INDIVIDUAL OPINION BY JUDGE ALVAREZ.

[*Translation.*]

I am in agreement with the Judgment delivered by the Court, but I feel that it is desirable to give prominence to certain considerations of a legal character in support of that Judgment.

I.

The cataclysm through which we have just passed opens a *new era* in the history of civilization ; it is of greater importance than all those that preceded it : more important than that of the Renaissance, than that of the French Revolution of 1789 or than that which followed the first World War ; that is due to the profound changes which have taken place in every sphere of human activity, and above all in international affairs and in international law.

It is therefore necessary to consider what is the present state of that law. We must examine it in connexion with the questions raised by the dispute submitted to the Court. That does not mean that this Court should pronounce on all the legal issues which those questions connote ; but it seems desirable that one of the judges, at least, should examine them, and that is the task I have set myself in this individual opinion.

II.

Among the different legal issues relating to the present dispute, I shall concern myself with the following seven :

A.—The law which the Court has to apply.
B.—The importance of politics, of force and of public opinion in regard to the *exercise* of the rights of States.
C.—The sovereignty of States. The new conception of that sovereignty.
D.—The responsibility of States. The different aspects of that responsibility presented in the dispute before the Court.
E.—The passage of merchant ships and warships of one State through the territorial waters of another State, and also through straits. Present position of this question.
F.—Intervention, acts of force, violations of sovereignty.
G.—Misuse of right.

All of the above are either old subjects presented under new aspects, or entirely new subjects. They all belong to what has been termed the *new international law*.

I will now examine these different points on broad lines, but without indicating their respective application to the present dispute, for that has been adequately dealt with in the Judgment.

III.

In the individual opinion which I appended to the Advisory Opinion delivered by the International Court of Justice on May 28th, 1948, I pointed out that, in consequence of profound changes that had taken place in international relations, a new international law had arisen; it is founded on *social interdependence*. In that opinion I described the characteristics of this new law. Briefly, it is the realization of social justice. It is entirely different from the old law, which was strictly juridical; it approaches nearer to the notion of equity, without however being merged in it. This new international law is not a *lex ferenda*, as is often believed; it has a real existence and it has essential and actual foundations—for instance, in the new régime of social interdependence which is coming into being, in the Charter of the United Nations and in other spheres which need not be enumerated. It often comes into collision with the old international law.

What is the law that the Court should apply? Is it that which existed until the cataclysm of 1939? Or must the Court remodel that law, bring it—so to speak—up to date and into harmony with the new conditions of social and international relations? (New international law.)

It is generally believed that the function of the Court is simply to apply the existing international law, without considering whether or not it corresponds to these new conditions, and that if the Court were to remodel the law it would be really assuming the task of a legislator.

But the present Court has a new mission which was not conferred —at least not expressly—on the Court which preceded it. For the Charter of the United Nations has instructed the General Assembly in Article 13 to "encourage the progressive development of international law and its codification". And, with a view to obtaining these results, the Assembly in its Resolution 171 of 1947 expressed the desire that the International Court of Justice should develop this law, in other words should bring it up to date.

The Court has thus, at the present moment, three functions:

(*a*) the former function, which consisted in elucidating the existing law, and in defining and confirming it;

(*b*) that of modifying, in conformity with the existing conditions of international relations, provisions which, though in force, have become out of date;

(*c*) that of creating and formulating new precepts, both for old problems where no rules exist and also for new problems.

The two latter functions of the Court have their origin in the fact that international life is in a state of constant evolution, and that international law must always be a reflection of that life. In exercising these functions the Court must not proceed arbitrarily, but must gain its inspiration from the great principles of the new international law.

The following two examples may serve to illustrate the correctness of what I have just said. Suppose that the Security Council of the U.N.O. decided to take measures of coercion against a State and, with that object, despatched warships, belonging to different countries—for the U.N.O. has no naval forces of its own. If this international squadron desired to pass through the territorial waters of certain States, the latter cannot do anything to impede its passage, under any pretext, not even if their national laws required a previous authorization, or other formalities. Here we have something new, the passage of an international force, which is surely entitled to pass freely everywhere. If a dispute arising out of this fact were referred to the Court, it would be quite inadmissible for it to rule that this international force must comply with the national legislation of the coastal States.

Coming next to the second example, also of a decisive character : we are all familiar with the well-established doctrine in international law of the clause known as *rebus sic stantibus*, according to which a State may refuse to execute a treaty if the conditions which prevailed at the time of signature have substantially changed. That doctrine is so just that it has begun to find its way into private law. But the power of the Court to remodel international law is merely the application in every branch of that law of the doctrine of the clause *rebus sic stantibus;* the principle at the root of it is the same : it is a principle of social justice.

The Court is therefore confronted with this dilemma : should it strictly apply the rules of the existing law, even if they are obsolete and might lead to injustices or to settlements which might be found unacceptable, or should it review these rules, as has just been explained ? In my opinion there is only one answer.

IV.

The law of social interdependence does not place law in opposition to politics, as has been done hitherto ; on the contrary, it admits that there are close relations between them.

Jurists, imbued with traditional law, have regarded international law as being of a strictly juridical character ; they only consider what they describe as *pure law*, to the entire exclusion of politics as something alien to law. But pure law does not exist : law is the result of social life and evolves with it ; in other words, it is, to a large extent, the effect of politics—especially of a collective kind —as practised by the States. We must therefore beware of

considering law and politics as mutually antagonistic. Each of them should be permeated by the other.

Politics and public opinion exercise a great influence on the *excercise* of the rights of States. Different cases may arise; some of them have arisen in the present dispute:

A.—A State possesses an unquestionable right vis-à-vis another State, but is unwilling to exercise it for different political reasons, perhaps because it wishes to maintain good relations with the said State.

B.—A State possesses a right vis-à-vis another State, but the latter disputes it. May it support its right by the use of force? And may the other State, for its part, resist by employing force in its turn?

C.—A State has a right which it is entitled to exercise in the territory of another State, e.g., the right of passage. May it support that right by force if it is disputed? And may the other State, in its turn, resist by force?

D.—The rights of two States are in conflict; this results, to a large extent, from the individualist régime which admits hardly any limitations to the rights which it recognizes. How are such conflicts to be resolved?

E.—A State does not possess the right to perform certain acts in the territory of another State, but its vital interests, or the general interest, impel it to perform these acts, thus violating the sovereignty of the other State and international law.

F.—A State fears that it may be the victim of aggression by another State, or entertains a legitimate fear that the latter intends to prevent it from exercising one of its rights. May it employ the threat of force, or even force itself, as a precautionary measure, to prevent this aggression or the violation of its right?

G.—A State acts in legitimate self-defence.

In all these situations, political considerations will play a very important part in the attitude of the States concerned. These States will have to show great regard for public opinion.

The Charter of the U.N.O. (para. 4 of Art. 2) forbids the employment of force except in case of legitimate self-defence (Art. 51). Consequently, a State which is in one of the situations mentioned above—except in those mentioned in paragraphs A and E—must have recourse, not to force but to the Security Council or to the International Court of Justice.

Here we see clearly the difference between the old and the new international law.

It may be observed, incidentally, that in spite of the prohibition of the use of force in the Charter of the United Nations, it is still possible, in certain cases, for force to produce juridical effects: for example, acquisitions made by the victor after a war, the inde-

pendence of colonies, the secession of States, such secession being subsequently recognized by the mother countries or by U.N.O. I will not dwell longer on this subject, which is so largely of a psychological character, as it is outside the scope of these observations.

V.

Questions which concern the sovereignty of States deserve special consideration, for the main issues in the present dispute have their primary origin in that notion or will affect it.

By sovereingty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States.

Sovereignty confers rights upon States and imposes obligations on them.

These rights are not the same and are not exercised in the same way in every sphere of international law. I have in mind the four traditional spheres—terrestrial, maritime, fluvial and lacustrine—to which must be added three new ones—aerial, polar and floating (floating islands). The violation of these rights is not of equal gravity in all these different spheres.

Some jurists have proposed to abolish the notion of the sovereignty of States, considering it obsolete. That is an error. This notion has its foundation in national sentiment and in the psychology of the peoples, in fact it is very deeply rooted. The constituent instrument of the International Organization has especially recognized the sovereignty of States and has endeavoured to bring it into harmony with the objects of that Organization (No. I of Art. 2).

This notion has evolved, and we must now adopt a conception of it which will be in harmony with the new conditions of social life. We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist régime, according to which States were only bound by the rules which they had accepted. To-day, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an *institution*, an *international social function* of a psychological character, which has to be exercised in accordance with the new international law.

VI.

Like sovereignty, the responsibility of States is an ancient conception and holds a very important place in international law. It

is a delicate matter, and is a constant subject of controversies, because it is not regulated by any well-established precepts. That was very evident at the Codification Conference at The Hague in 1930.

It is therefore necessary that this question of responsibility should be more closely defined, in its most essential features, and that it should even be restated.

In undertaking such a restatement, in regard to the matters at issue in the present dispute, the Court might be guided by the following considerations, based on the law of social interdependence:

(1) Every State is bound to preserve in its territory such order as is indispensable for the accomplishment of its international obligations: for otherwise its responsibility will be involved.

(2) Every State is bound to exercise proper vigilance in its territory. This vigilance does not extend to uninhabited areas; and it is not of the same nature in the terrestrial part of the territory as in the maritime, aerial or other parts.

This obligation of vigilance varies with the geographical conditions of the countries and with other circumstances: a State exercises greater vigilance in certain areas than in others, according to its interests. Moreover, this vigilance depends on the means available to a given State. In America this question has become very important: the United States and many of the Latin countries are unable to exercise effective vigilance over the whole vast extent of their coasts. As has been very rightly laid down in Article 25 of the Hague Convention XIII of 1907, a Power is not obliged to exercise greater vigilance than is consistent with the means at its disposal.

A State which fails to exercise this vigilance, or is negligent in its exercise, will find its responsibility involved in case of injury caused in its territory to other States or to their nationals.

(3) As a consequence of the foregoing, every State is considered as having known, or as having a *duty* to have known, of prejudicial acts committed in parts of its territory where local authorities are installed; that is not a presumption, nor is it a hypothesis, it is the consequence of its sovereignty. If the State alleges that it was unaware of these acts, particularly if they occurred in circumstances in which vigilance was unavailing—e.g., by the action of submarines, etc.—it must prove that this was the case, for otherwise its responsibility is involved.

(4) Every State is bound to take preventive measures to forestall the execution in its territory of criminal or prejudicial acts to the detriment of other States or of their nationals; and if such acts are committed it is bound to punish the offenders.

(5) Every State is bound to elucidate immediately the circumstances in which a criminal or prejudicial act was committed in its territory, and in particular to institute enquiries.

(6) The State is bound to give immediate information to countries that are concerned regarding the existence in its territory of dangers, resulting from the action of other States, that have been brought to its knowledge, and which might cause injury to the said countries ; if it fails to do so it becomes guilty of complicity.

There are at present in international law three notions of major importance, which are quite distinct but have points in common and apt to be confused with one another, as they all relate to damage suffered by a State generally in the territory of another State owing to the negligence of the latter, for which compensation is claimed. These three notions are *international delinquencies, prejudicial acts* and *unlawful acts.*

The characteristics of an *international delinquency* are that it is an act contrary to the sentiments of humanity. In consequence of the demands of the juridical consciousness of the peoples, there is now a tendency to introduce the notion of delinquency as a fundamental precept of international law.

The following acts are to be considered as international delinquencies :

(*a*) acts contrary to the sentiments of humanity committed by a State in its territory, even with the object of defending its security and its vital interests ; for instance, the laying of submarine mines without notifying the countries concerned ;

(*b*) acts contrary to the sentiments of humanity committed by a State, and causing damage in the territory of another State with the latter's consent. The latter State is considered as an accomplice ;

(*c*) acts contrary to the sentiments of humanity committed in the territory of a State by another country, without the consent of the first named State but of which that State knew, or had the *duty* of knowing, and which resulted in damage to a third State. Such knowledge does not suffice to constitute a delinquency : that term would only be applicable if the State had failed to notify the countries concerned of the act in question.

A *prejudicial act* is one which causes prejudice to a State or to its nationals, but which does so by means of acts not constituting an international delinquency, e.g., as a consequence of an insurrection, civil war, etc. This act does not involve the responsibility of the State in whose territory it was committed, unless the latter State failed to take the necessary action to prevent its execution or to punish the offenders.

An *unlawful act* is one which disregards or violates the rights of a State, or which is contrary to international law, to a treaty, etc. : e.g., the violation of frontiers, the non-execution of a convention, etc. The responsibility of the State which committed it varies according to the nature of the act.

Special attention must be drawn to five categories of unlawful acts, or acts contrary to international law, which are related to the

present dispute : *intervention, pressure* or *threat of force, demonstration of force,* with a view to intimidation, *violation of sovereignty,* and *misuse of right* to which I will return later.

The responsibility of a State may be *limited.* It may also be *attenuated* by certain circumstances, e.g., by the fact that the State was acting in the general interest, or that it took all proper precautions to prevent other States or their nationals from suffering injury in its territory. But in the case of international delinquency there cannot be extenuating circumstances.

In the preceding examples we see clearly the difference between the former individualistic law and the new law of social interdependence.

VII.

The passage of the merchant ships or warships of a State through the territorial waters of another State, or through straits situated therein and affording communication between two areas of open sea, is a matter of high importance. We are concerned only with passage in time of peace, for in regard to passage in war time there must be special rules adapted to the new juridical status of war.

In the present dispute, the Parties have admitted, in conformity with current doctrine, that the passage of the merchant ships of one State through the territorial waters of another State, including the waters of straits uniting two portions of open sea, is free. But the question whether the same rule applied to the passage of warships was keenly debated : the Albanian Government's Agent maintained that the coastal States might regulate the passage of these ships, a view which was contested by the Agent for the United Kingdom.

The Atlantic Charter of 1941 laid down the freedom of the seas and oceans as a fundamental principle. On January 1st, 1942, the united nations signed a Declaration in which they accepted the principle. Article 3 of the Charter of the United Nations alludes to that Declaration. Public opinion, also, is favourable to the freedom of the seas ; it may therefore be said to form part of the new international law.

Consequently, it may be accepted that, to-day, the passage through the territorial sea of a State, or through straits situated therein, and also through straits of an international character, is not a simple tolerance but is a *right* possessed by merchant ships belonging to other States. For these ships are discharging a peaceful mission and are contributing to the development of good relations between peoples.

The position is not the same in the case of warships. As war has been outlawed henceforward, the mission of these ships can only be to ensure the legitimate defence of the countries to which

they belong. Therefore, although they may effect an innocent passage through straits forming an international highway between two free seas, in other cases the coastal States are entitled to regulate the passage, especially with a view to the protection of their own security or interests, but they are not entitled to forbid it.

Warships only enjoy an unrestricted right of passage when they are engaged in an international mission assigned to them by the United Nations, as was stated above.

VIII.

In connexion with the passage of the British warships through the Albanian territorial waters on October 22nd, 1946, and on November 12-13th of that year, the subjects of intervention, demonstrations of force with a view to intimidation, violation of sovereignty, etc., were debated at some length, and it seemed at times that these notions were confused with one another.

The intervention of a State in the internal or external affairs of another—i.e., action taken by a State with a view to compelling another State to do, or to refrain from doing, certain things—has long been condemned. It is expressly forbidden by the Charter of the United Nations. The same applies to other acts of force, and even to a threat of force.

The Agent for the United Kingdom contended that the mine-sweeping operation known as "Retail", undertaken by the British ships in the Corfu Strait, was a justifiable act of self-help. That is not correct ; the operation was in fact a violation of Albanian sovereignty.

The Court must reaffirm, as often as the occasion arises, that intervention and all other kinds of forceable action are not permissible, in any form or on any pretext, in relations between States ; but the Court may excuse such acts in exceptional circumstances.

IX.

Formerly, the *misuse of a right* had no place in law. Anyone could exercise his rights to their fullest extent, even if the effect was prejudicial to others ; in such cases there was no duty to make reparation.

That is no longer the case : some civil codes, especially those of most recent dates, expressly forbid the misuse of right in private relations. The German Civil Code lays down in Article 226 : "The exercise of a right is forbidden when it can have no other object than to cause injury to others." And the Swiss Civil Code, in Article 2 of the preliminary chapter, declares : "Everyone is bound to exercise his rights and to discharge his obligations according to

the rules of good faith. The manifest misuse of a right is not protected by the law."

I consider that in virtue of the law of social interdependence this condemnation of the misuse of a right should be transported into international law. For in that law the unlimited exercise of a right by a State, as a consequence of its absolute sovereignty, may sometimes cause disturbances or even conflicts which are a danger to peace. Clashes of rights and interests are causes of social unrest and even of wars.

In this matter there are two questions to be determined : (*a*) when is there a misuse of a right ; and (*b*) what should be the penalty ? In regard to the former point, the facts must be evaluated in any given case ; and in regard to the penalty, this may consist, according to the circumstances, of an apology, a rebuke or even compensation for the injury caused.

The misuse of a right—in the same way as responsibility—admits of extenuating circumstances, for instance, if the misuse of the right was committed for the general advantage, etc.

(*Signed*) ALEJANDRO ALVAREZ.