DISSENTING OPINION BY DR. EČER.

[*Translation.*]

Part I of the Special Agreement.

I.

Criminal character of the incident on October 22nd, 1946.

Both the Parties have stigmatized the incident of October 22nd, 1946, as a crime. However, the International Court is not a criminal court. The Special Agreement did not ask it to decide whether Albania had committed this crime, or had participated in its commission as an accomplice. The Special Agreement requires the Court to give judgment as to Albania's responsibility in international law, that is to say without describing it either as a criminal or as a non-criminal (civil) responsibility. But Great Britain has founded her submissions in regard to Albania's responsibility primarily on the allegation that Albania laid the mines or took part as an accomplice in laying them, i.e., on an accusation of a definitely criminal character.

I regard the incident of October 22nd, 1946, as an abominable international crime, very close to an act of terrorism as defined by the Convention for the Prevention and Punishment of Terrorism, dated November 16th, 1937, a convention which has unfortunately never been ratified.

In my view there is no doubt that this action was prepared, organized and carried out with a view to disturbing the peace in the Adriatic and the peaceful relations between Great Britain and Albania.

It is a fact that has been established during the proceedings that Albania and Great Britain were desirous in 1946, before the incident of October 22nd, of establishing diplomatic relations. I refer to the Albanian note of May 21st, 1946, and to the British Admiralty's telegram to the Commander-in-Chief of the Mediterranean Fleet dated September 21st, 1946. The two States were negotiating for the establishment of diplomatic relations. The negotiations were not secret. I am convinced that the Albanian statesmen could not have been intending to effect an establishment of diplomatic relations with Great Britain by an attack upon the British ships, either by participating in the commission of such an attack or by failing to prevent it, by warning the ships. The logical conclusion must be that there was somebody—perhaps a State, or perhaps a group of militarist adventurers having ships at their disposal and acting on their own behalf, who were resolved,

at any price, to prevent the establishment of diplomatic relations between Albania and Great Britain—who wished to prevent the attainment by that means of peace in that disturbed region. History, even in the twentieth century, has furnished examples of such lawless acts.

The perpetrator of this crime directed his attempt primarily against the four British ships, but, in my opinion, he also wished to strike against Albania.

II.

The laying of mines by Albania.

Great Britain has virtually abandoned the charge that Albania herself laid the mines and now alleges that two Yugoslav ships laid them. Nevertheless, Great Britain formally maintained that charge in No. 2 of her final submissions. Albania submitted a conclusion (also numbered 2) definitely contrary to the British submission.

The Court has stated in its Judgment :

> "Although the suggestion that the minefield was laid by Albania was repeated in the United Kingdom statement in Court on January 18th, 1949, and in the final submissions read in Court on the same day, this suggestion was in fact hardly put forward at that time except *pro memoriae* and no evidence in support was furnished.
>
> In these circumstances, the Court need pay no further attention to this matter."

By this declaration, the Court has, in my opinion, rejected the accusation to the effect that Albania had herself laid the mines ; but, in view of the fact that Great Britain has definitely maintained and repeated this extremely grave accusation in her final submissions, I consider that Albania was entitled to have this British submission explicitly contradicted.

III.

Participation of Albania in the minelaying (collusion, complicity).

The alternative accusation (and submission) presented by Great Britain is that of complicity. Great Britain employed that term in paragraphs 77 (complicity) and 94 of her Memorial (direct complicity). The facts adduced by Great Britain in support of this second accusation for the most part constitute complicity. The Judgment has preferred the notion of "collusion". I am not particularly concerned with the terminology.

In any case, what is meant is participation in the laying of the mines, i.e., in a crime, having regard to the circumstances of the incident of October 22nd, 1946. But this participation (collusion) of Albania in the minelaying has not been proved. The Judgment states that the facts alleged by Great Britain as evidence of collusion between Albania and Yugoslavia, even so far as they are established, lead to no firm conclusion, and it continues: "the origin of the mines laid in Albanian territorial waters remains a matter for conjecture. It is clear that the existence of such a treaty .... however close may be the bonds uniting its signatories, in no way leads to the conclusion that they participated in a criminal act." I agree. But that statement is merely a partial rejection of the second British theory (submission). That submission is not limited to Albano-Yugoslav complicity. It does not even mention Yugoslavia. It concludes in favour of the complicity (collusion) of Albania with the author of the minelaying, whoever he may be. It is true that Great Britain has never in her pleadings or speeches alleged any other collusion (complicity) than that between Albania and Yugoslavia. But in her final submissions, she chose a more general form, which implies the participation of Albania in the laying of the mines, by whatever agency. Albania replied to this British submission by her own conclusions Nos. 3 and 4, in which she asked the Court to find that no complicity (collusion) on the part of Albania had been established, without making mention of any particular author. And so both Parties have asked the Court to decide whether the participation (complicity or collusion) of Albania in the minelaying has been proved, no matter by whom they were laid.

But the Court's Judgment confines itself to Albano-Yugoslav collusion (complicity). Consequently, it has given no answer to the conclusions of the two Parties in regard to the collusion (complicity) of Albania with some other author of the minelaying. A reply by the Court on this point was all the more called for because --apart from the fact that both Parties had asked for it--the Court itself has stated in the Judgment that "in the light of the information now available, the authors of the minelaying remain unknown". The fact that the Judgment keeps silence as to this complicity (collusion) between Albania and the unknown author of the crime leads one to conclude that the Court did not consider this complicity (collusion) to have been proved. But, in view of the clear and precise submissions of the two Parties, I consider that the Court was bound to state, in express terms, that the complicity or participation of Albania in the laying of the mines, by whatever agency effected, has not been established

IV.

The Albanian cognizance of the laying of the mines.

1. *The problem.*

The third legal basis of Albanian responsibility alleged by Great Britain is Albania's failure to notify the existence of a minefield (since she could not remove the mines) or to warn the four British ships on October 22nd, 1946, although at that time she was aware of the existence of the minefield.

The juridical basis of Albania's responsibility in this matter is not her actual cognizance, but her failure to take action. Such a failure naturally implies cognizance.

To establish Albania's responsibility on that basis, it would have been necessary to prove :

(*a*) that Albania was cognizant of the existence of the minefield ;

(*b*) that it was possible for Albania to have taken action (to notify the existence of the mines, or at any rate to have warned the ships).

No direct evidence has been produced that Albania knew about the minefield. Here again, we are in the sphere of indirect evidence, indications and presumptions. The conclusions of the Experts themselves are based on indications, presumptions and conjectures.

The question therefore arose whether it was possible, after examining the evidence, to become convinced that it was really impossible for Albania to have been unaware of the existence of the minefield, with the result that Albania's cognizance of the matter was judicially established.

2. *General observations concerning indirect evidence (by presumptions and indications).*

I would recall the wise advice given to international judges by Sandiffer, *Evidence before International Tribunals*, Chicago, 1939, page 3. He emphasizes the peculiar character of international procedure and the grave consequences which may follow from a judicial error, and he concludes : "The vital interests of States, directly concerning the welfare of thousands of people, may be adversely affected by a decision based upon a misconception of facts." And because the illegal act of October 22nd, 1946, was in reality a criminal act, it is useful to quote *per analogiam* another wise piece of advice, on this occasion given by a British jurist.

Taylor writes in his *Treatise on the Law of Evidence as administered in England and Ireland*, 1920, page 115: "But to affix on any person a stigma of crime requires a higher degree of assurance, and juries will not be justified in taking such a step, except on evidence which excludes from their mind all reasonable doubts." This advice is all the more cogent in the case of States.

(a) *Proofs by presumptions.*

The question arises whether there is really, in international law, a *presumptio juris* applicable to the present case. I find the reply in two works on international law: Sandiffer in his work quoted above, *Evidence before International Tribunals*, Chicago, 1939, page 99, has quoted Ralston, who enumerates a few presumptions which in his opinion are recognized by international courts, and two of which are, I believe, applicable to the present case:

(i) "The uniform presumption of the regularity and validity of all acts of public officials."

(ii) "The legal presumption .... of the regularity and necessity of governmental acts."

Schwarzenberger, *International Law*, 1945, page 396, writes: "Still stronger is the presumption that States are acting in accordance with international law...."

The author bases this opinion on the decision of the Permanent Court of International Justice in the case known as "German Interests in Upper Silesia", 1926.

In this decision the Permanent Court was dealing with the question "whether or not there had been an abuse of right by Germany", and stated that "such an abuse cannot be presumed".

I consider therefore that in international law there is a presumption in favour of every State, corresponding very nearly to the presumption in favour of the innocence of every individual in municipal law. There is a *presumptio juris* that a State behaves in conformity with international law. Therefore, a State which alleges a violation of international law by another State must prove that this presumption is not applicable in some special case; but

it is not possible to combat a presumption of legal conduct by another presumption.

(b) *Proofs by indication.*

The Counsel of the two Parties differed as to the degree of certainty attainable by a proof based on indications. Great Britain alleged that it suffices if the conclusion is beyond all reasonable doubt, though that would not absolutely exclude a different conclusion.

The Albanians contended that the conclusion drawn from the indications must be the only possible one, in view of the circumstances.

I think that one cause of this disagreement was the confusion made by the Parties between conclusions and hypotheses. A conclusion is not a hypothesis. Obviously, the number of hypotheses will be greater than the number of conclusions.

In my opinion, therefore, it suffices if a conclusion drawn from the indications is the only rational conclusion, having in view the concrete circumstances of the case. If two or more rational conclusions are possible, we must choose between them according to the general principle of law : *in dubio pro reo.*

In regard to the probative value of indications, we must bear in mind : (*a*) the danger of an indirect proof : this danger arises because the conclusion is reached by reasoning, and this, as experience teaches, is a frequent source of errors ; (*b*) the nature of the indirect proof : this is well described by Taylor, who writes on page 74 of his work, already quoted, *A Treatise on the Law of Evidence as administered in England and Ireland,* 1920 :

> "They [the jury] must decide, not whether these facts [indications] are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion."

Georges Vidal, in his *Cours de Droit criminel et de Science pénitentiaire,* 1935, discussing conclusions drawn from indications (he calls them presumptions), writes :

> "Juries and judges should only accept presumptions with extreme prudence and with considerable reserve in order to avoid judicial errors which are too easily made."

After these preliminary remarks, and with the reserve which is proper for a judge when considering indirect evidence, I shall now examine the proofs of Albania's responsibility, on the basis of cognizance.

3. *Examination of the proofs.*

The conclusion reached in the Judgment that the laying of the minefield could not have been accomplished without the knowledge of the Albanian Government is based on :

(A) the conduct of Albania both before and after the catastrophe of October 22nd, 1946 ;
(B) the facts concerning the possibility of observing the minelaying from the Albanian coast.

As cognizance does not suffice by itself to constitute a legal basis of responsibility, the judgment has added a third conclusion concerning the time at which Albania became cognizant of the minelaying.

ad A. *The conduct of Albania.*

The Court considers it to have been clearly established that Albania kept a very vigilant watch over the territorial waters in the North Corfu Channel ; but the Judgment is silent regarding another fact which was also clearly established by the evidence of the Albanian witnesses, namely, that the system of vigilance and that of the coastal defences was very inadequate. The presence of a look-out post at Denta Point was not established. That proves the inadequacy of the Albanian system of vigilance in regard, precisely, to the incident which is the subject of the proceedings.

The Judgment also omits to say that the inadequacy of the vigilance was recognized by Great Britain. For the representative of Great Britain admitted in his final address that the local authorities might have been unaware of the minelaying.

The Judgment also refers to the notes of the Albanian Government in which the latter expressed its intention of keeping a jealous watch over its territorial waters. Those notes prove nothing except that the Albanian Government was insisting on its right to regulate, and even to forbid, foreign ships from entering Albanian territorial waters without permission from the Albanian Government.

That Government was convinced that it possessed that right, and therefore in its notes it insisted upon its right. The government of any State would have acted in the same way, and nothing can be deduced from such conduct, which is even a part of the duty that every government owes towards its own people. But even if the coastal guards had exercised strict vigilance, that fact would not suffice to justify the conclusion that the ignorance of the Albanian Government was *a priori* improbable.

The Judgment next refers to the evidence of Captain Ali Shtino. We read in the Judgment : "The Court also noted the reply of

Captain Ali Shtino to a question put by it; this reply shows that the witness, who had been called on to replace the Coastal Defence Commander for a period of thirteen to fifteen days, immediately before the events of October 22nd, had received the following order: 'That the look-out posts must inform me of every movement [in the Corfu Channel], and that no action would be taken on our part.' "

The value which the Judgment assigns to Captain Shtino's answer is not clearly brought out in that quotation. A reader of the Judgment can only guess that the Court has interpreted this answer as indicating a change in an earlier order which might have embarrassed the minelayers, in other words, that a counter-order had been given to the coastal guards with the object of preventing interference with the minelaying. But that interpretation is not justified. A perusal of Captain Shtino's evidence shows at once that this part of his testimony refers to the incident on May 15th, 1946.

Captain Shtino was being questioned as to the incident when the Albanian battery fired in the direction of the British ships. In regard to that incident, he stated that when he temporarily took the place of the officer commanding the coast defences a few days before October 22nd, 1946, that officer told him that the look-out post should report to him any movements observed in the Channel, and that no action was to be taken. It is evident from the context that the witness was thinking of the gunfire incident on May 15th, 1946; what he meant was that an order had been given not to take any action, so as to prevent a repetition of the incident of May 15th, 1946.

As regards the telegrams sent by Albania to the Secretary-General of the United Nations on November 13th and 27th, 1946, the conclusions which the Judgment draws from these two telegrams seem to be ill-founded. If we confine ourselves to the evidence filed with the Court, we find that Albania learned for the first time that a minefield had been discovered from the British note of December 9th, 1946. But in that note, Great Britain already accused Albania of having laid the mines or of complicity in the minelaying. Albania replied on December 21st, 1946. She expressed her profound regret, stigmatizing the laying of the mines as an inhuman act, but naturally she rebutted the accusation that it was she who had laid the mines or caused them to be laid. It is entirely natural that for Albania the first thing to do was to defend herself against a criminal accusation. She protested to Great Britain, and in my view that protest sufficed.

She could not protest to a State unknown, so she protested to Great Britain, the country which had formulated the accusation.

It seems that the Judgment attributes great importance to the fact that Albania omitted to notify the existence of the minefield after it had been discovered by the British on November 13th, 1946.

The reader might gain the impression that the failure to do this, after November 13th, 1946, was an additional indication of Albania's cognizance of the minefield : that interpretation is not justified. The following fact must be taken into consideration : Great Britain had sent a note to Albania on November 10th, 1946, informing the Albanian Government that the sweep would be carried out on November 12th, 1946, and that the operation had been unanimously recommended by the Central Mine Clearance Board on November 1st.

The functions of this agency, which had been created by the Great Powers under the Agreement of November 22nd, 1945, are described in Annex 3 of the British Memorial. In paragraph 6 of that Annex one of the functions of the central agency was described as follows :

(i) to promulgate reports on experience gained in the course of operations.

There had thus been created for this task a special bureau, the duties of which are set forth in paragraphs 13 to 16 of Annex 3 of the British Memorial ; from all these provisions it is apparent that the responsibility for notifying minefields discovered in the course of sweeps rested on the Central Board in London and on its subordinate bodies. Hence we may conclude that Albania, who was acquainted with the functions of this central agency from the documents which she received between October 1945 and October 1946 (see paragraph 10 of the British Memorial), did not consider it to be her duty to notify the discovery of the minefield, seeing that that was the duty of the Central Board in London. This omission cannot therefore be interpreted as an additional indication of Albania's cognizance of the minelaying.

Apart from the fact that Albania only learned by the British note of December 9th, 1946, that a minefield had been discovered on November 13th, 1946, the indications mentioned in the Judgment in regard to Albania's conduct would be quite consistent with Albania's ignorance of the minelaying. But the Judgment keeps silence in regard to other indications, which were established by the procedure, and which lead to an opposite conclusion, that is to the conclusion that Albania was not cognizant of the minefield.

The Judgment omits to mention that Albania gave her consent, in principle, to the sweep announced by Great Britain in her note of November 10th, 1946, and that she proposed a mixed commission to determine the area to be swept (Great Britain gave no answer to this proposal), and finally that Great Britain herself has admitted that the Albanian local authorities may not have known about the minelaying. Therefore, if the Judgment reaches the conclusion that the conduct of Albania before and after the catastrophe is evidence (of course, indirect) of Albania's cognizance, it does so by a line of reasoning which is in contradiction with the general rule

of law concerning the evaluation of indications. I have in mind the rule which I referred to above (p. 119, Taylor).

In my opinion, the indications regarding Albania's conduct which are set forth in the Judgment in no way prove that Albania was aware of the existence of the minefield. But even if, *per inconcessum*, it were admitted that these indications justify that conclusion, it ought to be added that they also justify an opposite conclusion. In a case where several rational conclusions are possible, a choice must be made between them in accordance with the general principle of law *in dubio pro reo*. But the indications which the Judgment has omitted to mention, and to which I have referred above, tilt the balance in favour of the conclusion that Albania was not cognizant of the existence of the minefield.

ad B. *The possibility of observation.*

The second series of facts mentioned in the Judgment as leading to the conclusion in favour of Albania's cognizance relate to the possibility of observing the minelaying from the Albanian coast. The Judgment begins by mentioning three considerations which the Court had in view, and then goes on to analyse the Experts' report.

(a) *The Court's three considerations :*

(*aa*) The geographical configuration of the Bay of Saranda and of the Channel prove, according to the Judgment, that the laying of the mines could not have escaped the vigilance of the Albanian coast defence commander. However, from a geographical point of view, the best position for observing anything that happened in the waters with which we are concerned in this case was Denta Point : it was off Denta Point that the mines had been laid. But there was no look-out post on Denta Point ; that is admitted by the Judgment. Consequently, in the absence of any look-out at the point which is of chief geographical importance, the geographical configuration does not justify the conclusion referred to above.

(*bb*) The time available for the minelaying operation was sufficient, according to the Judgment, for the attention of the look-out posts at Cape Kiephali and San Giorgio Monastery to have been drawn to it. That is sheer conjecture. If the minelaying had been effected under favourable conditions, it could perhaps have been observed, but if it was effected by night, under unfavourable conditions (cloudy and rainy weather, etc., as indicated in the *Mediterranean Pilot* for October 1946), it would certainly not have been observed. The hour at which the mines were laid was not established, and could not be established, during the debates ; nothing is known about the weather conditions when the mines were laid, and the conclusion of the Judgment on that point is based upon simple conjectures.

(*cc*) As the Judgment refers, in support of its conclusion, to the distance from the coast at which the minelaying ships must have passed, it must be borne in mind that there was no observation post at Denta Point. Besides, even if the minelaying ships had been seen, it does not follow that the operation itself would have been observed ! A distinction must be drawn between the passage of the minelaying ships and the minelaying operation.

(b) *The Experts' opinion.*

Lastly, the Court has analyzed the report of the Experts in which it finds confirmation for the conclusion that Albania was cognizant of the minelaying.

In their first report, the Experts dealt with the visibility and the audibility of the minelaying. In their second report, they confined themselves solely to the question of the visibility of the passage of the minelaying ships and of the minelaying operation itself.

As regards the audibility of the minelaying operation, the conclusion at which the Experts arrived in their first report is subject to strict reservations. They said that in less favourable circumstances it would nevertheless be impossible to hear the operation, and they even added a sentence which is of great importance for the whole question of observation : "We are not in possession of sufficient information as to the conditions when the mines were laid to give a more definite statement." But even during their enquiry on the spot they were not able to obtain any fuller information.

The Experts' enquiries were therefore concentrated on the problem of visibility. In their first report their conclusion regarding visibility lacked precision. In their second report the Experts were more categorical. Their conclusion is quoted in the Judgment. If one reads it carefully, it is evident that the reply is only categorical in appearance. In reality, the reply of the Experts, in spite of its categorical form, is just as conditional as that in the first report. Their conclusions are based on five facts, two of which—the existence of a look-out post at Denta Point and the prevalence of normal weather conditions at the time of the minelaying—have not been established. These two facts, or conditions, in conjunction with three others, constitute the sole basis of the Experts' conclusions. If one of these conditions is not established, the whole basis collapses. The Judgment admits that the existence of a look-out post at Denta Point has not been established. The weather conditions have only been ascertained for October ; in that month they were unfavourable. If the mines were laid before October—a point which the Court has not succeeded in establishing —the conditions under which the mines were laid, at an unknown time, are also unknown. It follows that the conclusions of the

Experts in regard to visibility do not afford any judicial evidence proving that it was impossible for Albania to have been ignorant of the minelaying.

(c) *The time at which cognizance was acquired.*

Even if we accept the conclusion of the Judgment that the coastguards must necessarily have noticed the minelaying, that is still not enough to establish Albania's responsibility. And so the Judgment—quite rightly—considers the question of the time at which the Albanian authorities became cognizant of the minelaying. It is, as I have said, quite impossible to determine that time in any manner which could be called probative, in a judicial sense. The Court has based its conclusion concerning the time at which Albania became cognizant of the minelaying upon a conjecture.

The Judgment accepts as the last possible moment the night of October 21st-22nd, 1946. In that case, as the Judgment admits, it would have been impossible for Albania to notify the minefield to the shipping of all States, but—still according to the Judgment—it would have been possible to warn the British ships whose approach was reported to the coast defence command about 1 p.m. on October 22nd. We are therefore to suppose that the coast defence command was cognizant of the minefield at 1 p.m. on October 22nd, 1946. The commander, who at that time was Captain Shtino, has deposed before the Court that he knew nothing of any minefield in the Corfu Channel. The Judgment says nothing whatever about this testimony, though it has not tried to show that he was unworthy of credence. It simply assumes that the coast defence command was cognizant of the minefield at that time, a simple conjecture which is uncorroborated by any evidence.

4. *Summary.*

For the foregoing reasons, I am unable to accept the conclusion of the Judgment that the laying of the minefield which caused the explosions on October 22nd, 1946, could not have escaped the knowledge of the Albanian Government.

I consider that that conclusion, so far from being based on well-established evidence, is only supported by presumptions and even by conjectures.

I have accordingly reached the following conclusions:

(A) The Albanian Government's knowledge of the minelaying has not been judicially established.

In support of this conclusion, I invoke the following additional reasons:

(*a*) Great Britain admitted, in Sir Frank Soskice's speech, that the local authorities might not have known of the minelaying.

(*b*) If Albania had really known of the presence of the minefield, she could have removed the mines; she had almost three

weeks, from October 22nd to November 13th, to get rid of the traces of this crime of which, according to Great Britain's allegation, she was cognizant.

(*c*) It is an established fact that, in 1946, before the incident of October 22nd, Albania was desirous of establishing diplomatic relations with Great Britain. Negotiations were proceeding. The incident on October 22nd, 1946, naturally put an end to these efforts. But I am convinced that if the Albanian Government had known about the laying of the mines (the evident purpose of which was to provoke an incident and so wreck the negotiations), it would have done everything in its power to prevent the mine-laying, or if that had been found impossible, to notify it or at any rate to warn the ships.

(*d*) The conclusion that Albania was cognizant of the mine-laying is in reality a presumption of fact. It is not sufficient to annul the legal presumption of international law according to which States act in conformity with international law.

(B) Even if one admitted the conclusion that Albania had known of the minelaying, it would still be necessary to establish the facts determining her duty to take action : in the first place, the time at which Albania acquired this cognizance and, hence, the fact that the coastal guards informed their superior officers, and through those superior officers the Albanian Government, in sufficient time to enable that Government to issue a notification, or for the superior officers to order the removal of the mines, or to give warning to the British ships on October 22nd, 1946.

Those are facts which were not discussed during the proceedings and have not been established.

V.

The rules of law.

In general, I agree with the Judgment on the question of law. But in view of the tendency shown in the opening address of British Counsel to draw certain legal conclusions (which as a fact were rejected by the Judgment) from the fact that the minefield was laid in Albanian territorial waters, I think it would perhaps be desirable to state in express terms in the Judgment that the responsibility of a State assumes either *dolus* or *culpa* on its part. On that point I would refer to Oppenheim-Lauterpacht, *The International Law*, 1948, p. 311 :

"An act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence."

VI.

The competence of the Court to assess the amount of compensation.

My reply to this question is as follows:

(*a*) We must keep strictly to the terms of the Special Agreement, because that agreement constitutes the *petita* of the Parties.

(*b*) In this Special Agreement, the Parties have asked the Court to decide whether Albania is or is not bound to pay compensation. The two Parties did not ask the Court to assess the amount of the compensation.

(*c*) The Parties have submitted to the Court a request for a declaratory judgment. They did not ask the Court to condemn a Party to make a certain payment. Their request is analogous to a declaratory action in municipal law.

In consequence, I consider that the Court does not possess this competence.

Second Part of the Special Agreement.

I.

Operations by the British fleet on October 22nd, 1946.

1. *The right of passage of warships through straits.*

The Judgment expresses the opinion that the coastal State has not the right to prohibit innocent passage through straits in peace time and that, consequently, owing to the exceptional circumstances in the North Corfu Channel, Albania would have been justified in regulating the passage of warships through the strait without, however, prohibiting it or subjecting it to special permission.

I doubt whether this argument is well founded. In any case, in 1946 there was no definite rule on the subject. The practice of States was so varied that no proof of the existence of such a rule was to be found. Doctrine itself was completely divided. Nothing was therefore certain. Great Britain might put forward good reasons to justify her position in law; but Albania also could invoke sufficient reasons to justify her position, naturally apart from the argument contained in the Albanian General

Staff's communication of May 17th, 1946, concerning all foreign ships, including merchant ships. At the time of the incident of October 22nd, 1946, the situation as regards the law was very confused on the subject of the right of passage. In such a case, I think that the general rule *in dubio pro reo* must be applied by analogy.

2. *The operations by the British fleet.*

In my opinion, two standards of judgment can be applied to the passage of the British fleet on October 22nd : a subjective standard (intention) and an objective standard (the methods used).

(a) *Subjective standard.*

As regards the subjective standard, we have one important indication, the existence of an Order XCU for the passage of the four British vessels on October 22nd, 1946. Great Britain refused to produce this Order for security reasons. The Court is entitled to draw conclusions from this refusal. An endeavour was made to give a natural explanation : the purpose of the Order was only to prevent the incident of May 15th, 1946. But if that was the only purpose of Order XCU, why conceal it ? It was a quite legitimate purpose. There was no reason for hiding from the Court a quite legitimate purpose. Therefore, in my opinion, this refusal is an indication against Great Britain and might justify a presumption or a conclusion that Great Britain had, on October 22nd, other intentions than merely a test of her right of passage.

But this conclusion is faced with the *presumptio juris* of international law mentioned on pages 120 and 121 : presumption of the legality of a State's conduct.

This is a strong presumption ; it cannot be countered by a single indication like that of Great Britain's refusal to communicate Order XCU to the Court.

Great Britain's refusal to produce Order XCU gives rise to suspicions as to her intentions in regard to the passage on October 22nd ; but this is only an indication, and no proof, and it cannot rebut the presumption that Great Britain had quite legitimate intentions.

(b) *Objective standard.*

I admit that the number of vessels was excessive. Great Britain might make a test with one or two ships ; but four warships made the passage appear like a naval demonstration, involving an element of intimidation and even of misuse of the right of passage.

3. *Conclusions.*

(*a*) In 1946, there was no clear rule of customary international law concerning the right of passage for a warship through straits. The juridical situation was doubtful ; each of the two Parties could put forward good arguments in support of his claim.

(*b*) I do not think it has been judicially established that the passage of the four British vessels on October 22nd, 1946, was offensive, from the subjective standpoint (intention). It involved an element of intimidation and of misuse of a right from the objective standpoint. It might appear to the Albanian authorities and people as a demonstration of force. But even if this be admitted, the passage on October 22nd was not of an offensive character such as would amount to a violation of Albanian sovereignty, in the absence of judicial proof of an offensive intention.

II.

Operation "Retail", November 12th-13th, 1946.

I agree with the decision in the Judgment. But I will add that, in my opinion, Operation Retail was an intervention, if not in the political, at least in the police or legal sense. In reality, the British Navy substituted itself for the Albanian police or judicial authorities in performing an act which was a quasi-judicial or police enquiry in Albanian territorial waters—i.e., an act strictly prohibited by international law.

I think further that the Judgment should mention, amongst the arguments for its decision, the provisions of the United Nations Charter, in particular, Article 2, paragraph 4, and Article 42.

The International Court's task as the juridical instrument of the United Nations is more far-reaching than that of a domestic court. A national court is called upon strictly to apply the law, and nothing more. The cohesion of the national community is provided for by other means. The decisions of national courts have not the same importance for the cohesion of the national community as international justice has for the cohesion of the international community. The International Court's task is therefore to help to strengthen the cohesion of the international community. The instrument of cohesion of the international community is the United Nations Charter. It is true international law, with its source in the new requirements of international life and the juridical conscience of the peoples. The authority of the Judgment, and that of the Court as judicial organ of the

United Nations, would be strengthened by a reference to the provisions of the Charter.

In referring to the Charter, the Judgment would emphasize that the supreme task of the International Court of Justice is:

That its jurisdiction should contribute to the technical development of international law, and also promote peaceful relations between the States of the world, and thus help to maintain peace.

(*Signed*) Dr. B. EČER.