of the seas is that a ship must fly the flag of a single State and that it is subject to the jurisdiction of that State.'

As a unilateral response by coastal States to ineffective flag State control, port State control has been described by IMO as; 'the inspection of foreign flagged ships in national ports to verify that the condition of the ship and its equipment comply fully with the requirements of international regulations and that the ship is manned and operated within these rules', as recalled in Chapter Thirteen covering Port and Coastal State control.

Coastal State control is based upon 'the twin pillars of freedom of the high seas and the sovereignty of the coastal State over the adjacent sea…including the right to deny foreign ships passage through its territorial sea'. The second part of Chapter Thirteen examines the extent of a coastal State's authority and control within its various maritime zones.

Maritime security, a relatively recent requirement for both ships and ports, was brought about by the hijacking of a large passenger ship and murder of one of its passengers, as recounted in depth in Chapter Fourteen.

As a direct result, in 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) came into effect covering *inter alia* the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which are likely to damage or destroy it. A 2005 Protocol to the SUA Convention considerable broadened its scope.

Other developments from terrorism, piracy and armed robbery were the introduction of the International Code for the Security of Ships and Port Facilities, Automatic Identification Systems, Long Range Identification and Tracking of Ships, Continuous Synoptic Records and Ship Identification Numbers.

The Covenant of the League of Nations was born out of the horrors of the Great War when there were serious concerns that such a devastating conflict should not be repeated. The League of Nations was the first intergovernmental organisation. By joining members agreed to comply with international law. Sixty-three States became members, excluding the United States of America, but the organization became moribund and was officially abandoned in 1947.

However, Chapter Fifteen recalls the formation, also out of the Great War, of the International Labour Office, an initiative of labour leaders and trade unions to include in any peace treaty a social chapter for minimum labour standards. This organization was, and is, very successful as recognised by receipt of the Nobel Peace Prize on its fiftieth anniversary in 1959 as one of the 'rare institutional creations of which the human race can be proud'.

In 2006, a large number of labour Conventions were amalgamated into the Maritime Labour Convention which has become one of the primary maritime Conventions alongside SOLAS, MARPOL and STCW. The other primary maritime organization is the International Maritime Organisation, an initiative of the newly formed United Nations Organization at the end of the Second World War.

Chapter Sixteen recalls the long history of the development of international bodies in progressively developing the Law of the Sea Convention, based upon reports drafted by the International Law Commission that was formed after the Second World War, charged with 'progressive codification of international law', particularly the nature and extent of coastal State's rights over the territorial sea and the right of innocent passage.

The first conference on the Law of the Sea (UNCLOS I) was held at Geneva in 1958, followed by UNCLOS II in 1960 and then the

mammoth UNCLOS III between 1973 and 1982 which culminated in the Law of the Sea Convention, 1982. This treaty established the International Seabed Authority to regulate commercial activities of States and their nationals in respect of prospecting, exploration and production of the seabed beyond national jurisdiction. The International Tribunal for the Law of the Sea (ITLOS) was also established at this time.

Chapter 1
International Maritime Law

International maritime law has been defined as the 'public international law of the sea' – that is to say, with the rules and principles that bind States together in their international relations concerning maritime matters.[1]

Conventions (or treaties or agreements as they are often called) are the clearest expression of legal undertakings made by States. The existence of a treaty relating to any particular matter will usually provide a clear and conclusive statement of the rights of the States Parties to it in their relations with each other. Treaties are binding only upon the States Parties to them. Treaties remain binding until any time limit set down in them expires or, if the parties intended to allow denunciation, until they are denounced, or until the parties conclude a later treaty relating to the same subject matter. Treaties often require, in addition to signature, ratification by the parties before they enter into force. Multilateral treaties may require ratification by a prescribed minimum number of States.[2]

One of the fundamental features of international law is that while States, when they act externally, base themselves on their own subjective judgement of law and fact, the legality of their action falls to be evaluated by objective standards. Whatever the initial judgement of law and fact by the acting State in question, objective standards will, according to international law, be applied in the

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[1] Churchill R.R. and Lowe A. V, *The Law of the Sea,* Third Edition, Manchester University Press, 1998, p.1
[2] Ibid, p.6

determination of, for example, whether or not a measure taken avowedly in self-defence was or was not 'necessary', whether a countermeasure was or was not lawful, and whether, for example, settlement of occupied territory was or was not legal.[3]

The relations between a State-party to a treaty and non-Party States are also regulated by customary law; 'international custom, as evidenced by a practice generally accepted as law'.

Customary international law is not a monolithic body of general rules uniformly binding upon all States alike. Rather, the existence of customary law obligations between particular States is ultimately a question of opposability. Thus, customary law may develop by shifts in the pattern of opposability. For instance, at a time when most States claimed only three or twelve mile fishery zones, but a few Latin American States claimed 200-mile fishery zones, it could be said that the 'general' rule – using the term in a descriptive rather that prescriptive sense – was that international law admitted fishery jurisdiction only up to three or twelve miles from shore, and that as an exception 200-mile zones were opposable to the Latin American States only. But as more and more States have moved to the Latin American position and claimed 200-mile zones the balance has shifted, so that the 'general' rule now admits the legality of such claims, even though they would not be opposable to any States which have persistently objected to them. It is in this sense that we refer to 'general' rules and practices.[4]

In an industry where more than 60,000 ships greater than 500 gross tons trade internationally it is clearly essential for there to be uniform

[3] Bjore, Erick, Oxford Academic, The British Yearbook of International Law, *Opposability and Non-Opposability in International Law*, 14 October 2021, https://doi.org/10.1093/bybil/brab006

[4] Churchill & Lowe, p.10

international standards for safety, prevention of collision, certification of seafarers, watchkeeping, labour and prevention of pollution. These, and a suite of associated Conventions, developed and agreed by the member States of the International Maritime Organization (IMO) and the International Labour Organization (ILO) form the framework of international maritime law that currently applies to ships and seafarers.

It wasn't always so. Until the end of the First World War ships were regulated by their country of registration, with regulations for radio telephony and for the avoidance of collision being the only uniform international standards; both agreed during the late nineteenth century.

The Covenant of the League of Nations, the first such intergovernmental agreement, was drafted during the peace negotiations at the end of the First World War and signed by 41 member States representing more than 70% of the world population. The formation of intergovernmental organizations to 'promote international cooperation and to achieve international peace and security' were a direct outcome of the two world wars. However, the League did not become a truly international organization, with the United States never joining, and by the Second World War had become dormant.[5]

A Permanent Court of International Justice (PCIJ) was established in 1920 under Article 14 of the Covenant of the League of Nations to provide a permanent body to settle disputes between States and also to provide advisory opinions. It was composed of judges representing the world's main legal systems and carried out its functions at the Peace Palace in The Hague. During its operation from 1922 to 1940 it

[5] Ibid

handled 29 contentious cases and issued 22 advisory opinions before being dissolved in 1946.[6]

One of the most well-known cases considered by the PCIJ was that of the collision between the French flagged passenger/mail steamer ***Lotus*** and the Turkish collier ***Boz-Kourt*** which resulted in the loss of the Turkish ship. The ***Lotus*** was under the command of a French national named Demons while the ***Boz-Court*** was commanded by one Hassan Bey. Eight crew members of the Turkish ship were lost when the ship was cut into two and sank as a result of the collision.

> Although the Lotus did all it could within its power to help the shipwrecked persons, it continued on its course to Constantinople where it arrived on August 3, 1927. On the 5th of August Demons was asked by the Turkish authorities to go ashore to give evidence. After Demons was examined, he was placed under arrest without informing the French Consul-General and Hassan-Bey. Demons was convicted by the Turkish courts for negligent conduct in allowing the collision to take place. This conviction was challenged by Demons on the ground that the court lacked jurisdiction over him.
>
> With this development both Turkey and France agreed to submit to the Permanent Court of International Justice the question of whether the exercise of Turkish criminal jurisdiction over Demons for an incident that occurred on the high seas contravened international law.
>
> The Court held that a rule of international law which prohibits a State from exercising criminal jurisdiction over a foreign national who commits acts outside of the State's national jurisdiction, does not exist. Failing the existence of a permissive rule to the contrary

[6] Permanent Court of International Justice, International Court of Justice at *icj-cij.org*

> is the first and foremost restriction imposed by international law on a State and it may not exercise its power in any form in the territory of another State.
>
> This does not imply that international law prohibits a State from exercising jurisdiction in its own territory in respect of any case that relates to acts that have taken place abroad which it cannot rely on some permissive rule of international law. In this situation, it is impossible to hold that there is a rule of international law that prohibits Turkey from prosecuting Demons because he was aboard a French ship. This stems from the fact that the effects of the alleged offense occurred on a Turkish vessel.
>
> Hence, both States here may exercise concurrent jurisdiction over the matter because there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown.[7]

In the early 1920's the League of Nations appointed a Committee of Experts to draw up a list of subjects ripe for codification. Territorial waters, piracy, exploitation of marine resources and the legal status of State-owned merchant ships were among the subjects considered and the committee circulated questionnaires on the first three of them. Subsequently, a Preparatory Commission was established to prepare three topics – nationality, State responsibility and territorial waters - for codification.

The subsequent conference, convened at The Hague in 1930, did not succeed in adopting a convention on territorial waters. A committee was set up to study this subject and a report produced including draft articles on matters such as the nature and extent of coastal States' rights over the territorial sea, and of the right of innocent passage,

[7] Permanent Court of Int'l Justice P.C.I.J. (ser A) No 10 (19270)

however, it was not possible to reach agreement on the breadth of territorial waters. Accordingly, the conference decided to do no more than refer the draft articles to Governments in the hope that agreement could be reached at some later date.[8]

The draft Hague Rules provided the basis for establishment of a body in 1945 charged with the 'progressive codification' of international law under the auspices of the newly established United Nations. The International Law Commission (ILC), a group of thirty-four eminent lawyers, serving in individual capacities but nominated and elected by Governments, whose first members were appointed in 1948.[9]

In the process of developing the Charter of the United Nations towards the close of the Second World War the member States present agreed upon the chapeau to the Charter as follows;

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
to reaffirm faith in the fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
to promote social progress and better standards of life in larger freedom

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbours, and

[8] Ibid, pp.14 & 15
[9] Ibid, p.15

to unite our strength to maintain international peace and security, and
to ensure, by acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
to employ international machinery for the promotion of the economic and social advancement of all peoples

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

Article 7 of the Charter made provision for establishment of the principal organs of the United Nations, including an International Court of Justice; the ICJ. The Charter came into force on October 24, 1945, following ratification by the 51 original members.

The ICJ is comprised of 15 Judges who are elected for terms of office of nine years by the United Nations General Assembly and the Security Council. The court has a twofold role: to settle, in accordance with international law, legal disputes submitted to it by States (contentious cases) and to give advisory opinions (advisory procedures) on legal questions referred to it by duly authorised United Nations organs and specialised agencies. Between 22 May 1947 and 18 September 2025, 201 cases were entered in the General List.[10]

The International Court of Justice's Statute refers to 'international custom, as evidence of a general practice accepted as law' as a source

[10] International Court of Justice @ *icj-cij.org*

of international law. Orthodox legal theory requires proof of two elements in order to establish the existence of a rule of customary international law. The first is a general and consistent practice adopted by States. The practice need not be universally adopted, and in assessing its generality special weight will be given to the practice of States most directly concerned, for example the practice of coastal States in the case of claims to maritime zones, or of the major shipping States in claims of jurisdiction over merchant ships.

The second element is the so-called *opinion juris* – the conviction that the practice is one which is either required or allowed by customary international law, or more generally that the practice concerns a matter which is the subject of legal regulation and is consistent with international law. This second requirement, for example, prevents the exercise of restraint in certain cases in enforcing coastal State laws against foreign ships in passage through the territorial sea from becoming rules of law; they remain merely "rules' of comity or courtesy.[11]

The positivist approach to international law is reflected in Article 38 of the Statute of the International Court of Justice, which directs the Court to apply, in deciding international disputes brought before it;

(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognised by civilised nations;

[11] Churchill & Lowe, p.7

(d) …judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 38 is as much concerned with the establishment of authority and legitimacy in the international legal system as it is with the kinds of rule that may be made. It does not merely stipulate what the sources of law are; it also stipulates who may make those rules and how they may make them.

Only States may make those rules and only by the modalities falling within paragraphs (a) to (c) of Article 38. The prescription in Article 38 is, strictly, a direction to the International Court of Justice alone; but it is widely accepted as an authoritative statement of the sources of international law applicable more generally.[12]

The vague category in Article 38 of 'general principles of international law' permits the ICJ to fill gaps in treaty and customary law by applying the principles of law which are common to the major legal systems of the world and are suitable for transposition into international maritime law.[13]

Article 38(1) refers to judicial decisions and the writings of publicists as a subsidiary means for the determination of rules of law. This places their role into a proper perspective. Judges and jurists cannot create law: only States can through the formation of treaty and customary rules and general principles of law. Judicial decisions and the writing of jurists merely aid the process.

The first case heard by the ICJ was the Corfu Channel case; arising from a series of incidents in 1946 involving British warships transiting

[12] Ibid, pp 5 & 6
[13] Ibid, p.12

the narrow channel between Corfu and Albania, resulting in serious damage to two British destroyers and many injuries and deaths of British seamen. The detailed report of the ICJ, issued in 1949, is reproduced in full as an early example of the work of the Court.

CORFU CHANNEL CASE (MERITS)

Judgment of 9 April 1949

The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland and Albania) arose from incidents that occurred on October 22nd, 1946, in the Corfu Strait: two British destroyers struck mines in Albanian waters and suffered damage, including serious loss of life. The United Kingdom first seized the Security Council of the United Nations which, by a Resolution of April 9th, 1947, recommended the two Governments to submit the dispute to the Court. The United Kingdom accordingly submitted an Application which, after an objection to its admissibility had been raised by Albania, was the subject of a Judgement, dated March 25th, 1948, in which the Court declared that it possessed jurisdiction. On the same day the two Parties concluded a Special Agreement asking the Court to give judgment on the following questions:

Is Albania responsible for the explosions, and is there a duty to pay compensation?

Has the United Kingdom violated international law by the acts of its Navy in Albanian waters, first on the day on which the explosions occurred and, secondly, on November 12th and 13th, 1946, when it undertook a sweep of the Strait?

In its Judgment the Court declared on the first question, by 11 votes against 5, that Albania was responsible.

In regard to the second question, it declared by 14 votes against 2 that the United Kingdom did not violate Albanian sovereignty on October 22nd; but it declared unanimously that it violated that sovereignty on November 12th/13th, and that this declaration, in itself, constituted appropriate satisfaction.

The facts are as follows. On October 22nd, 1946, two British cruisers and two destroyers, coming from the south, entered the North Corfu Strait. The channel they were following, which was in Albanian waters, was regarded as safe: it had been swept in 1944 and check-swept in 1945. One of the destroyers, the *Saumarez*, when off Saranda, struck a mine and was gravely damaged. The other destroyer, the *Volage*, was sent to her assistance and, while towing her, struck another mine and was also seriously damaged. Forty-five British officers and sailors lost their lives, and forty-two others were wounded.

An incident had already occurred in these waters on May 15th, 1946: an Albanian battery had fired in the direction of two British cruisers. The United Kingdom Government had protested, stating that innocent passage through straits is a right recognized by international law; the Albanian Government had replied that foreign warships and merchant vessels had no right to pass through Albanian territorial waters without prior authorization; and on August 2nd, 1946, the United Kingdom Government had replied that if, in the future, fire was opened on a British warship passing through the channel, the fire would be returned. Finally, on September 21st, 1946, the Admiralty in London had cabled to the British Commander-in-Chief in the Mediterranean to the following effect:

"Establishment of diplomatic relations with Albania is again under consideration by His Majesty's Government who wish to know whether the Albanian Government have learnt to behave

themselves. Information is requested whether any ships under your command have passed through the North Corfu Strait since August and, if not, whether you intend them to do so shortly."

After the explosions on October 22nd, the United Kingdom Government sent a Note to Tirana announcing its intention to sweep the Corfu Channel shortly. The reply was that this consent would not be given unless the operation in question took place outside Albanian territorial waters and that any sweep undertaken in those waters would be a violation of Albania's sovereignty.

The sweep effected by the British Navy took place on November 12th/13th 1946, in Albanian territorial waters and within the limits of the channel previously swept. Twenty-two moored mines were cut; they were mines of the German GY type.

The first question put by the Special Agreement is that of Albania's responsibility, under international law, for the explosions on October 22nd, 1946.

The Court finds, in the first place, that the explosions were caused by mines belonging to the minefield discovered on November 13th. It is not, indeed, contested that this minefield had been recently laid; it was in the channel, which had been previously swept and check-swept and could be regarded as safe, that the explosions had taken place. The nature of the damage shows that it was due to mines of the same type as those swept on November 13th; finally, the theory that the mines discovered on November 13th might have been laid after the explosions on October 22nd is too improbable to be accepted.

In these circumstances the question arises what is the legal basis of Albania's responsibility? The Court does not feel that it need pay serious attention to the suggestion that Albania herself laid the mines: that suggestion was only put forward *pro memoria,* without

evidence in support, and could not be reconciled with the undisputed fact that, on the whole Albanian littoral, there are only a few launches and motor boats. But the United Kingdom also alleged the connivance of Albania: that the mine laying had been carried out by two Yugoslav warships by the request of Albania, or with her acquiescence. The Court finds that this collusion has not been proved. A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here, and the origin of the mines laid in Albanian territorial waters remains a matter for conjecture.

The United Kingdom also argued that whoever might be the authors of the mine laying, it could not have been effected without Albania's knowledge. True, the mere fact that mines were laid in Albanian waters neither involves *prima facie* responsibility nor does it shift the burden of proof. On the other hand, the exclusive control exercised by a State within its frontiers may make it impossible to furnish direct proof of facts which would involve its responsibility in case of a violation of international law. The State, which is the victim, must in that case, be allowed a more liberal recourse to inferences of fact and circumstantial evidence; such indirect evidence must be regarded as of especial weight when based on a series of facts, linked together and leading logically to a single conclusion.

In the present case two series of facts, which corroborate one another have to be considered.

The first relates to the Albanian Government's attitude before and after the catastrophe. The laying of the mines took place in a period in which it had shown its intention to keep a jealous watch on its territorial waters and in which it was requiring prior authorization before they were entered, this vigilance sometimes going so far as to involve the use of force: all of which render the assertion of

ignorance *a priori* improbable. Moreover, when the Albanian Government had become fully aware of the existence of a minefield, it protested strongly against the activity of the British Fleet, but not against the laying of the mines, though this act, if effected without her consent, would have been a very serious violation of her sovereignty; she did not notify shipping of the existence of the minefield, as would be required by international law, and she did not undertake any of the measures of judicial investigation which would seem to be incumbent on her in such a case. Such an attitude could only be explained if the Albanian Government, while knowing of the mine laying, desired the circumstances in which it was effected to remain secret.

The second series of facts relate to the possibility of observing the mine laying from the Albanian coast. Geographically, the channel is easily watched: it is dominated by heights offering excellent observation points, and it runs close to the coast (the nearest mine was 500 m from the shore). The methodical and well-thought-out laying of the mines compelled the minelayers to remain from two to two-and-a-half hours in the waters between Cape Kiephali and the St. George's Monastery. In regard to that point, the naval experts appointed by the Court reported, after enquiry and investigation on the spot, that they considered it to be indisputable that, if a normal look-out was kept at Cape Kiephali, Denta Point, and St. George's Monastery, and if the lookouts were equipped with binoculars, under normal weather conditions for this area, the mine-laying operations must have been noticed by these coastguards. The existence of a look-out post at Denta Point was not established; but the Court, basing itself on the declarations of the Albanian Government that look-out posts were stationed at other points, refers to the following conclusions in the experts' report: that in the case of mine laying 1) from the North towards the South, the minelayers would have been seen from Cape

Kiephali; if from South towards the North, they would have been seen from Cape Kiephali and St. George's Monastery.

From all the facts and observations mentioned above, the Court draws the conclusion that the laying of the minefield could not have been accomplished without the knowledge of Albania. As regards the obligations resulting for her from this knowledge, they are not disputed. It was her duty to notify shipping and especially to warn the ships proceeding through the Strait on October 22nd of the danger to which they were exposed. In fact, nothing was attempted by Albania to prevent the disaster, and these grave omissions involve her international responsibility.

The Special Agreement asks the Court to say whether, on this ground, there is "any duty" for Albania "to pay compensation" to the United Kingdom. This text gave rise to certain doubts: could the Court not only decide on the principle of compensation but also assess the amount? The Court answered in the affirmative and, by a special Order, it has fixed fine limits to enable the Parties to submit their views to it on this subject.

The Court then goes on to the second question in the Special Agreement: Did the United Kingdom violate Albanian sovereignty on October 22nd, 1946, or on November 12th/13th, 1946?

The Albanian claim to make the passage of ships conditional on a prior authorization conflicts with the generally admitted principle that States, in time of peace, have a right to send their warships through straits used for international navigation between two parts of the high seas, provided that the passage is innocent. The Corfu Strait belongs geographically to this category, even though it is only of secondary importance (in the sense that it is not a necessary route between two parts of the high seas) and irrespective of the volume of traffic passing through it. A fact of

particular importance is that it constitutes a frontier between Albania and Greece, and that a part of the strait is wholly within the territorial waters of those States. It is a fact that the two States did not maintain normal relations, Greece having made territorial claims precisely with regard to a part of the coast bordering the strait. However, the Court is of opinion that Albania would have been justified in view of these exceptional circumstances, in issuing regulations in respect of the passage, but not in prohibiting such passage or in subjecting it to the requirement of special authorization.

Albania has denied that the passage on October 22 was innocent. She alleges that it was a political mission and that the methods employed - the number of ships, their formation, armament, manoeuvres, etc. - showed an intention to intimidate. The Court examined the different Albanian contentions so far as they appeared relevant. Its conclusion is that the passage was innocent both in its principle, since it was designed to affirm a right which had been unjustly denied, and in its methods of execution, which were not unreasonable in view of the firing from the Albanian battery on May 15th.

As regards the operation on November 12th/13th, it was executed contrary to the clearly expressed wish of the Albanian Government; it did not have the consent of the international mine clearance organizations; it could not be justified as the exercise of the right of innocent passage. The United Kingdom has stated that its object was to secure the mines as quickly as possible for fear lest they should be taken away by the authors of the mine laying or by the Albanian authorities: this was presented either as a new and special application of the theory of intervention, by means of which the intervening State was acting to facilitate the task of the international tribunal, or as a method of self-protection or *self-help.*

> The Court cannot accept these lines of defence. It can only regard the alleged right of intervention as the manifestation of a policy of force which cannot find a place in international law. As regards the notion of *self-help*, the Court is also unable to accept it: between independent States the respect for territorial sovereignty is an essential foundation for international relations. Certainly, the Court recognises the Albanian Government's complete failure to carry out its duties after the explosions and the dilatory nature of its diplomatic Notes as extenuating circumstances for the action of the United Kingdom. But, to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her counsel and is in itself appropriate satisfaction.
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> To the Judgment of the Court there are attached one declaration and the dissenting opinions of judges Alvarez, Winiarski, Zoricic, Badawi Pasha, Krylov and Azevedo, and also that of Dr. Ecer, Judge *ad hoc*.

In defining the right of innocent passage, the Court referred to the manner of the passage as the decisive criterion, holding that, as long as the passage was conducted in a fashion which presented no threat to the coastal State it was to be regarded as innocent.[14]

While the Corfu Channel case settled the rights of warships to innocent passage, it did not deal expressly with their general rights in the territorial sea, i.e. their unrestricted rights as warships. A sizeable minority of about 40 States currently demand prior authorisation of passage of warships although the demands have been opposed by the major western naval powers, and in a significant number of cases those powers have countered the claims by the physical assertion of a

[14] Ibid, p.83