stated in the comment of the Harvard Research, "From an international point of view the introduction of lists of indictable offenses into an ever-increasing number of bipartite treaties tends towards uncertainty and disorder, where effective coöperation is needed." [10]

GEORGE A. FINCH

THE CORFU CHANNEL CASE

The Corfu Channel Case originally came before the International Court of Justice on the basis of a British application in conformity with a resolution of the Security Council of April 9, 1947. Albania objected to the jurisdiction, denying the British contention that a Security Council recommendation under Article 36 was a "decision" binding, according to Article 25, on Members (or non-Members which had accepted an invitation to participate in discussions before the Security Council as provided in Article 32). Without passing on this point, the Court found that Albania had, in fact, accepted the Court's jurisdiction by its note of July 2, 1947. Immediately after this decision on March 25, 1948,[1] the parties announced an agreement to implement the Security Council's resolution by submitting to the Court for decision the following questions:

> (1) Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?
>
> (2) Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and is there any duty to give satisfaction? [2]

The form of this agreement caused the Court some difficulty in its judgment on the merits of the case, April 9, 1949,[3] because it left it unclear whether the Court could decide the amount of damages which Albania must pay if the first question were answered affirmatively. The Court, however, held on this point that the agreement could not be regarded as narrowing the jurisdiction which the Court had already decided it had.[4]

The facts of the case indicated that the disaster occurred as the result of a mine field which had been laid shortly before the disaster and after the British had found the Channel clear of mines in 1945.[5]

In dealing with the first question, the Court had to consider the British contention that the mines had been laid with wrongful intent by Albania,

[10] AM. JOUR. INT. LAW, SUPPLEMENT, Vol. 29 (1935), pp. 15, 21, 75.

[1] I.C.J. Reports, 1947–1948, p. 15; this JOURNAL, Vol. 42 (1948), p. 690.

[2] I.C.J. Reports, 1949, p. 6.

[3] *Ibid.*, p. 4; this JOURNAL, p. 558.

[4] I.C.J. Reports, 1949, p. 26.

[5] *Ibid.*, pp. 13–15.

or by Yugoslavia with Albanian complicity. The Court found the evidence insufficient to support these charges, but held by a vote of 11 to 5 that Albania was responsible for the disaster on the ground that it must have known about the mines, and had been negligent in not warning ships about the dangers in this international highway and in not taking measures after the disaster to discover and punish those who laid the mines. The Albanian obligations, said the Court,

> are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[6]

The Soviet Judge, Krylov, dissented on this point of the judgment, saying, "One cannot condemn a State on the basis of probabilities."[7] The Court took a view which may seem similar in rejecting the British charge that Yugoslavia with the complicity of Albania had laid the mines, saying: "A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here."[8]

The distinction may seem justifiable because of the presumption that a state knows what happens in its territory or territorial waters, while states, like individuals, are presumed not to commit wrongful acts. With these different presumptions Albania would have the burden of proving that it was not negligent, while Great Britain would have the burden of proving that Yugoslavia was guilty. The Court, however, made a more subtle distinction, saying:

> . . . it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that the State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.
>
> On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.[9]

Great Britain was therefore permitted to rely on inferences and circumstances in proving Albanian knowledge and negligence which would not

[6] *Ibid.*, p. 22.
[7] *Ibid.*, p. 72.
[8] *Ibid.*, p. 17.
[9] *Ibid.*, p. 18.

have been adequate to prove Albania or Yugoslavia guilty of a wrongful act or of complicity. It would appear that this distinction in regard to the types of evidence admissible had the practical effect of shifting the burden of proof.

The damages which Albania should pay was not determined because Albania, having contended that the Court's jurisdiction did not extend to this matter, had not argued the point. The Court, however, in an order of April 9 fixed dates in June, July, and August, 1949 for submission of written observations on the point by the parties.[10]

On the second question before it, the Court, by a vote of 14 to 2, held that Great Britain did not violate the sovereignty of Albania by the acts of its navy in the Corfu Channel on October 22, 1946, but held unanimously that the mine-sweeping operations conducted by British naval forces on November 12 and 13, 1946, after the disaster, were in violation of that sovereignty.[11] This decision was based on a careful analysis of the rights of innocent passage through straits within the territorial waters of a state.

> It is, in the opinion of the Court, generally recognized and in accordance with international custom 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 without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.[12]

The passage of the Channel on October 22, when the disaster occurred, was, in the opinion of the Court, innocent, but the subsequent sweeping operations, although provoked by the disaster, were held by the Court to be of a character permissible only with express Albanian consent. The Court declined to accept the British argument that in the circumstances it was entitled to "intervene" to get evidence to present to the International Tribunal or to act "for self-protection."

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.
> . . . Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom

[10] Order of April 9, 1949, *ibid.*, pp. 171–172.
[11] *Ibid.*, p. 36.
[12] *Ibid.*, p. 28.

Government. 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.[13]

The opinion is notable for the extent to which the Court relied upon broad principles of law, apparently deemed to be self-evident and stated without citation of precedent or authority. It is also notable that these principles referred to rights of humanity and obligations not to resort to force which have been especially emphasized in recent general conventions. This aspect was especially noted in Judge Alvarez's concurring opinion suggesting that we are entering "a *new era* in the history of civilization" in which "profound changes have taken place in every sphere of human activity, and above all in international affairs and in international law." He therefore sought to relate the opinion to principles of what he called "the new international law" and the interpretation it gives to such questions as the sovereignty of states, the responsibility of states, intervention, and misuse of right.[14]

Judge Basdevant, President of the Court, dissented from the conclusion that the Court had jurisdiction to assess the amount of compensation. Judges Zoričić (Yugoslavia), Winiarski (Poland), Badawi Pasha (Egypt), Krylov (Soviet Union), and *ad hoc* Judge Ečer (Czechoslovakia), appointed by Albania for the case, dissented from this conclusion and also from the portion of the judgment holding Albania responsible. Judges Krylov and Azevedo (Brazil) dissented in respect to the Court's finding that the British Navy was innocent in its passage of the Channel on October 22, 1946.[15]

QUINCY WRIGHT

THE NEW FUNDAMENTAL LAW FOR THE WESTERN GERMAN FEDERAL REPUBLIC

Thirty years ago, at the close of World War I, an expectant world turned its eyes toward the German city of Weimar, to discover what manner of constitution a defeated and dejected nation, truncated in territory and threatened with civil war, would produce. Those Germans desirous of breaking with the imperial tradition thought it imperative that the nation repudiate more than a half-century of its history, and return to the tradition of the liberal revolutionists of 1848. Those disinclined to turn back the pages of history saw greater promise in transforming the essentially political anti-dynastic and republican revolution of November, 1918, into a more socially dynamic process which would link the fate of the republican Reich to the contemporary Soviet experiment in the re-ordering of society. The result was the Weimar Constitution of August 11, 1919, which, if it "vibrated with the tramp of the proletariat" as an analyst

[13] *Ibid.*, p. 35.
[14] *Ibid.*, p. 39.
[15] *Ibid.*, pp. 37–38.